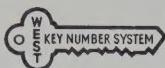


# WORDS AND PHRASES™

PERMANENT EDITION



**Volume 28B**

**NONJOINDER — NYSTAGMUS**

Updated by cumulative annual pocket parts

**THOMSON**  
★  
**WEST**

## Cite by Word or Phrase

Thus

Words and Phrases, "Accretion"

### Closing with Cases Reported in

Atlantic Reporter, Second Series -----	813 A.2d 1000
Bankruptcy Reporter -----	287 B.R. 588
California Reporter, Second Series -----	129 Cal.Rptr.2d 604
Federal Claims Reporter -----	54 Fed.Cl. 755
Federal Reporter, Third Series -----	315 F.3d 296
Federal Appendix -----	53 Fed.Appx.
Federal Supplement, Second Series -----	233 F.Supp.2d
Federal Rules Decisions -----	211 F.R.D. 498
Illinois Decisions -----	269 Ill.Dec. 874
Military Justice Reporter -----	57 M.J.
New Jersey Tax Court Reports -----	20 N.J.Tax 241
New York Supplement, Second Series -----	752 N.Y.S.2d 253
North Eastern Reporter, Second Series -----	781 N.E.2d 1064
North Western Reporter, Second Series -----	655 N.W.2d 547
Pacific Reporter, Third Series -----	61 P.3d 401
South Eastern Reporter, Second Series -----	574 S.E.2d 534
Southern Reporter, Second Series -----	833 So.2d 603
South Western Reporter, Third Series -----	92 S.W.3d 29
Supreme Court Reporter -----	123 S.Ct. 818
Veterans Appeals Reporter -----	16 Vet.App. 548

COPYRIGHT © 2003

By

WEST GROUP



The above symbol, KeyCite, WESTLAW®, WEST's and Words and Phrases are registered trademarks. Registered in the U.S. Patent and Trademark Office.

West Group has created this publication to provide you with accurate and authoritative information concerning the subject matter covered. However, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. West Group is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

## WORDS AND PHRASES

---

*"A word is not crystal, transparent and unchanging, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."*

*Justice Holmes,  
245 U.S. 418, 38 S.Ct.  
158, 62 L.Ed.2d 372.*

The interpretation or meaning attributed to a word or a phrase in a statute, court rule, administrative regulation, business document or agreement often determines rights, duties, obligations and liabilities thereunder or a controversy between parties.

The courts, state and federal, determine the meaning given to words and to phrases in issue in the context of specific facts and particular issues. New developments in the economic, political and social life of the nation are reflected in the laws and in the kinds of controversies which the courts are called upon to resolve. The result is frequently that in judicial opinions established words and phrases acquire new significance or relevance.

Today's lawyer and judge must have immediate, accurate and convenient access to the judicial interpretations of the new words added to the language as well as the new interpretations of the old. Providing this essential service to lawyers and to judges is the purpose of *Words and Phrases*.

*Words and Phrases* is known as the "one minute method" of case finding. Many decisions are resolved by the meaning attributed by an appellate court to a single word or phrase. All of these are quickly and accurately available in *Words and Phrases*.

The thousands of judicial definitions of words and phrases are arranged alphabetically so as to be instantly available for use as primary authority.

Through modern pocket part supplementation, all of the new judicial constructions and interpretations of words and phrases are promptly supplied as they become available from the decisions of the courts of the nation.

THE PUBLISHER

March, 2003



## ABBREVIATIONS

---

Aband L P	Abandoned and Lost Property.	Banks	Banks and Banking.
Abate & R	Abatement and Revival.	Ben Assoc	Beneficial Association.
Abort	Abortion and Birth Control.	Big	Bigamy.
Absentees	Absentees.	Bills & N	Bills and Notes.
Abstr of T	Abstracts of Title.	Bonds	Bonds.
Accession	Accession.	Bound	Boundaries.
Accord	Accord and Satisfaction.	Bounties	Bounties.
Acct	Account.	Breach of M P	Breach of Marriage Promise.
Acct Action on	Account, Action on.	Breach of P	Breach of the Peace.
Acct St	Account Stated.	Brib	Bribery.
Accnts	Accountants.	Bridges	Bridges.
Ack	Acknowledgment.	Brok	Brokers.
Action	Action.	B & L Assoc	Building and Loan Associations.
Action on Case	Action on the Case.	Burg	Burglary.
Adj Land	Adjoining Landowners.	Canals	Canals.
Admin Law	Administrative Law and Procedure.	Can of Inst	Cancellation of Instruments.
Adm	Admiralty.	Carr	Carriers.
Adop	Adoption.	Cem	Cemeteries.
Adulteration	Adulteration.	Census	Census.
Adultery	Adultery.	Cert	Certiorari.
Adv Poss	Adverse Possession.	Champ	Champery and Maintenance.
Afft	Affidavits.	Char	Charities.
Agric	Agriculture.	Chat Mtg	Chattel Mortgages.
Aliens	Aliens.	Chem Dep	Chemical Dependents.
Alt of Inst	Alteration of Instruments.	Child C	Child Custody.
Amb & C	Ambassadors and Consuls.	Child S	Child Support.
Am Cur	Amicus Curiae.	Child	Children Out-of-Wedlock.
Anim	Animals.	Citiz	Citizens.
Annuities	Annuities.	Civil R	Civil Rights.
App & E	Appeal and Error.	Clerks of C	Clerks of Courts.
Appear	Appearance.	Clubs	Clubs.
Arbit	Arbitration.	Colleges	Colleges and Universities.
Armed S	Armed Services.	Collision	Collision.
Arrest	Arrest.	Commerce	Commerce.
Arson	Arson.	Com Fut	Commodity Futures Trading Regulation.
Assault	Assault and Battery.	Com Lands	Common Lands.
Assign	Assignments.	Com Law	Common Law.
Assist	Assistance, Writ of.	Comp Off	Compounding Offenses.
Assoc	Associations.	Compromise	Compromise and Settlement.
Assumpsit	Assumpsit.	Condo	Condominium.
Asyl	Asylums.	Confusion of G	Confusion of Goods.
Attach	Attachment.	Consp	Conspiracy.
Atty & C	Attorney and Client.	Const Law	Constitutional Law.
Atty Gen	Attorney General.	Cons Cred	Consumer Credit.
Auctions	Auctions and Auctioneers.	Cons Prot	Consumer Protection.
Aud Quer	Audita Querela.	Contempt	Contempt.
Autos	Automobiles.	Contracts	Contracts.
Aviation	Aviation.	Contrib	Contribution.
Bail	Bail.		
Bailm	Bailment.		
Bankr	Bankruptcy.		

## ABBREVIATIONS

Controlled Subs	Controlled Substances.
Conversion	Conversion.
Convicts	Convicts.
Copyr	Copyrights and Intellectual Property.
Coroners	Coroners.
Corp	Corporations.
Costs	Costs.
Counterfeit	Counterfeiting.
Counties	Counties.
Court Comrs.	Court Commissioners.
Courts	Courts.
Cov Action of	Covenant, Action of.
Covenants	Covenants.
Cred R A	Credit Reporting Agencies.
Crim Law	Criminal Law.
Crops	Crops.
Cust & U	Customs and Usages.
Cust Dut	Customs Duties.
Damag	Damages.
Dead Bodies	Dead Bodies.
Death	Death.
Debt Action of	Debt, Action of.
Debtor & C	Debtor and Creditor.
Decl Judgm	Declaratory Judgment.
Dedi	Dedication.
Deeds	Deeds.
Dep & Escr	Deposits and Escrows.
Dep in Court	Deposits in Court.
Des & Dist	Descent and Distribution.
Detectives	Detectives.
Detinue	Detinue.
Disorderly C	Disorderly Conduct.
Disorderly H	Disorderly House.
Dist & Pros Atty	District and Prosecuting Attorneys.
Dist of Col	District of Columbia.
Distur of Pub A	Disturbance of Public Assemblage.
Divorce	Divorce.
Domicile	Domicile.
Double J	Double Jeopardy.
Dower & C	Dower and Curtesy.
Drains	Drains.
Ease	Easements.
Eject	Ejectment.
Elect of Rem	Election of Remedies.
Elections	Elections.
Electricity	Electricity.
Embez	Embezzlement.
Em Dom	Eminent Domain.
Emp Liab	Employers' Liability.
Entry Writ of	Entry, Writ of.
Environ Law	Environmental Law.
Equity	Equity.
Escape	Escape.
Escheat	Escheat.
Estates	Estates in Property.
Estop	Estoppel.
Evid	Evidence.
Exceptions Bill of	Exceptions, Bill of.
Exch of Prop	Exchange of Property.
Exchanges	Exchanges.
Execution	Execution.
Ex & Ad	Executors and Administrators.
Exempt	Exemptions.
Explos	Explosives.
Extort	Extortion and Threats.
Extrad	Extradition and Detainers.
Fact	Factors.
False Imp	False Imprisonment.
False Pers	False Personation.
False Pret	False Pretenses.
Fed Civ Proc	Federal Civil Procedure.
Fed Cts	Federal Courts.
Fences	Fences.
Ferries	Ferries.
Fines	Fines.
Fires	Fires.
Fish	Fish.
Fixt	Fixtures.
Food	Food.
Forci E & D	Forcible Entry and Detainer.
Forfeit	Forfeitures.
Forg	Forgery.
Franch	Franchises.
Fraud	Fraud.
Frds St of	Frauds, Statute of.
Fraud Conv	Fraudulent Conveyances.
Game	Game.
Gaming	Gaming.
Garn	Garnishment.
Gas	Gas.
Gifts	Gifts.
Good Will	Good Will.
Gr Jury	Grand Jury.
Guar	Guaranty.
Guard & W	Guardian and Ward.
Hab Corp	Habeas Corpus.
Hawk & P	Hawkers and Peddlers.
Health	Health.
High	Highways.
Holidays	Holidays.
Home	Homestead.
Homic	Homicide.
Hus & W	Husband and Wife.
Impl & C C	Implied and Constructive Contracts.
Improv	Improvements.
Incest	Incest.
Indem	Indemnity.
Indians	Indians.
Ind & Inf	Indictment and Information.
Infants	Infants.
Inj	Injunction.
Inn	Innkeepers.
Inspect	Inspection.

## ABBREVIATIONS

Insurance	Insurance.
Insurrect	Insurrection and Sedition.
Interest	Interest.
Int Rev	Internal Revenue.
Intern Law	International Law.
Interpl	Interpleader.
Int Liq	Intoxicating Liquors.
Joint Adv	Joint Adventures.
Joint-St Co	Joint-Stock Companies and Business Trusts.
Joint Ten	Joint Tenancy.
Judges	Judges.
Judgm	Judgment.
Jud S	Judicial Sales.
Jury	Jury.
J P	Justices of the Peace.
Kidnap	Kidnapping.
Labor	Labor Relations.
Land & Ten	Landlord and Tenant.
Larc	Larceny.
Levees	Levees and Flood Control.
Lewd	Lewdness.
Libel	Libel and Slander.
Licens	Licenses.
Liens	Liens.
Life Est	Life Estates.
Lim of Act	Limitation of Actions.
Lis Pen	Lis Pendens.
Logs	Logs and Logging.
Lost Inst	Lost Instruments.
Lotteries	Lotteries.
Mal Mis	Malicious Mischief.
Mal Pros	Malicious Prosecution.
Mand	Mandamus.
Manuf	Manufactures.
Mar Liens	Maritime Liens.
Marriage	Marriage.
Mast & S	Master and Servant.
Mayhem	Mayhem.
Mech Liens	Mechanics' Liens.
Mental H	Mental Health.
Mil Jus	Military Justice.
Militia	Militia.
Mines	Mines and Minerals.
Monop	Monopolies.
Mtg	Mortgages.
Motions	Motions.
Mun Corp	Municipal Corporations.
Names	Names.
Nav Wat	Navigable Waters.
Ne Ex	Ne Exeat.
Neglig	Negligence.
Neut Laws	Neutrality Laws.
Newsp	Newspapers.
New Tr	New Trial.
Notaries	Notaries.
Notice	Notice.
Nova	Novation.
Nuis	Nuisance.
Oath	Oath.
Obscen	Obscenity.
Obst Just	Obstructing Justice.
Offic	Officers and Public Employees.
Pardon	Pardon and Parole.
Parent & C	Parent and Child.
Parl Law	Parliamentary Law.
Parties	Parties.
Partit	Partition.
Partners	Partnership.
Party W	Party Walls.
Pat	Patents.
Paymt	Payment.
Penalties	Penalties.
Pensions	Pensions.
Perj	Perjury.
Perp	Perpetuities.
Pilots	Pilots.
Plead	Pleading.
Plgs	Pledges.
Poss Warr	Possessory Warrant.
Postal	Postal Service.
Powers	Powers.
Pretrial Proc	Pretrial Procedure.
Princ & A	Principal and Agent.
Princ & S	Principal and Surety.
Prisons	Prisons.
Priv Roads	Private Roads.
Proc	Process.
Prod Liab	Products Liability.
Prohib	Prohibition.
Propy	Property.
Prost	Prostitution.
Pub Contr	Public Contracts.
Pub Lands	Public Lands.
Pub Ut	Public Utilities.
Quiet T	Quieting Title.
Quo W	Quo Warranto.
RICO	Racketeer Influenced and Corrupt Organizations.
R R	Railroads.
Rape	Rape.
Real Act	Real Actions.
Receivers	Receivers.
Rec S Goods	Receiving Stolen Goods.
Recogn	Recognizances.
Records	Records.
Refer	Reference.
Ref of Inst	Reformation of Instruments.
Reg of Deeds	Registers of Deeds.
Release	Release.
Relig Soc	Religious Societies.
Remaind	Remainders.
Rem of C	Removal of Cases.
Replev	Replevin.
Reports	Reports.
Rescue	Rescue.
Revers	Reversions.
Review	Review.

## ABBREVIATIONS

Rewards	Rewards.	Tender	Tender.
Riot	Riot.	Territories	Territories.
Rob	Robbery.	Theaters	Theaters and Shows.
Sales	Sales.	Time	Time.
Salv	Salvage.	Torts	Torts.
Schools	Schools.	Towage	Towage.
Sci Fa	Scire Facias.	Towns	Towns.
Seals	Seals.	Trade Reg	Trade Regulation.
Seamen	Seamen.	Treason	Treason.
Searches	Searches and Seizures.	Treaties	Treaties.
Sec Tran	Secured Transactions.	Tresp	Trespass.
Sec Reg	Securities Regulation.	Tresp to T T	Trespass to Try Title.
Seduct	Seduction.	Trial	Trial.
Sent & Pun	Sentencing and Punishment.	Trover	Trover and Conversion.
Sequest	Sequestration.	Trusts	Trusts.
Set-Off	Set-Off and Counterclaim.	Turnpikes	Turnpikes and Toll Roads.
Sheriffs	Sheriffs and Constables.	Undertak	Undertakings.
Ship	Shipping.	U S	United States.
Sig	Signatures.	U S Mag	United States Magistrates.
Slaves	Slaves.	U S Mar	United States Marshals.
Social S	Social Security and Public Welfare.	Unlawf Assemb	Unlawful Assembly.
Sod	Sodomy.	Urb R R	Urban Railroads.
Spec Perf	Specific Performance.	Usury	Usury.
Spendthrifts	Spendthrifts.	Vag	Vagrancy.
States	States.	Ven & Pur	Vendor and Purchaser.
Statut	Statutes.	Venue	Venue.
Steam	Steam.	War	War and National Emergency.
Stip	Stipulations.	Wareh	Warehousemen.
Submis of Con	Submission of Controversy.	Waste	Waste.
Subrog	Subrogation.	Waters	Waters and Water Courses.
Subscrip	Subscriptions.	Weap	Weapons.
Suicide	Suicide.	Weights	Weights and Measures.
Sunday	Sunday.	Wharves	Wharves.
Supersed	Supersedeas.	Wills	Wills.
Tax	Taxation.	Witn	Witnesses.
Tel	Telecommunications.	Woods	Woods and Forests.
Ten in C	Tenancy in Common.	Work Comp	Workers' Compensation.
		Zoning	Zoning and Planning.

# DIGEST TOPICS

## UPDATING WITH WESTLAW®

WESTLAW provides easy and quick access to those cases reported after the latest available digest supplementation.

The WESTLAW query is entered in any appropriate caselaw data base of interest. The query format used substitutes a numerical equivalent for the digest topic name and adds the key number through the use of "K" as illustrated in the search for later Contracts => 155 cases published after December 31, 2002.

ad(after 12-31-02) & 95K155.

1	Abandoned and Lost Property	42	Assumpsit, Action of Asylums	76H	Children Out-of- Wedlock
2	Abatement and Revival	44	Attachment	77	Citizens
4	Abortion and Birth Control	45	Attorney and Client	78	Civil Rights
5	Absentees	46	Attorney General	79	Clerks of Courts
6	Abstracts of Title	47	Auctions and Auctioneers	80	Clubs
7	Accession	48	Audita Querela	81	Colleges and Universities
8	Accord and Satisfaction	48A	Automobiles	82	Collision
9	Account	48B	Aviation	83	Commerce
10	Account, Action on	49	Bail	83H	Commodity Futures Trading Regulation
11	Account Stated	50	Bailment		
11A	Accountants	51	Bankruptcy	84	Common Lands
12	Acknowledgment	52	Banks and Banking	85	Common Law
13	Action	54	Beneficial Associations	88	Compounding Offenses
14	Action on the Case	55	Bigamy	89	Compromise and Settlement
15	Adjoining Landowners	56	Bills and Notes	89A	Condominium
15A	Administrative Law and Procedure	58	Bonds	90	Confusion of Goods
16	Admiralty	59	Boundaries	91	Conspiracy
17	Adoption	60	Bounties	92	Constitutional Law
18	Adulteration	61	Breach of Marriage Promise	92B	Consumer Credit
19	Adultery	62	Breach of the Peace	92H	Consumer Protection
20	Adverse Possession	63	Bribery	93	Contempt
21	Affidavits	64	Bridges	95	Contracts
23	Agriculture	65	Brokers	96	Contribution
24	Aliens	66	Building and Loan Associations	96H	Controlled Substances
25	Alteration of Instruments	67	Burglary	97	Conversion
26	Ambassadors and Consuls	68	Canals	98	Convicts
27	Amicus Curiae	69	Cancellation of Instruments	99	Copyrights and Intellectual Property
28	Animals	70	Carriers	100	Coroners
29	Annuities	71	Cemeteries	101	Corporations
30	Appeal and Error	72	Census	102	Costs
31	Appearance	73	Certiorari	103	Counterfeiting
33	Arbitration	74	Champerty and Maintenance	104	Counties
34	Armed Services	75	Charities	105	Court Commissioners
35	Arrest	76	Chattel Mortgages	106	Courts
36	Arson	76A	Chemical Dependents	107	Covenant, Action of
37	Assault and Battery	76D	Child Custody	108	Covenants
38	Assignments	76E	Child Support	108A	Credit Reporting Agencies
40	Assistance, Writ of			110	Criminal Law
41	Associations				

## DIGEST TOPICS

111	Crops	167	Factors	220	Internal Revenue
113	Customs and Usages	168	False Imprisonment	221	International Law
114	Customs Duties	169	False Personation	222	Interpleader
115	Damages	170	False Pretenses	223	Intoxicating Liquors
116	Dead Bodies	170A	Federal Civil Procedure	224	Joint Adventures
117	Death	170B	Federal Courts	225	Joint-Stock Companies and Business Trusts
117G	Debt, Action of	171	Fences	226	Joint Tenancy
117T	Debtor and Creditor	172	Ferries	227	Judges
118A	Declaratory Judgment	174	Fines	228	Judgment
119	Dedication	175	Fires	229	Judicial Sales
120	Deeds	176	Fish	230	Jury
122A	Deposits and Escrows	177	Fixtures	231	Justices of the Peace
123	Deposits in Court	178	Food	232	Kidnapping
124	Descent and Distribution	179	Forcible Entry and Detainer	232A	Labor Relations
125	Detectives	180	Forfeitures	233	Landlord and Tenant
126	Detinue	181	Forgery	234	Larceny
129	Disorderly Conduct	183	Franchises	235	Levees and Flood Control
130	Disorderly House	184	Fraud	236	Lewdness
131	District and Prosecuting Attorneys	185	Frauds, Statute of Conveyances	237	Libel and Slander
132	District of Columbia	186	Fraudulent	238	Licenses
133	Disturbance of Public Assemblage	187	Game	239	Liens
134	Divorce	188	Gaming	240	Life Estates
135	Domicile	189	Garnishment	241	Limitation of Actions
135H	Double Jeopardy	190	Gas	242	Lis Pendens
136	Dower and Curtesy	191	Gifts	245	Logs and Logging
137	Drains	192	Good Will	246	Lost Instruments
141	Easements	193	Grand Jury	247	Lotteries
142	Ejectment	195	Guaranty	248	Malicious Mischief
143	Election of Remedies	196	Guardian and Ward	249	Malicious Prosecution
144	Elections	197	Habeas Corpus	250	Mandamus
145	Electricity	198	Hawkers and Peddlers	251	Manufactures
146	Embezzlement	198H	Health	252	Maritime Liens
148	Eminent Domain	200	Highways	253	Marriage
148A	Employers' Liability	201	Holidays	255	Master and Servant
149	Entry, Writ of	202	Homestead	256	Mayhem
149E	Environmental Law	203	Homicide	257	Mechanics' Liens
150	Equity	205	Husband and Wife	257A	Mental Health
151	Escape	205H	Implied and Constructive Contracts	258A	Military Justice
152	Escheat	206	Improvements	259	Militia
154	Estates in Property	207	Incest	260	Mines and Minerals
156	Estoppel	208	Indemnity	265	Monopolies
157	Evidence	209	Indians	266	Mortgages
158	Exceptions, Bill of	210	Indictment and Information	267	Motions
159	Exchange of Property	211	Infants	268	Municipal Corporations
160	Exchanges	212	Injunction	269	Names
161	Execution	213	Innkeepers	270	Navigable Waters
162	Executors and Administrators	216	Inspection	271	Ne Exeat
163	Exemptions	217	Insurance	272	Negligence
164	Explosives	218	Insurrection and Sedition	273	Neutrality Laws
165	Extortion and Threats	219	Interest	274	Newspapers
166	Extradition and Detainers			275	New Trial
				276	Notaries
				277	Notice
				278	Novation
				279	Nuisance

## DIGEST TOPICS

280	Oath	327	Reference	369	Sunday
281	Obscenity	328	Reformation of Instruments	370	Supersedes
282	Obstructing Justice	330	Registers of Deeds	371	Taxation
283	Officers and Public Employees	331	Release	372	Telecommunications
284	Pardon and Parole	332	Religious Societies	373	Tenancy in Common
285	Parent and Child	333	Remainders	374	Tender
286	Parliamentary Law	334	Removal of Cases	375	Territories
287	Parties	335	Replevin	376	Theaters and Shows
288	Partition	336	Reports	378	Time
289	Partnership	337	Rescue	379	Torts
290	Party Walls	338	Reversions	380	Towage
291	Patents	339	Review	381	Towns
294	Payment	340	Rewards	382	Trade Regulation
295	Penalties	341	Riot	384	Treason
296	Pensions	342	Robbery	385	Treaties
297	Perjury	343	Sales	386	Trespass
298	Perpetuities	344	Salvage	387	Trespass to Try Title
300	Pilots	345	Schools	388	Trial
302	Pleading	346	Scire Facias	389	Trover and Conversion
303	Pledges	347	Seals	390	Trusts
305	Possessory Warrant	348	Seamen	391	Turnpikes and Toll Roads
306	Postal Service	349	Searches and Seizures	392	Undertakings
307	Powers	349A	Secured Transactions	393	United States
307A	Pretrial Procedure	349B	Securities Regulation	394	United States Magistrates
308	Principal and Agent	350	Seduction	395	United States Marshals
309	Principal and Surety	350H	Sentencing and Punishment	396	Unlawful Assembly
310	Prisons	351	Sequestration	396A	Urban Railroads
311	Private Roads	352	Set-Off and Counterclaim	398	Usury
313	Process	353	Sheriffs and Constables	399	Vagrancy
313A	Products Liability	354	Shipping	400	Vendor and Purchaser
314	Prohibition	355	Signatures	401	Venue
315	Property	356	Slaves	402	War and National Emergency
316	Prostitution	356A	Social Security and Public Welfare	403	Warehousemen
316A	Public Contracts	357	Sodomy	404	Waste
317	Public Lands	358	Specific Performance	405	Waters and Water Courses
317A	Public Utilities	359	Spendthrifts	406	Weapons
318	Quieting Title	360	States	407	Weights and Measures
319	Quo Warranto	361	Statutes	408	Wharves
319H	Racketeer Influenced and Corrupt Organizations	362	Steam	409	Wills
320	Railroads	363	Stipulations	410	Witnesses
321	Rape	365	Submission of Controversy	411	Woods and Forests
322	Real Actions	366	Subrogation	413	Workers' Compensation
323	Receivers	367	Subscriptions	414	Zoning and Planning
324	Receiving Stolen Goods	368	Suicide		
325	Recognizances				
326	Records				





## NON-JOINDER

Mo.App. S.D. 1980. Instrument, which provided that insured owner of automobile involved in accident assigned to his collision coverage insurer all claims or causes of action to the extent of the payment made, did not involve subrogation but was a "partial assignment of cause of action," and, even assuming legal title to such cause of action against tort-feasor was vested in insurer and insured, insured was a "real party in interest" in regard to such an action and his failure to join insurer in the action was merely a "nonjoinder" which would not necessarily require dismissal of the action. V.A.M.R. Civil Rules 52.04, 52.06.—Warren v. Kirwan, 598 S.W.2d 598.—Insurance 3525, 3526(8).

Pa. 1952. "Non-joinder" is the failure to include, in addition to those named, someone else who has a vital and direct interest in controversy and whose interest cannot in law or good conscience be severed from parties named in the suit. Pa.R.C.P.No.1032, 12 P.S.Appendix.—Maxson v. McElhinney, 88 A.2d 747, 370 Pa. 622.—Parties 78, 81.1.

## NON-JOINDER OF PARTIES

Ala. 1942. Minority stockholders' bill alleging that majority stockholders, who were made defendants, were in control of corporation, that they had illegally voted themselves excessive salaries, that they had been grossly negligent in management of corporation's business, and that corporation was insolvent, had equity, and was not subject to objection that there was a "non-joinder of parties", where corporation was made a defendant.—Altoona Warehouse Co. v. Bynum, 7 So.2d 497, 242 Ala. 540.—Corp 190.

Ga. 1942. In action by two children to whom their deceased father's property had been set aside as a year's support, against medicine company, those who had taken possession of company's business, guardian of children, and guardian's surety, petition alleging that ordinary set apart as year's support assets consisting of merchandise, drugs and accessories at place of business of medicine company, and that certain of defendants had taken possession of the business without accounting to the children, was not defective for "misojoinder" or "nonjoinder of parties".—Pardue Medicine Co. v. Pardue, 22 S.E.2d 143, 194 Ga. 516.—Ex & Ad 201.

## NON-JUDICIAL

N.D.Miss. 1990. "Nonjudicial" act, for which no judicial immunity is available, is one which is not normally performed by judicial officer, or which is performed outside judge's official capacity.—Boston v. Lafayette County, Miss., 744 F.Supp. 746, affirmed 933 F.2d 1003.—Judges 36.

Bkrcty.N.D.Ohio 2001. Act is "non-judicial," and not protected by judicial immunity, if it is one not normally performed by judicial officer or if parties did not deal with judge in his or her official

capacity.—In re Cadillac by DeLorean & DeLorean Cadillac, Inc., 262 B.R. 711.—Judges 36.

Iowa 1949. Under statute establishing procedure for the fixing of an assessment district for street improvements in commission plan, city having population of 125,000 or more, the grant to district court of power to find that benefited properties had been omitted and to order their inclusion in assessment district, is not a "nonjudicial" function which legislature could not empower court to perform.—In re Bowdoin St., City of Des Moines, 35 N.W.2d 571, 240 Iowa 64.

## NON-JUDICIAL ACT

C.A.7 (Ind.) 1989. Ex parte nature of alleged telephone call between trial court judge who heard criminal case and Chief Judge of state Court of Appeals concerning appeal of criminal defendant did not, without more, transform communication into "non-judicial act" for judicial immunity purposes.—Dellenbach v. Letsinger, 889 F.2d 755, certiorari denied 110 S.Ct. 1821, 494 U.S. 1085, 108 L.Ed.2d 950.—Judges 36.

## NONJUDICIAL BODY

Mich. 1941. In condemnation proceedings instituted by Board of County Road Commissioners, title to land involved could not be decided by condemnation jury which was a "nonjudicial body," and where it appeared that city was owner of land involved and certain persons were reversioners, such persons were required to be classed as persons owning reversionary interest and could not litigate whether city had forfeited right to the lands. Comp.Laws 1929, §§ 3772, 3784 et seq., and 3986.—In re Woodward Ave. in City of Detroit, 297 N.W. 468, 297 Mich. 235.—Em Dom 158.

## NONJUDICIAL DAY

Cal. 1933. Term "nonjudicial day" within constitutional provision requiring courts to be always open, legal holidays and nonjudicial days excepted, means day on which process cannot ordinarily issue or be executed or returned, and on which courts do not usually sit. Const. art. 6, § 5.—Vidal v. Backs, 21 P.2d 952, 218 Cal. 99, 86 A.L.R. 1134.—Holidays 5.

Or. 1889. A "nonjudicial day" means one on which process cannot ordinarily issue or be executed or returned, and on which courts do not usually sit.—Whitney v. Blackburn, 21 P. 874, 17 Or. 564, 11 Am.St.Rep. 357.

## NON-JUDICIAL FORECLOSURE

C.A.9 (Cal.) 1998. Under California law, "non-judicial foreclosure" is a process where property that secures a defaulted obligation is sold by a trustee pursuant to power of sale contained in a deed of trust, without recourse to the courts; after exercise of a power of sale, the debtor has no statutory right of redemption and the creditor is prohibited from recovering a deficiency judg-

ment.—Citicorp Real Estate, Inc. v. Smith, 155 F.3d 1097.—Mtg 329, 375.

Tex.Civ.App.—Austin 1969. Under Business and Commerce Code, where automobile buyer defaulted under installment contract and automobile seller repurchased such contract from assignee, repurchase of contract was not private sale of automobile by assignee which could constitute “non-judicial foreclosure”. V.T.C.A., Bus. & C. § 9.504(e).—Rangel v. Bock Motor Co., 437 S.W.2d 329, ref. n.r.e.—Sec Tran 183.

### **NONJUDICIAL FUNCTIONS**

Ohio App. 1 Dist. 1940. The levy and collection of taxes are “nonjudicial functions”.—City of Cincinnati v. Board of Education of City School Dist. of City of Cincinnati, 27 N.E.2d 413, 63 Ohio App. 549, 17 O.O. 273, 20 O.O. 50, 31 Ohio Law Abs. 248, appeal dismissed 31 N.E.2d 440, 137 Ohio St. 568, 20 O.O. 59.—Const Law 68(4).

### **NONJUDICIAL SALE**

C.A.9 (Wash.) 1975. Declaration of forfeiture of purchasers’ interest under real estate sales contract was not a “nonjudicial sale” under law of Washington so as to come within provision of Internal Revenue Code requiring notice to Government before its interest in property based on tax liens could be extinguished. 26 U.S.C.A. (I.R.C.1954) §§ 7425, 7425(b, c).—Runkel v. U.S., 527 F.2d 914.—Int Rev 4803.1.

### **NONJUDICIAL SALE OF PROPERTY**

C.A.9 (Mont.) 2001. Forfeiture of a land sales contract for property that is subject to a federal tax lien is a “nonjudicial sale of property,” to which statutory requirement that notice be provided to Internal Revenue Service (IRS) is applicable, and thus, forfeiture is subject to, and does not disturb, tax lien if notice is not given. 26 U.S.C.A. § 7425(b)(1), (c)(1, 4).—Orme v. U.S., 269 F.3d 991.—Int Rev 4803.1.

### **NON-JURISDICTIONAL**

Ariz. 1983. It is not statutory requirement that defensive matter must be raised that makes particular defense jurisdictional; rather, defense is “nonjurisdictional” where court has power to adjudicate claim though defense be factually established.—Magma Copper Co. v. Industrial Com’n of Arizona, 676 P.2d 1096, 139 Ariz. 38.—Action 12.

Cal.App. 1 Dist. 1976. Defect in tax proceeding is “non-jurisdictional” where there has been nonobservance of some procedural notice or other step which legislature, without defiance of State or Federal Constitution, might have dispensed with altogether, and is “jurisdictional” where nonperformance consists of constitutionally indispensable steps.—Philbrick v. Huff, 131 Cal.Rptr. 733, 60 Cal.App.3d 633.—Tax 734(1).

### **NONJURISDICTIONAL DEFECT**

Tex.App.—Houston [14 Dist.] 1991. Trial court’s ruling on motion to suppress evidence involves

alleged “nonjurisdictional defect,” for purposes of rule that appellate court may not entertain issues that are nonjurisdictional in nature when there is faulty notice of appeal. Rules App.Proc., Rule 40(b)(1).—Wilson v. State, 811 S.W.2d 700, petition for discretionary review refused.—Crim Law 1081(2).

### **NON-JURISDICTIONAL DEFENSES**

Wyo. 1994. “Jurisdictional defenses” not waived by guilty plea involve use of state’s power to bring defendant into court, while “non-jurisdictional defenses” are those objections and defenses which would not prevent a trial.—Smith v. State, 871 P.2d 186.—Crim Law 273.4(1).

### **NONJURISDICTIONAL ERROR**

Cal.App. 1 Dist. 1994. Allegations that insufficient evidence was presented to justify modification of charitable trust terms by probate court to require perpetual support of three selected charities alleged “nonjurisdictional error” and could not be basis for final collateral attack on modification order after it became final judgment.—Estate of Buck, 35 Cal. Rptr.2d 442, 29 Cal.App.4th 1846, rehearing denied, and review denied.—Judgm 501.

### **NONJURY**

Tex.Civ.App.—Beaumont 1974. A summary judgment case is a “nonjury” case within purview of statute providing that court, in nonjury cases, may take judicial knowledge of State Bar Minimum Fee Schedule in determining amount of attorney fees without the necessity of hearing further evidence. Vernon’s Ann.Civ.St. art. 2226; Rules of Civil Procedure, rule 166-A.—Coward v. Gateway Nat. Bank of Beaumont, 515 S.W.2d 129, writ granted, reversed 525 S.W.2d 857.—Evid 18.

### **NON-JURY ACTION**

D.Vt. 1941. The distinction between law and equity, abolished by federal rules, is a distinction in procedure and not a distinction between remedies, and the distinction still remains between jury actions and non-jury actions, and what was, before adoption of new rules, an action at law is a “jury action”, and what was a suit in equity is a “non-jury action”. Fed.Rules Civ.Proc., rule 38(a) 28 U.S.C.A.; U.S.C.A.Const. Amend. 7.—Ransom v. Staso Milling Co., 2 F.R.D. 128.—Jury 13(3).

### **NONJUSTICIABILITY**

U.S.Tenn. 1962. “Nonjusticiability” means inappropriateness of subject for judicial consideration.—Baker v. Carr, 82 S.Ct. 691, 369 U.S. 186, 7 L.Ed.2d 663, on remand 206 F.Supp. 341.—Const Law 67.

C.A.5 (Tex.) 1997. “Nonjusticiability” based on commitment of issue to coordinate political department generally entails finding that Constitution confers final authority over question at issue to political department, to exclusion of judiciary.—State of Tex. v. U.S., 106 F.3d 661.—Const Law 68(1).

## NON-JUSTICIABILITY DOCTRINE

Md. 2000. The “non-justiciability doctrine” precluded the Court of Appeals from deciding whether the state Army National Guard was liable to estate and widow of United States Army officer, who was killed while participating as an evaluator of National Guard’s annual training, for its alleged systemic negligence in failing to provide sufficient night vision goggles, proper training in their use, and adequate medical evacuation equipment and training. Const. Art. 2, § 8; Art. 9, § 1; Code 1957, Art. 65, §§ 10, 12.—Estate of Burris v. State, 759 A.2d 802, 360 Md. 721.—States 112.2(5).

Md. 2000. The “non-justiciability doctrine” is based on the notion that certain policy issues relating to military provisioning, duty assignments, and training are ordinarily matters committed to the Legislative and Executive Branches and, at least in the absence of a Constitutional authorization by them, may not be interfered with by judges and juries.—Estate of Burris v. State, 759 A.2d 802, 360 Md. 721.—States 112.2(5).

Md. 2000. The “non-justiciability doctrine,” which precludes judges and juries from interfering with certain military policy issues, applies to suits for money damages.—Estate of Burris v. State, 759 A.2d 802, 360 Md. 721.—U.S. 78(16).

## NON-JUSTICIALE

C.A.5 (Tex.) 1997. Judicial action presents “nonjusticiable” political question not amenable to judicial resolution where there is textually demonstrable constitutional commitment of issue to coordinate political department, or lack of judicially discoverable and manageable standards for resolving it.—State of Tex. v. U.S., 106 F.3d 661.—Const. Law 68(1).

Fed.Cl. 2002. A claim is “nonjusticiable” when, notwithstanding the court’s jurisdiction over the claim, the claim is such that the court lacks the ability to supply relief.—Alexander v. U.S., 52 Fed. Cl. 710, dismissed 50 Fed.Appx. 435.—Fed Cts 12.1.

N.Y.Sup. 1993. Matter that is “nonjusticiable,” that is, inappropriate or improper for judicial inquiry or adjudication, includes political questions, issues that have become moot or academic, disputes in which only advisory opinion is sought, disputes that are not ripe for consideration, and disputes which are contingent on the happening of future event which may not come to pass.—Matter of City of New York (Jamaica Water Supply Co.), 600 N.Y.S.2d 914, 158 Misc.2d 378.—Action 6; Const. Law 68(1).

N.C.App. 2001. To determine whether a claim is “non-justiciable,” for purposes of award of attorney fees for defense against non-justiciable claim, the trial court may consider evidence developed after the pleadings have been filed, and the test is whether the party persisted in litigating the case after a point where he should reasonably have become aware that the pleading he filed no longer contained a justiciable issue.—Fox-Kirk v. Hannon, 542 S.E.2d 346, 142 N.C.App. 267, review dismissed

551 S.E.2d 437, 353 N.C. 725, review denied 551 S.E.2d 437, 353 N.C. 725.—Costs 194.44.

## NON-JUSTICIALE ISSUE

N.C.App. 2001. Father’s claim of negligent infliction of emotional distress against driver of vehicle involved in accident in which child was injured, driver’s employer, and manufacturer of goods sold by employer was “non-justiciable issue,” and thus award of fees for defense against claim was warranted, where at time of filing, almost two years after accident, father had not sought any medical treatment or received any diagnosis for any condition that could support claim for severe emotional distress.—Fox-Kirk v. Hannon, 542 S.E.2d 346, 142 N.C.App. 267, review dismissed 551 S.E.2d 437, 353 N.C. 725, review denied 551 S.E.2d 437, 353 N.C. 725.—Costs 194.44.

## NON-LABOR GROUP

C.A.9 (Cal.) 1994. To constitute “nonlabor group” for purposes of statutory labor exemption to antitrust laws, entity in question must operate in same market as plaintiff to sufficient degree that it would be capable of committing antitrust violation against plaintiff, independent of union’s involvement. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.; Clayton Act, § 1 et seq., 15 U.S.C.A. § 12 et seq.; Norris-LaGuardia Act, § 1 et seq., 29 U.S.C.A. § 101 et seq.—USS-POSCO Industries v. Contra Costa County Bldg. & Const. Trades Council, AFL-CIO, 31 F.3d 800.—Monop 12(8.1).

C.A.2 (N.Y.) 1980. Theatrical agents who had agreed with actors’ union to become franchised were a “labor group,” and thus, any combination between such agents and union did not involve a combination between union and “non-labor group” as would preclude protection of statutory labor exemption to system of actor’s union of franchising theatrical agents who paid a fee and agreed to abide by certain restrictions in return for certifications of franchise agents, with equity members being forbidden to deal with franchise agents. Clayton Act, § 6, 15 U.S.C.A. § 17; § 20, 29 U.S.C.A. § 52; Norris-LaGuardia Act, §§ 5–15, 29 U.S.C.A. §§ 105–115.—H. A. Artists & Associates, Inc. v. Actors Equity Ass’n, 622 F.2d 647, certiorari granted 101 S.Ct. 526, 449 U.S. 991, 66 L.Ed.2d 288, affirmed in part, reversed in part 101 S.Ct. 2102, 451 U.S. 704, 68 L.Ed.2d 558.—Monop 12(9).

## NONLAWYER

Ariz.App. Div. 1 1987. Attorney licensed in another state, not licensed within state, and not admitted to state practice pro hac vice, is a “nonlawyer” within meaning of Disciplinary Rule generally precluding lawyer from sharing legal fees with non-lawyer. A.R.S. § 41–2371, subd. 4; 17A A.R.S. Sup.Ct.Rules, Rule 29(a), Code of Prof.Resp., DR3–102 (1984).—Peterson v. Anderson, 745 P.2d 166, 155 Ariz. 108.—Atty & C 151.

**NON-LEGALS**

N.Y.Sur. 1968. Where testator was aware that discretionary investments such as common and preferred stocks were removed from statutory classification of "non-legals", investments unauthorized by statute but permitted to trustees if authorized by terms of trust, but was in doubt as to whether they fell within the "legal" classification or comprised new and distinct category, provision of will limiting investment by trustees of testamentary trust to securities "now or formerly" called "legals" intended to exclude discretionary investments. Personal Property Law § 21, subd. 1(a-m).—*In re Moser's Will*, 296 N.Y.S.2d 701, 58 Misc.2d 742.—Trusts 217.3(2).

Ohio Prob. 1969. When fiduciary receives securities which are not proper trust investments, often called "nonlegals", it is his duty to dispose of them within reasonable time, unless statutes or provisions in will or trust instrument authorize fiduciary to retain property coming to him, thereby relieving fiduciary of that common-law duty, but he is not thereby relieved of duty of exercising due care with reference to retention or disposal of such property. R.C. § 2109.38.—*Union Commerce Bank v. Kusse*, 251 N.E.2d 884, 21 Ohio Misc. 217, 49 O.O.2d 413, 50 O.O.2d 423.—Ex & Ad 102; Trusts 189, 217.3(4).

**NON-LEGISLATIVE ACT**

Hawai'i 1980. Approval of application for variance or modification constitutes a "non-legislative act," not a legislative act.—*Life of the Land, Inc. v. City Council of City and County of Honolulu*, 606 P.2d 866, 61 Haw. 390.—Zoning 191, 542.1.

**NONLEGISLATIVE RULES**

C.A.11 1982. "Nonlegislative rules" are those not promulgated pursuant to power to issue regulations with binding effect; they are merely an expression of how agency interprets and intends to enforce its governing statute, how it intends to exercise discretionary function or procedure agency intends to use in exercising its powers.—*American Trucking Ass'n, Inc. v. U.S.*, 688 F.2d 1337, rehearing denied 696 F.2d 1007, certiorari granted *Interstate Commerce Commission v. American Trucking Association, Inc.*, 103 S.Ct. 3109, 462 U.S. 1130, 77 L.Ed.2d 1365, reversed *I.C.C. v. American Trucking Associations, Inc.*, 104 S.Ct. 2458, 467 U.S. 354, 81 L.Ed.2d 282, rehearing denied *Interstate Commerce Com'n v. American Trucking Ass'n, Inc.*, 105 S.Ct. 20, 468 U.S. 1224, 82 L.Ed.2d 915, on remand 744 F.2d 754, certiorari denied *American Tr Admin Law* 382.1.

**NONLIABILITY DOCTRINE**

C.A.6 (Tenn.) 2001. The "nonliability doctrine," which exempts a federal government agency from liability arising out of exercise of certain wholly governmental functions, is applied when the subject governmental function is discretionary.—*Edwards v. Tennessee Valley Authority*, 255 F.3d 318.—U.S. 78(12).

**NON-LICENSED**

C.C.A.6 1947. The Federal Trade Commission in substituting for the word "unlicensed" in complaint, the word "non-licensed" did not indicate intention to limit charge of restraint of trade in unpatented materials to designated items, notwithstanding dictionary distinction between prefix "un" and prefix "non", latter being a more negative term than the former, since for purposes of case "unlicensed" and "non-licensed" had equivalent meanings, namely, that articles which they described were not licensed. Federal Trade Commission Act, § 5(a), 15 U.S.C.A. § 45(a).—*Keasbey & Mattison Co. v. Federal Trade Commission*, 159 F.2d 940.—Trade Reg 794.

**NONLIQUIDATING DISTRIBUTION**

C.A.2 1998. A "liquidating distribution" is a distribution by a corporation that is in complete liquidation of the entity's trade or business activities, whereas a "nonliquidating distribution" is a payment made by a corporation to the entity's owners when the entity's legal existence does not cease thereafter.—*Eisenberg v. C.I.R.*, 155 F.3d 50, recommendation regarding acquiescence SUBJECT: *EISENBERG V. COMMISSIONER*, 1999 WL 33100239.—Corp 151, 629.

**NON-LITERAL**

D.Mass. 2002. Copyright protection is extended to both "literal" copying, i.e., verbatim copying of original expression, and "non-literal" copying, i.e., that which is paraphrased or loosely paraphrased.—*ILOG, Inc. v. Bell Logic, LLC*, 181 F.Supp.2d 3.—Copyr 53(1).

**NONLITERAL COMPONENTS**

S.D.N.Y. 1994. To varying degree, copyright law protects certain parts of computer program's "nonliteral components," which entail various steps programmer employs prior to actually writing instructions or source code, including flow charts, intermodular or subroutine relationships, parameter lists and macros. 17 U.S.C.A. § 101.—*Cognotech Services, Ltd. v. Morgan Guar. Trust Co. of New York*, 862 F.Supp. 45.—Copyr 10.4.

**NONLITERAL SIMILARITY**

C.A.11 (Fla.) 1996. "Nonliteral similarity," in context of copying copyrighted computer code, can be thought of as paraphrasing or copying essence or structure of work just short of literal copying.—*Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, rehearing denied.—Copyr 57.

**NONMALICIOUS ACTS PERFORMED AS PUBLIC OFFICIAL IN FURTHERANCE OF DUTIES**

Md. 1986. Police officer who told allegedly drunk driver to pull to side of parking lot and discontinue driving, who did not confine or restrain driver did not "stop" or "detain" driver, was not required to detain driver and administer sobriety test pursuant to statute which requires police officer to detain and investigate driver, if police officer

stops or detains driver, and, therefore, was acting in “discretionary” capacity which entitled police officer to immunity from suit for “nonmalicious acts performed as public official in furtherance of duties”. Code, Transportation, § 16–205.1(b)(2).—Ashburn v. Anne Arundel County, 510 A.2d 1078, 306 Md. 617.—Mun Corp 747(3).

### NONMANAGERIAL POSITION

Minn. 1992. Phrase “to superintend or supervise classroom instruction,” as used in Teacher Tenure Act, refers to “nonmanagerial position” which involves close proximity to and substantial direct involvement with classroom instruction; neither superintendent nor associate who shares in superintendent’s managerial responsibilities is “teacher” under Act, regardless of whether associate’s duties involve district finances or educational programs and curricula. M.S.A. § 125.17 et seq.—Frye v. Independent School Dist. No. 625, 494 N.W.2d 466, amended on denial of rehearing.—Schools 133.6(6).

### NON-MANDATED OFFICE

Pa.Super. 1942. Where music teacher was appointed assistant principal with title of dean, additional duties of supervising discipline and additional salary of only \$420 a year, such additional employment was a “non-mandated office” not equivalent to that of “principal” within statutory definition of “professional employee” and hence new contract executed by secretary, comprising the additional duties and salary, was invalid as exceeding authority given by appointing resolution, and did not prevent dismissal of teacher from additional duties and reduction to original salary. 24 P.S. § 1 et seq., and §§ 1121, 1126, 1126.1, 1128a, 1161, 1168, 1201, 1202.—Com. ex rel. Ricapito v. School Dist. of City of Bethlehem, 25 A.2d 786, 148 Pa.Super. 426.—Schools 135(1), 147.2(1).

### NONMANDATORY PROVISIONS

C.A.9 (Cal.) 1996. Although “mandatory provisions,” provisions required by law to be in tariff give constructive notice to shipper, “nonmandatory provisions,” not required by law to be in tariff, such as statute of limitations provisions, do not have this effect.—Comsource Independent Foodservice Companies, Inc. v. Union Pacific R. Co., 102 F.3d 438, certiorari denied Union Pacific R. Co. v. Comsource Independent Food Service Companies, Inc., 117 S.Ct. 1821, 520 U.S. 1229, 137 L.Ed.2d 1029.—Carr 152.

### NONMANDATORY SUBJECTS OF BARGAINING

Cal.App. 4 Dist. 1991. “Nonmandatory subjects of bargaining” within meaning of EERA means contentions and issues not falling within enumerated matters in EERA or additional subjects identified by the courts. West’s Ann.Cal.Gov.Code §§ 3543.2(a), 3543.5(c).—South Bay Union School Dist. v. Public Employment Relations Bd., 279 Cal. Rptr. 135, 228 Cal.App.3d 502.—Labor 178.

### NONMARITAL

Md.App. 1983. Language of statute governing property disposition in divorce and annulment which refers to “marital property” as, inter alia, all property, however titled, makes clear that characterization of property as “marital” or “nonmarital” is not dependent upon legalistic concept of title. Code, Courts and Judicial Proceedings, §§ 3–6A–01(c), 3–6A–05(a).—Schweizer v. Schweizer, 462 A.2d 562, 55 Md.App. 373, certiorari granted 468 A.2d 1013, 298 Md. 49, affirmed in part 484 A.2d 267, 301 Md. 626.—Divorce 252.3(1); Marriage 63.

Wis.App. 1992. In divorce context, “nonmarital” property must retain both its character and identity if its exempt status is to be preserved.—Matter of Estate of Lloyd, 487 N.W.2d 647, 170 Wis.2d 240, review denied Lloyd v. Lloyd, 494 N.W.2d 210.—Divorce 252.3(3).

### NONMARITAL ASSETS

Fla.App. 4 Dist. 1998. Husband was entitled to retain, as “nonmarital assets,” funds that had been in retirement account at time of his marriage to wife, plus passive accumulations thereon. West’s F.S.A. § 61.075(5)(b)1, 3.—Blase v. Blase, 704 So.2d 741.—Divorce 252.3(4).

### NONMARITAL CHILD

Wis.App. 1989. Where adoption is not an issue, whether child is “marital child” or “nonmarital child” is determined by marital status of his or her biological parents vis-a-vis each other. W.S.A. 990.01(19m, 23m).—Matter of Estate of Schneider, 441 N.W.2d 335, 150 Wis.2d 286.—Child 1.

### NONMARITAL CHILDREN

Mass. 2002. Because death ends a marriage, posthumously conceived children are always “nonmarital children” for purposes of intestacy law. M.G.L.A. c. 190, § 1 et seq.—Woodward v. Commissioner of Social Sec., 760 N.E.2d 257, 435 Mass. 536.—Des & Dist 27.

### NONMARITAL CONTRIBUTION

Ky.App. 1981. With respect to an apportionment between marital and nonmarital property, “nonmarital contribution” is defined as the equity in the property at the time of the marriage, plus any amount expended after marriage by either spouse from traceable nonmarital funds in the reduction of mortgage principal, and/or the value of improvements made to the property from such nonmarital funds.—Brandenburg v. Brandenburg, 617 S.W.2d 871.—Divorce 252.3(1), 252.3(3).

Mo.App. E.D. 1995. For purposes of allocating property between separated parties, “nonmarital contribution” is equity in property at time of marriage, plus any reduction of mortgage principal from expenditure of traceable nonmarital funds, and/or value of improvements made to property from such nonmarital funds.—Brooks v. Brooks, 911 S.W.2d 631, rehearing denied.—Divorce 252.3(3).

## NONMARITAL CONTRIBUTIONS

Md.App. 1984. Husband's payments made toward his pension prior to marriage were "nonmarital contributions" and thus constituted "nonmarital property"; however, portion of husband's pension that accrued after date of marriage having been paid for marital contributions was acquired during the marriage, and thus was "marital property." Code, Courts and Judicial Proceedings, § 3-6A-01(e).—*Gravenstine v. Gravenstine*, 472 A.2d 1001, 58 Md.App. 158.—Divorce 252.3(4).

Mo.App. W.D. 1997. For purposes of determining marital interest in property upon dissolution of marriage, "total contribution" is sum of marital and nonmarital contributions, and "nonmarital contributions" include equity in property at time of marriage, plus any reduction of mortgage principal from expenditures of traceable nonmarital funds, and/or value of improvements made to property from such nonmarital funds.—*Alexander v. Alexander*, 956 S.W.2d 957.—Divorce 252.3(3).

## NONMARITAL DEBT

Ky.App. 1993. Loan which husband secured to obtain educational degree was "nonmarital debt," which dissolution court properly assigned solely to husband.—*Glidewell v. Glidewell*, 859 S.W.2d 675, review denied.—Divorce 252.4.

Md.App. 2000. A "marital debt" is directly traceable to the acquisition of marital property; conversely, a "nonmarital debt" is not directly traceable to the acquisition of marital property.—*Welsh v. Welsh*, 761 A.2d 949, 135 Md.App. 29, reconsideration denied, certiorari denied 768 A.2d 55, 363 Md. 207.—Divorce 252.4.

## NON-MARITAL PROPERTY

Ark.App. 1999. The increase in the value of a former wife's retirement account subsequent to the marriage was "nonmarital property," and, thus, the former wife was entitled to the amount by which her premarital interest in her 401(k) account appreciated in value during the marriage. A.C.A. § 9-12-315(b)(1, 5).—*Thomas v. Thomas*, 4 S.W.3d 517, 68 Ark.App. 196.—Divorce 252.3(4).

Ill.App. 2 Dist. 1998. Shares of corporate stock received by wife as gift pursuant to corporate resolution executed by her father, who was president of corporation, were "nonmarital property," for purposes of property division following dissolution of wife's marriage. S.H.A. 750 ILCS 5/503(a)(7).—In re Marriage of Blunda, 234 Ill.Dec. 339, 702 N.E.2d 993, 299 Ill.App.3d 855.—Divorce 252.3(3).

Ill.App. 2 Dist. 1998. Increase in value of shares of corporate stock wife had received as gift from her father, who was president of corporation, which was attributable to corporation's acquisition and retirement of shares which had been gifted to wife's brother, was "nonmarital property," for purposes of property division following dissolution of wife's marriage, irrespective of whether increase resulted from contribution of marital estate; however, increase to nonmarital property was subject to right of reimbursement to contributing estate. S.H.A.

750 ILCS 5/503(a)(7), (c).—In re Marriage of Blunda, 234 Ill.Dec. 339, 702 N.E.2d 993, 299 Ill.App.3d 855.—Divorce 252.3(3).

Ill.App. 2 Dist. 1992. Marital settlement agreement was valid, "post-nuptial contract," notwithstanding dismissal of divorce proceedings; terms of agreement satisfied requirements necessary to form valid contract pursuant to statute defining "nonmarital property" as property excluded by valid agreement of parties, validity of agreement was not made expressly dependent upon entry of divorce decree, and substantial performance of contractual terms took place after its execution. S.H.A. ch. 40, ¶ 503(a)(4).—In re Marriage of Vella, 177 Ill.Dec. 328, 603 N.E.2d 109, 237 Ill.App.3d 194.—Hus & W 278(1).

Ill.App. 3 Dist. 1990. Husband's interest in farming partnership, which he owned prior to marriage, was "nonmarital property" and retained its nonmarital classification despite addition of third partner and significant increase in its value during marriage.—In re Marriage of Kamp, 146 Ill.Dec. 57, 557 N.E.2d 999, 199 Ill.App.3d 1080.—Divorce 252.3(3).

Ill.App. 4 Dist. 1979. Increased value of land inherited by husband was "marital property" for purposes of Marriage and Dissolution of Marriage Act, and such increase in value did not fall within provision of the Act specifying that property acquired by gift, bequest, devise or descent is "nonmarital property," even though the increase in value of the farmland was substantially due to economic factors or other external factors rather than improvements made to the farmland by the husband and wife, where the land was inherited and its value increased after the parties were married. S.H.A. ch. 40, §§ 503, 503(a, b).—In re Marriage of Komnick, 34 Ill.Dec. 214, 397 N.E.2d 886, 78 Ill.App.3d 599, reversed 49 Ill.Dec. 291, 417 N.E.2d 1305, 84 Ill.2d 89, 24 A.L.R.4th 446.—Divorce 252.3(1).

Md.App. 1984. Husband's payments made toward his pension prior to marriage were "nonmarital contributions" and thus constituted "nonmarital property"; however, portion of husband's pension that accrued after date of marriage having been paid for marital contributions was acquired during the marriage, and thus was "marital property." Code, Courts and Judicial Proceedings, § 3-6A-01(e).—*Gravenstine v. Gravenstine*, 472 A.2d 1001, 58 Md.App. 158.—Divorce 252.3(4).

Md.App. 1984. Although securities purchased by husband before marriage were "nonmarital property," securities acquired by reinvesting dividends during the marriage were "marital property" where the marital unit was able to purchase the additional securities due to wife's contribution to the marriage's finances. Code, Courts and Judicial Proceedings, § 3-6A-01(e).—*Gravenstine v. Gravenstine*, 472 A.2d 1001, 58 Md.App. 158.—Divorce 252.3(1).

Minn.App. 2002. For purposes of property division at divorce, wife's interest in a Subchapter S corporation's retained-earnings account was not at-

tributable to wife's entrepreneurial efforts during the marriage, and thus was "nonmarital property," even though the income on the retained earnings was taxed to the parties as earned income and wife attended quarterly board meetings, voted annually on distributions, and voted once to alter corporate tax structure, where corporation paid the taxes and no marital assets were used, and wife was a minority shareholder, played little to no role in the daily management of the corporation, and had no authority to call for a shareholder distribution. M.S.A. § 518.54, subd. 5; 26 U.S.C.A. § 1363.—Robert v. Zygmunt, 652 N.W.2d 537.—Divorce 252.3(3).

Minn.App. 1999. "Nonmarital property" includes property acquired by a spouse during the marriage by gift, bequest, devise or inheritance made by a third party to one but not to the other spouse. M.S.A. § 518.54, subd. 5(a).—Pfleiderer v. Pfleiderer, 591 N.W.2d 729.—Divorce 252.3(3).

Minn.App. 1994. "Nonmarital property" includes all property acquired before marriage and the increase in value of that property. M.S.A. § 518.54, subd. 5(b, c).—White v. White, 521 N.W.2d 874.—Divorce 252.3(3).

Minn.App. 1986. For purpose of property division in marriage dissolution proceeding, "nonmarital property" includes "increase in value" of property otherwise covered by statutory definition of nonmarital property, M.S.A. § 518.54, subd. 5.—Stroh v. Stroh, 383 N.W.2d 402.—Divorce 252.3(3).

Minn.App. 1984. "Non-marital property" includes both property acquired before the marriage and increase in value of that property. M.S.A. § 518.54.—Quinlivan v. Quinlivan, 359 N.W.2d 276.—Divorce 252.3(3).

Miss. 1995. "Nonmarital property" is not subject to equitable distribution because it was not acquired within marriage.—Maslowski v. Maslowski, 655 So.2d 18, rehearing denied.—Divorce 252.3(1).

Miss. 1994. For purposes of terminology in equitable distribution jurisdictions, property subject to equitable distribution is termed "marital property," and property not subject to equitable distribution is termed "nonmarital property."—Johnson v. Johnson, 650 So.2d 1281, rehearing denied.—Divorce 252.3(1), 252.3(3).

Mo.App. W.D. 1982. Husband carried burden of proving that bank certificate of deposit was obtained in exchange for funds acquired by him from his deceased "son's estate" by "bequest" or "descent," and, therefore, constituted "nonmarital property".—Fields v. Fields, 643 S.W.2d 611.—Divorce 253(2).

#### NONMARITIME EMPLOYMENT

Wash. 1937. Work done on vessel prior to its completion and commission constitutes "nonmaritime employment," which is governed by state Compensation Act. Rem.Rev.Stat. § 7673 et seq.—Rohlf v. Department of Labor and Industries, 69 P.2d 817, 190 Wash. 566.—Adm 20.

#### NON-MARITIME TORT

E.D.Mich. 1934. Alleged injuries sustained by seaman while standing upon dock on land at Ohio port held to constitute a "non-maritime tort" and not subject to jurisdiction of admiralty or rules of maritime law, but governed by Ohio Employers' Liability Act. Gen.Code Ohio, § 6242 et seq.—Kulczyk v. Rockport S.S. Co., 8 F.Supp. 336.—Adm 20.

E.D.N.Y. 1940. Where vessel owned and operated by United States collided with bridge, precipitating bridge tender into canal and resulting in tender's death, the tort was a "nonmaritime tort", not cognizable under Suits in Admiralty Act, since bridge was a land structure, and libel could not be maintained against United States for tender's death. Suits in Admiralty Act, 46 U.S.C.A. § 741 et seq.—Oakes v. U.S., 35 F.Supp. 868.—Adm 21; U S 125(13).

#### NON-MARKETABILITY DISCOUNT

S.D. 2001. "Non-marketability discount," which applies to shares of a corporation that have no market for sale, is separate and distinct from minority discount.—First Western Bank Wall v. Olsen, 621 N.W.2d 611, 2001 SD 16.—Corp 182.4(5).

#### NON-MARKETABLE

Ill.App. 1 Dist. 1967. The pendency of litigation renders a title "non-marketable".—Ableman v. Slader, 224 N.E.2d 569, 80 Ill.App.2d 94.—Ven & Pur 130(5).

#### NON-MATERIAL VARIATION FROM DESIGN

Pa.Super. 1986. "Non-material variation from design," for purposes of strict products liability action, is not causally related to mishap giving rise to such action.—Mackey v. Maremont Corp., 504 A.2d 908, 350 Pa.Super. 415.—Prod Liab 15.

#### NONMEDICAL FACTORS

Idaho 1994. Effects of and possible complications from artificial lens implanted in claimant's eye were not "nonmedical factors," for purposes of determining whether to increase claimant's permanent disability from loss of natural lens in his eye to more than his permanent physical impairment. I.C. § 72-430.—Burke v. EG & G/Morrison-Knudsen Const. Co., 885 P.2d 372, 126 Idaho 413.—Work Comp 898.

#### NON-MEDICAL POLICY

Tex.Civ.App.—San Antonio 1942. The fact that at time "non-medical policy", providing that it would not take effect unless applicant was in good health at time of delivery and payment of first premium was issued on insured's life, insured was suffering from cancer did not preclude recovery from insurer for insured's death, in view of statute, where insurer did not initiate a contest of the policy until more than two years after its delivery to insured. Rev.St.1925, art. 4732, subd. 3 (repealed. See V.A.T.S. Insurance Code, art. 3.44).—Reserve

Loan Life Ins. Co. of Texas v. Brown, 159 S.W.2d 179, writ refused.—Insurance 3125(6).

**NONMEMBER**

Pa.Cmwlth. 1991. Two years after teacher terminated her employment, she became “nonmember” of Public School Employees’ Retirement System; nonmember status began two years after she last made contribution to retirement fund. 24 Pa. C.S.A. § 8102.—Lawrie v. Public School Employees’ Retirement Bd. of Com., 595 A.2d 753, 141 Pa.Cmwlth. 366, appeal denied 608 A.2d 32, 530 Pa. 657.—Schools 146(1).

**NON-MEMBERS**

N.D.Ill. 1996. Investors who had purchased shares in reliance upon allegedly false information provided by broker who was member of stock exchange were “non-members” of exchange, for purposes of exchange rule compelling arbitration of disputes between members and “non-members,” even though broker claimed that term “non-members” referred to brokers and dealers who were not members of exchange.—Lehman Bros. Inc. v. Certified Reporting Co., 939 F.Supp. 1333.—Exchanges 11(11.1).

**NONMERCHANTABLE TITLE**

Kan. 1942. A title need not be bad in fact to be a “nonmerchantable title” or “unmarketable title”, but it is sufficient to render it so if an ordinarily prudent man with knowledge of the facts and aware of legal questions involved would not accept it in ordinary course of business.—Ghormley v. Kleeden, 124 P.2d 467, 155 Kan. 319.—Ven & Pur 130(2).

Kan. 1941. A title need not be bad in fact in order to be a “nonmerchantable title” or an “unmarketable title”, but it is sufficient to render it so if an ordinarily prudent man with knowledge of the facts and aware of legal questions involved would not accept it in the ordinary course of business.—Barrett v. McMannis, 110 P.2d 774, 153 Kan. 420.

**NON-MERIT FACTORS**

Pa.Cmwlth. 1989. Inappropriate classification of position did not constitute one of the “non-merit factors” within meaning of provision of Civil Service Act prohibiting any Commonwealth officer from discriminating against any person in employment, and thus employees of Public Welfare Department whose positions were reclassified because they had been originally inappropriately classified were entitled to hearing on their appeal from reclassification decision. 71 P.S. §§ 741.905a, 741.951(b).—Balas v. Com., Dept. of Public Welfare, 563 A.2d 219, 128 Pa.Cmwlth. 205, opinion after remand 616 A.2d 143, 151 Pa.Cmwlth. 53, appeal denied 631 A.2d 1010, 535 Pa. 639.—Offic 72.32.

W.Va. 1977. Within state civil service rule providing that no person shall be discriminated against because of political or religious opinions or affiliations, race, national origin, or other nonmerit factors, “non-merit factors” do not include examina-

tion requirements which are intended to measure whether a candidate merits promotion, unless there is an allegation that the director of personnel is intentionally treating employees in different manner from other employees in the same class.—Adkins v. Civil Service Commission, 241 S.E.2d 428, 160 W.Va. 720.—Offic 11.3.

**NON-MILITARY**

S.D.Fla. 1993. Under Foreign Sovereign Immunities Act, Nicaraguan military aircraft sent to United States for repairs and maintenance were immune from seizure pursuant to Florida court’s writ of execution; aircraft were used to transport senior military personnel, which was essential to military operations, and fact that aircraft were being altered for more luxurious accommodations did not render them “non-military.” 28 U.S.C.A. § 1611(b)(2).—All American Trading Corp. v. Cuartel General Fuerza Aerea Guardia Nacional De Nicaragua, 818 F.Supp. 1552.—Intern Law 10.35, 10.36.

**NONMINERAL LANDS**

U.S.Wash. 1940. “Agricultural lands” within provision of railroad land grant permitting selection of “agricultural lands” in lieu of excepted mineral lands, is to be interpreted in the light of existing legislation and conditions and as so interpreted is not synonymous with “nonmineral lands” but is synonymous with land subject to be taken by pre-emptors or homesteaders under the public land laws. Act July 2, 1864, § 3, 13 Stat. 368.—U.S. v. Northern Pac. Ry. Co., 61 S.Ct. 264, 311 U.S. 317, 85 L.Ed. 210, conformed to 41 F.Supp. 273.—Pub Lands 81(1).

**NON-MINISTERIAL OR DISCRETIONARY FUNCTIONS**

Md. 2001. A person engages in “non-ministerial or discretionary functions” when he or she exercises judgment in the process of establishing and maintaining employment relationships for their family members with a county board.—State Ethics Com’n v. Antonetti, 780 A.2d 1154, 365 Md. 428.—Counties 88.

**NON-MONETARY CONTRIBUTIONS**

Mont. 1982. Trial court did not abuse its discretion in its evaluation of its various contributions to the marriage, in dividing property of the parties in dissolution action, despite contention that it failed to consider as wife’s “non-monetary contributions” the work she put in during the time of marriage in maintaining house, keeping it clean, providing the meals, doing the shopping, carrying for the children, doing the ironing, helping with lawn care, and participating in social functions relating to the husband’s business. MCA 40-4-202.—In re Marriage of Krause, 654 P.2d 963, 200 Mont. 368.—Divorce 252.1.

**NON-MUTUAL COLLATERAL ESTOPPEL**

Bkrtcy.D.Dist.Col. 1994. Maryland applies four-part test to determine whether it is appropriate to permit “nonmutual collateral estoppel”: that issue

decided in prior adjudication was identical with the one presented in action in question, but there was final judgment on merits; that party against whom plea is asserted was party or in privity with party to prior adjudication; and that party against whom plea is asserted was given fair opportunity to be heard on issue.—*In re Judiciary Tower Associates*, 175 B.R. 796.—Judgm 632.

Md. 1993. Under limited doctrine of “nonmutual collateral estoppel,” adverse determination against party in prior litigation may preclude that party from relitigating issues in subsequent case involving different adversary.—*Gillis v. State*, 633 A.2d 888, 333 Md. 69, certiorari denied 114 S.Ct. 1558, 511 U.S. 1039, 128 L.Ed.2d 205.—Judgm 632.

Mo. 2001. The principle of “non-mutual collateral estoppel” permits use of a prior judgment to preclude relitigation of an issue even though the party asserting collateral estoppel was not a party to the prior case.—*James v. Paul*, 49 S.W.3d 678, rehearing denied.—Judgm 632.

Neb. 1994. “Nonmutual collateral estoppel” involves invocation of doctrine by nonparty to original action.—*State v. Secret*, 524 N.W.2d 551, 246 Neb. 1002.—Judgm 632.

#### **NONMUTUAL DEFENSIVE COLLATERAL ESTOPPEL**

Ill. 1995. There is distinction between offensive and defensive use of collateral estoppel, and offensive collateral estoppel should not be indiscriminately applied where there is no mutuality of parties; “nonmutual offensive collateral estoppel” occurs where plaintiff who was not party to prior proceeding seeks to prevent defendant from relitigating issue previously decided, while “nonmutual defensive collateral estoppel” occurs where defendant who was not party in prior proceeding seeks to prevent plaintiff from relitigating issue previously decided.—*Herzog v. Lexington Tp.*, 212 Ill. Dec. 581, 657 N.E.2d 926, 167 Ill.2d 288.—Judgm 632.

#### **NONMUTUAL DEFENSIVE ISSUE PRECLUSION**

D.Mass. 1995. “Nonmutual defensive issue preclusion” is where defendant seeks to prevent plaintiff from asserting claim that plaintiff has previously litigated and lost against another defendant.—*Manosoff v. DuBois*, 899 F.Supp. 782.—Judgm 632.

#### **NONMUTUAL ISSUE PRECLUSION**

W.D.Wis. 1996. “Nonmutual issue preclusion” is special aspect of preclusion that bars party who has had one fair trial on issue from going to trial on merits of that issue a second time, even against a different defendant, and is warranted by public policy of limiting litigation.—*Menominee Indian Tribe of Wisconsin v. Thompson*, 922 F.Supp. 184, affirmed 161 F.3d 449, certiorari denied 119 S.Ct. 1459, 526 U.S. 1066, 143 L.Ed.2d 544.—Judgm 632.

W.D.Wis. 1996. To invoke “nonmutual issue preclusion,” party asserting it must show that its opponent is same party that first went to trial on

issue, issue is the same, issue was resolved by final judgment on merits, and party against whom it is invoked had full and fair opportunity to litigate issue in first action.—*Menominee Indian Tribe of Wisconsin v. Thompson*, 922 F.Supp. 184, affirmed 161 F.3d 449, certiorari denied 119 S.Ct. 1459, 526 U.S. 1066, 143 L.Ed.2d 544.—Judgm 632.

#### **NON-MUTUAL OFFENSIVE COLLATERAL ESTOPPEL**

C.D.Cal. 1998. The doctrine of “non-mutual offensive collateral estoppel” arises when a plaintiff attempts to prevent a defendant from relitigating an issue that the defendant has already litigated and lost in an action with someone else.—*Thomas v. Continental Cas. Co.*, 7 F.Supp.2d 1048.—Judgm 632.

M.D.N.C. 1995. Use by litigant, of prior judgment in suit in which litigant was not a party, against adversary in present action who was party to earlier case, is known as “nonmutual, offensive collateral estoppel.”—*Simpson v. Specialty Retail Concepts, Inc.*, 908 F.Supp. 323.—Judgm 632.

D.R.I. 1992. “Nonmutual offensive collateral estoppel” means that plaintiff seeking to invoke collateral estoppel was not plaintiff in prior suit in which defendant unsuccessfully litigated issue.—*U.S. v. American Cyanamid Co.*, 786 F.Supp. 152.—Judgm 632.

D.R.I. 1990. “Nonmutual offensive collateral estoppel” means that plaintiff in second suit that is seeking to invoke collateral estoppel was not plaintiff in first suit.—*U.S. v. American Cyanamid Co.*, 794 F.Supp. 61.—Judgm 632.

Fed.Cl. 1998. “Nonmutual offensive collateral estoppel,” i.e., the common law, judicially-created doctrine precluding reconsideration of an issue decided in another forum when only one party was involved in the prior litigation, is unavailable, on policy grounds, against the government.—*Howarth v. U.S.*, 41 Fed.Cl. 160, appeal dismissed *Bell v. U.S.*, 178 F.3d 1310, order recalled and vacated 185 F.3d 880, appeal reinstated 185 F.3d 880, affirmed 217 F.3d 853.—Judgm 702.

Ill. 1995. There is distinction between offensive and defensive use of collateral estoppel, and offensive collateral estoppel should not be indiscriminately applied where there is no mutuality of parties; “nonmutual offensive collateral estoppel” occurs where plaintiff who was not party to prior proceeding seeks to prevent defendant from relitigating issue previously decided, while “nonmutual defensive collateral estoppel” occurs where defendant who was not party in prior proceeding seeks to prevent plaintiff from relitigating issue previously decided.—*Herzog v. Lexington Tp.*, 212 Ill. Dec. 581, 657 N.E.2d 926, 167 Ill.2d 288.—Judgm 632.

N.C.App. 1997. Where “non-mutual offensive collateral estoppel” is applied, plaintiff seeks to foreclose defendant from relitigating issue that defendant has previously litigated unsuccessfully in another action against different party.—*Rymer v.*

Estate of Sorrells By and Through Sorrells, 488 S.E.2d 838, 127 N.C.App. 266.—Judgm 632.

S.C.App. 1995. Under doctrine of “nonmutual offensive collateral estoppel,” party may be prevented from relitigating issues actually determined in prior action so long as party estopped had full and fair opportunity to litigate issue in first action and there are no circumstances which justify affording him opportunity to retry issue.—Middleborough Horizontal Property Regime Council of Co-Owners v. Montedison S.p.A., 465 S.E.2d 765, 320 S.C. 470, rehearing denied.—Judgm 707, 720.

#### **NON-MUTUAL OFFENSIVE ISSUE PRECLUSION**

E.D.La. 2000. “Non-mutual offensive issue preclusion” is essentially where one not a party nor privy to a prior action uses a ruling in that prior action offensively to one’s advantage to preclude consideration of the same issue in a later case.—Washington v. CSC Credit Services, Inc., 194 F.R.D. 244.—Judgm 632.

D.Mass. 1995. “Nonmutual offensive issue preclusion” is where plaintiff seeks to foreclose defendant from litigating an issue defendant has previously litigated unsuccessfully in an action with another party.—Masonoff v. DuBois, 899 F.Supp. 782.—Judgm 632.

#### **NON-NARCOTIC DRUG**

C.A.9 (Idaho) 2002. For purpose of Idaho’s driving under the influence (DUI) statute, marijuana is a “non-narcotic drug.” I.C. § 18-8004(5).—U.S. v. Patzer, 277 F.3d 1080, rehearing denied 284 F.3d 1043.—Autos 332.

#### **NON-NATURAL USE**

Kan. 1987. Drilling and operation of natural gas wells in largest known reservoir of natural gas in the world was not “non-natural use” of the land, for purposes of determining whether to impose strict liability on gas company for damages resulting from escape of natural gas from gas company’s natural gas well into underground water formations and subsequently into farmers’ irrigation water.—Williams v. Amoco Production Co., 734 P.2d 1113, 241 Kan. 102.—Mines 121.

#### **NONNATURAL USE OF LAND**

Fla.App. 2 Dist. 1975. Impounding of phosphate slime in connection with mining operations constituted a “nonnatural use of land” such as to invoke the doctrine of strict liability for damage resulting from dam break.—Cities Service Co. v. State, 312 So.2d 799.—Waters 172.

#### **NON-NAVIGABLE**

U.S.Utah 1931. Mere presence of sandbars impeding navigation does not make rivers “nonnavigable”.—U.S. v. State of Utah, 51 S.Ct. 438, 283 U.S. 64, 75 L.Ed. 844.—Nav Wat 1(3).

C.A.3 (N.J.) 1994. Intrastate, man-made, land locked lake was “nonnavigable” for purposes of

federal admiralty jurisdiction.—Reeves v. Mobile Dredging & Pumping Co., Inc., 26 F.3d 1247, rehearing and rehearing denied.—Adm 4.

Ind.App. 1996. Lake is “nonnavigable” when it is enclosed and bordered by riparian landowners.—Berger Farms, Inc. v. Estes, 662 N.E.2d 654.—Nav Wat 1(3).

Or. 1936. At common law, all streams not affected by tide were “nonnavigable,” and adjacent landowners held to center of stream.—Luscher v. Reynolds, 56 P.2d 1158, 153 Or. 625.—Waters 89.

Or. 1936. At common law, all bodies of water not affected by tide were “nonnavigable,” and adjacent landowners held to center of lake.—Luscher v. Reynolds, 56 P.2d 1158, 153 Or. 625.—Waters 111.

Pa.Super. 2001. “Non-navigable” bodies of water are defined as not usable for commercial shipping purposes.—Mountain Properties, Inc. v. Tyler Hill Realty Corp., 767 A.2d 1096, appeal denied 782 A.2d 547, 566 Pa. 666.—Nav Wat 1(3).

Wash. 1935. Meandered lake, one mile long and one-third of mile wide, without inlet or outlet, having center depth of 70 or 80 feet, swampy shore line, vegetation extending 40 or 50 feet into water, only pleasure boats, no commerce or transportation of passengers or freight for hire, and used for summer resorts and for summer and permanent homes, *held* “nonnavigable”, as regards ownership of shorelands and lake bed.—Smith v. State, 50 P.2d 32, 184 Wash. 58.—Nav Wat 1(1).

#### **NONNAVIGABLE LAKE**

Ind. 1999. A “nonnavigable lake” is one enclosed and bordered by riparian landowners.—Carnahan v. Moriah Property Owners Ass’n, Inc., 716 N.E.2d 437.—Nav Wat 1(3).

#### **NONNAVIGABLE STREAM**

Wis. 1916. A river wholly within the state, and not meandered nor declared to be a navigable stream by the Legislature, is a “nonnavigable stream.”—McDonald v. Apple River Power Co., 160 N.W. 156, 164 Wis. 450.

#### **NON-NEGLIGENCE**

Tex.App.-Fort Worth 1998. “Non-negligence” within the meaning of the principle of governmental immunity from liability on a nuisance theory for the non-negligent performance of a governmental function means beyond negligence, as in gross negligence or an intentional act.—Tarrant County v. English, 989 S.W.2d 368, rehearing overruled, and review denied.—Mun Corp 736.

#### **NON-NEGIGENT TORTFEASORS**

La.App. 5 Cir. 1996. In maritime matters, indemnity is severely restricted to those defendants who are vicariously liable, to nonnegligent tortfeasors, to “Ryan doctrine” defendants, and to cases of contractual indemnity; “non-negligent tortfeasors” are those on which the law imposes responsibility even though they committed no negligent act; under the “Ryan doctrine” indemnity is permitted

where vessel owner, by entrusting his vessel to contractor who rendered vessel unseaworthy, has been subjected to absolute liability without directly contributing to unseaworthy condition that caused the accident.—*Olivier v. Best Workover, Inc.*, 669 So.2d 476, 94-994 (La.App. 5 Cir. 1/30/96), vacated in part on rehearing.—*Indem* 33(8), 69.

### **NON-NEGOTIABLE**

C.A.2 (N.Y.) 1994. While indicia of negotiability must be visible on face of instrument, note containing an otherwise unconditional promise is not made “conditional,” and thus “nonnegotiable,” merely because it refers to, or states that it arises from, a separate agreement or transaction. N.Y.McKinney’s Uniform Commercial Code § 3-105(1)(b, c).—*A.I. Trade Finance, Inc. v. Laminaciones de Lesaca, S.A.*, 41 F.3d 830.—Bills & N 165.

W.D.Wash. 1924. Under Washington statutes, pledgees of warehouse receipts held holders for ‘value.’ Where salmon pledged to secure loan by Canadian bank were, with bank’s consent, shipped to United States by pledgor under bill of lading not containing words “nonnegotiable,” bill was negotiable under Rem. Comp. Stat. Wash. 1921, Sec. 3657, and subsequent pledgees of warehouse receipts were innocent holders for value; “value” being anything that will support simple contract.—*Standard Bank of Canada v. Lowman*, 1 F.2d 935.—Wareh 17.

Cal. 1886. Under Acts 1878, p. 950, a warehouse receipt, not marked “Nonnegotiable” across its face, is negotiable, and its indorsement passes the absolute title to the property mentioned therein.—*Bishop v. Fulkerth*, 10 P. 122, 68 Cal. 607.—Wareh 15(2).

Fla. 1940. Refunding bonds to be issued by the city of Fort Myers are not “nonnegotiable” because of covenant that, on default by city, rate of interest of refunding bonds would revert to the original rate borne by the bonds being refunded.—*State v. City of Fort Myers*, 198 So. 814, 145 Fla. 135.—Mun Corp 938.

Fla. 1940. In order to render a check “nonnegotiable” by a notation made thereon, words must be employed which clearly show that the maker of the check intended the instrument to be burdened with the condition of the agreement. F.S.A. §§ 674.02, 674.04, 676.48.—*First Bank of Marianna v. Havana Canning Co.*, 195 So. 188, 142 Fla. 554.—Bills & N 165.

Fla. 1940. Notation “for berries to be delved us June 8th” appearing in lower left-hand corner of bank check dated June 7, 1938, was merely a statement of the transaction giving rise to issuance of the check, and did not render check “nonnegotiable” as not containing unconditional order to pay. F.S.A. §§ 674.02, 674.04, 676.48.—*First Bank of Marianna v. Havana Canning Co.*, 195 So. 188, 142 Fla. 554.—Bills & N 163.

Kan. 1940. Notes given to mutual insurance company for premium on policies of crop insur-

ance, and providing that in “event of crop failure, I, or we, do hereby assign that portion of the Crop Insurance collected from” the mutual insurance company, “necessary to pay this note to -----” were “non-negotiable,” and hence maker was not liable to holder in due course, where he suffered a crop loss in excess of the amounts of the notes, and where mutual insurance company had gone into receivership and could not pay crop loss.—*First Nat. Bank of Anthony v. Zollars*, 106 P.2d 657, 152 Kan. 542.

Mo. 1940. Where holders in due course, on default in interest payments, placed principal and interest notes secured by deed of trust in hands of trustee who foreclosed and bid in property for holders to whom he executed trustee’s deed, and trustee, without knowledge of holders, pledged principal and interest notes to secure indebtedness of company of which he was president, principal note was not rendered “nonnegotiable” and overdue when pledged because last extension agreement was not signed, where extension was admitted and notes for future interest duly executed by makers were delivered to pledgee with principal note, and were evidence that time for payment had been extended.—*Tower Grove Bank & Trust Co. v. Duing*, 144 S.W.2d 69, 346 Mo. 896, 152 A.L.R. 1325.—Bills & N 348.

Mo. 1940. Under statute, a note payable at a fixed or determinable time is not rendered “nonnegotiable” by provision for acceleration for nonpayment of interest, taxes, insurance, etc., even though such provision is by its terms automatic and not expressed to be at the option of the holder, since such provision is for the benefit of the holder, and may be waived. Mo.St.Ann. § 2634, p. 646.—*Tower Grove Bank & Trust Co. v. Duing*, 144 S.W.2d 69, 346 Mo. 896, 152 A.L.R. 1325.—Bills & N 155.

Mo. 1940. Where deed of trust securing principal note provided for payment of taxes, keeping property insured, and that on failure to pay interest notes when due whole sum would become due, extension agreement requiring that all stipulations specified in deed of trust securing notes should be complied with, otherwise extension was void, did not render principal note “nonnegotiable” on ground that it contained a promise to do something in addition to the payment of money in violation of statute, where holders did not claim acceleration on account of failure of debtors to pay taxes, but foreclosed deed of trust on default in payment of interest. Mo.St.Ann. §§ 2631, 2634, pp. 645, 646.—*Tower Grove Bank & Trust Co. v. Duing*, 144 S.W.2d 69, 346 Mo. 896, 152 A.L.R. 1325.—Bills & N 165.

Mo.App. 1912. Under Rev. St. 1909, § 3392, making notes given by members of a building association “nonnegotiable,” notes executed by stockholders of a building association are not, while the association is a going concern, assignable.—*Layton v. Hough*, 152 S.W. 410, 169 Mo.App. 213.—B & L Assoc 38(4).

Mo.App. 1912. Under V.A.M.S. §§ 369.255, 369.385, providing that for every loan made by a building and loan association a "nonnegotiable note" secured by a first mortgage on real estate shall be given, accompanied by a transfer of the stock of the member, notes executed by stockholders of a building and loan association are not, while the association is a going concern, assignable; the word "nonnegotiable" meaning "nonassignable."—*Layout v. Hough*, 152 S.W. 410, 169 Mo. App. 213.

N.J.Dist.Ct. 1931. That note refers to some transaction, or that it was given in payment of chattels, does not make note "nonnegotiable."—*Perth Amboy Trust Co. v. Modern School Ass'n of North America*, 154 A. 418, 9 N.J.Misc. 368.—Bills & N 163.

N.Y.Sup. 1941. A note which appeared negotiable on its face but which, on its back, bore legend, followed by makers' signatures, to effect that note was subject to collateral instrument guaranteeing payment of note, was "nonnegotiable."—*City Bank Farmers Trust Co. v. Kiamie*, 32 N.Y.S.2d 181, affirmed in *re Kiamie's Will*, 42 N.Y.S.2d 434, 266 A.D. 785.—Bills & N 165.

Ohio App. 9 Dist. 1941. Elaborate instruments, containing collateral undertakings, are "nonnegotiable" under the Negotiable Instruments Law. Gen. Code, § 8110.—*Akron Auto Finance Co. v. Stoneraker*, 35 N.E.2d 585, 66 Ohio App. 507, 20 O.O. 521.—Bills & N 164.

Ohio App. 9 Dist. 1941. A contract entered into in pursuance of the provisions of the Small Loan Act and containing numerous requirements in addition to the payment of money was "nonnegotiable", notwithstanding that it contained an unconditional promise for the payment of money. Gen.Code, § 6346-1 et seq. (repealed 1943. See § 8624-51 et seq.) § 8110.—*Akron Auto Finance Co. v. Stoneraker*, 35 N.E.2d 585, 66 Ohio App. 507, 20 O.O. 521.—Bills & N 164.

Oklahoma. 1942. A note containing provisions authorizing payee to declare all indebtedness owed to payee by maker immediately due and payable if maker failed to furnish additional security upon payee's demand was "non-negotiable", especially in view of provisions respecting right of payee or a holder to use collateral hypothecated in their own business, and maker could present any defense against a holder that could have been presented against payee. 48 Okl.St.Ann. §§ 21, 25.—*American Finance Corp. v. Bourne*, 123 P.2d 671, 190 Okla. 332, 1942 OK 61.

Oklahoma. 1942. A note containing provisions empowering holder to declare note due and payable before maturity in exercise of holder's unrestrained option is by reason thereof "nonnegotiable" and subject, in hands of an endorsee, to same defenses it would have been subject to in hands of payee. 48 Okl.St.Ann. §§ 21, 25.—*American Finance Corp. v. Bourne*, 123 P.2d 671, 190 Okla. 332, 1942 OK 61.—Bills & N 155.

Oklahoma. 1942. A note containing provisions authorizing payee to declare all indebtedness owed to payee by maker immediately due and payable if maker failed to furnish additional security upon payee's demand was "nonnegotiable", especially in view of provisions respecting right of payee or a holder to use collateral hypothecated in their own business, and maker could present any defense against a holder that could have been presented against payee. 48 Okl.St.Ann. §§ 21, 25.—*American Finance Corp. v. Bourne*, 123 P.2d 671, 190 Okla. 332, 1942 OK 61.—Bills & N 155.

Or. 1947. Bond which was not payable either to order or bearer, which was transferable only by registered owner thereof in manner prescribed, and which provided that interest prior to maturity was payable only out of surplus net earnings and income of hospital and other property covered by trust agreement, was "nonnegotiable".—*Miller v. Corvallis General Hospital Ass'n*, 185 P.2d 549, 182 Or. 18, 174 A.L.R. 424.

Tex.App.—Amarillo 1985. Fact that certificate of deposit was clearly marked in two places as nonnegotiable was sufficient to make certificate "nonnegotiable," notwithstanding fact that certificate provided that it was payable to order. V.T.C.A., Bus. & C. § 3.104(a).—*Amarillo Nat. Bank v. Dilley*, 693 S.W.2d 38, 58 A.L.R.4th 623.—Bills & N 164.

Tex.Civ.App.—Dallas 1975. Whether a certificate of deposit is negotiable or nonnegotiable is not determined by labeling the writing "nonnegotiable" but by its terms; to be "negotiable" it must be payable to "order" or "bearer"; otherwise, it is nonnegotiable. V.T.C.A., Bus. & C. § 3.104(a).—*First Nat. Bank in Grand Prairie v. Lone Star Life Ins. Co.*, 524 S.W.2d 525, ref. n.r.e. *First Nat. Bank of Grand Prairie v. Lone Star Life Ins.*, 529 S.W.2d 67.—Bills & N 147.

Wis. 1940. A note payable to order of maker and not endorsed by maker did not become upon transfer a "negotiable instrument," and could not be enforced as such, but the note when transferred for value became "nonnegotiable", and the maker and endorsers were liable as original promissors to transferee for value, where names of endorsers were on note at time of transfer.—*Kiel Wooden Ware Co. v. Laun*, 290 N.W. 214, 233 Wis. 559, 126 A.L.R. 1305.—Bills & N 235.

#### NONNEGOTIABLE BILL OF LADING

E.D.Wis. 1993. "Nonnegotiable bill of lading," in which consignee is specified, may be considered evidence of title, but transfer of nonnegotiable bill of lading does not by itself transfer title to goods under the bill.—*Met-Al, Inc. v. Hansen Storage Co.*, 828 F.Supp. 1369, reconsideration denied 844 F.Supp. 485.—Carr 57, 58.

Cal.App. 2 Dist. 2002. A "negotiable bill of lading," in effect, requires delivery to the bearer of the bill or, if to the order of a named person, to that person, while a "nonnegotiable bill of lading" is one in which the consignee is specified.—*BII Finance*

**NON-NEGOTIABLE NOTE**

Co. v. U-States Forwarding Services Corp., 115 Cal.Rptr.2d 312, 95 Cal.App.4th 111.—Carr 55.

**NON-NEGOTIABLE CERTIFICATE OF INDEBTEDNESS**

Ohio App. 8 Dist. 1959. Where a beneficiary elected to leave proceeds of life policy with insurer and beneficiary surrendered policy and received in exchange a "non-negotiable certificate of indebtedness", which provided that sole power of withdrawing funds could be exercised on only one occasion in any one contract year and that such power should not pass to or be exercised by any person in beneficiary's stead or upon her behalf and that beneficiary could not alienate or assign proceeds, certificate of indebtedness was not a "certificate of deposit" and was includable in assets of beneficiary's estate notwithstanding attempted assignment of certificate.—In re McKean's Estate, 157 N.E.2d 436, 83 Ohio Law Abs. 218, appeal dismissed 161 N.E.2d 493, 170 Ohio St. 6, 9 O.O.2d 306.—Assign 22; Gifts 28(1).

**NONNEGOTIABLE DOCUMENTS**

C.A.7 (Ill.) 1982. Color film separations contained in package sent by "Express Mail" did not qualify as "nonnegotiable documents" within meaning of Postal Service regulations which provided that "nonnegotiable documents" sent by express mail were insured for up to \$50,000 per mailing unit, but that "merchandise" was subject to an indemnity limit of \$500, where regulation stated that nonnegotiable documents "include commercial papers, documents, and such written instruments as are used in the conduct and operation of banks and banking institutions that have not been made negotiable or which cannot be negotiated or converted into cash by unauthorized persons without resort to forgery," and that nonnegotiable documents also included "valuable records, audit media, and other business records," in that plaintiff's film separations were not valuable solely as a means by which commercial information was carried.—Portmann v. U.S., 674 F.2d 1155.—Postal 22.

**NONNEGOTIABLE INSTRUMENT**

Cal. 1932. Savings bank passbook held "nonnegotiable instrument," notwithstanding by-laws of bank and nature of passbook.—Ornbau v. First Nat. Bank, 8 P.2d 470, 215 Cal. 72, 81 A.L.R. 1146.—Bills & N 151.

Miss. 1928. Defendant, who gave option for purchase of land, could plead any defense against assignee of interest in option which existed against assignor before defendant received actual notice of assignment, since option contract is "nonnegotiable instrument."—Globe Realty Co. v. Hardy, 119 So. 192, 155 Miss. 12.

Mo.App. E.D. 1984. Note secured by second deed of trust, which incorporated maker's right to apply payments to keep current obligation under first deed of trust, was conditional and a "nonnegotiable instrument"; therefore, assignee of note could not be a "holder in due course." V.A.M.S. §§ 400.3-102(1)(e), 400.3-104(1)(b),

400.3-105(2)(a), 400.3-302.—Illinois State Bank of Quincy, Ill. v. Yates, 678 S.W.2d 819.—Bills & N 167.

Okla.Terr. 1905. A note reciting that the principal and interest are payable at a designated place, but if any part of the principal or interest is not paid at maturity it shall bear interest, and if the note is placed in the hands of an attorney for collection or suit is brought thereon an attorney's fee of 10 per cent., including interest, shall be taxed as costs or included in the judgment, is a "nonnegotiable instrument."—Dickerson v. Higgins, 82 P. 649, 15 Okla. 588, 1905 OK 70.

Pa.Super. 1946. A judgment note under seal which authorized a confession of judgment "as of any term" without restriction as to time was a "nonnegotiable instrument".—Shinn v. Stemler, 45 A.2d 242, 158 Pa.Super. 350.—Bills & N 150(1).

Wis. 1940. A note which was negotiable in form and was payable to order of corporate maker and was not endorsed by corporate maker but by president-manager of corporate maker, was not "negotiable note" but was "nonnegotiable instrument" to which plaintiff to which note was delivered for value took title and upon which plaintiff might bring action against corporate maker and against president-manager, on ground that president-manager was liable as original promisor. St.1937, § 116.88.—Kiel Wooden Ware Co. v. Laun, 290 N.W. 214, 233 Wis. 559, 126 A.L.R. 1305.—Bills & N 235.

**NON-NEGOTIABLE NOTE**

Conn. 1938. A written instrument executed by buyer of merchandise and accepted by the seller, which stated a balance due on an account and stated that seller agreed to accept monthly payments payable on certain dates of each month, was not a "nonnegotiable note" to which the 17-year limitation statute applied, but an action thereon was barred by six-year limitation statute. Gen.St. 1930, §§ 6003, 6005.—Carling Tool & Machine Co. v. La Pointe, 199 A. 427, 124 Conn. 293.—Lim of Act 24(2).

La.App. 1 Cir. 1993. "Non-negotiable note" is document that is not payable to order or bearer, but that meets other requirements for negotiable note. LSA-R.S. 10:3-104.—Dixie Web Graphic Corp. v. Sharp, 619 So.2d 1173.—Bills & N 31.

La.App. 4 Cir. 1968. The only distinguishing feature between a "negotiable note" and a "non-negotiable note" is that in order to be negotiable the note must be made payable "to order or to bearer". LSA-C.C. arts. 3538, 3540; LSA-R.S. 7:184.—DeRouin v. Hinphy, 209 So.2d 352, writ refused 211 So.2d 330, 252 La. 465.—Bills & N 147.

Md. 1968. Note, which was under seal, and which authorized confession of judgment in any court "as of any term" was a "non-negotiable note." Code 1957, art. 95B, § 3-112(1) (d).—Vain v. Gordon, 238 A.2d 872, 249 Md. 134.—Bills & N 150(1).

## NON-NEGOTIABLE NOTE

28B W&P—14

Mo.App. 1912. Under V.A.M.S. §§ 369.255, 369.385, providing that for every loan made by a building and loan association a “nonnegotiable note” secured by a first mortgage on real estate shall be given, accompanied by a transfer of the stock of the member, notes executed by stockholders of a building and loan association are not, while the association is a going concern, assignable; the word “nonnegotiable” meaning “nonassignable.”—*Layout v. Hough*, 152 S.W. 410, 169 Mo. App. 213.

### NON-NEGOTIABLE PROMISSORY NOTE

La.App. 1 Cir. 1994. Document which provided that sum of \$10,652 was payable to holder of note on demand against maker’s property constituted a “non-negotiable promissory note” subject to five-year prescriptive period. LSA-R.S. 10:3–102(1)(c) (1993); LSA-R.S. 10:3–104; LSA-C.C. art. 3498.—*Smith v. McKeller*, 638 So.2d 1192, 1993-1944 (La. App. 1 Cir. 6/24/94).—Bills & N 153, 452(1).

### NONNEGOTIABLE SECURITIES

Pa. 1939. Bonds which were issued under terms of mortgage indentures and which were required to be registered were “nonnegotiable securities,” and from date of issue were subject to all defenses and equities that could be asserted between original parties thereto.—*Land Title Bank & Trust Co. v. Schenck*, 6 A.2d 878, 335 Pa. 419.—Mtg 256.

### NON-NEGOTIABLE WAREHOUSE RECEIPT

Mo.App. 1942. A warehouse receipt issued by a licensed public warehouse reciting that warehouse had received certain goods for storage and that goods would be delivered to names owner or his authorized agent on presentation of a written order from owner, and stating that no transfer of goods covered by receipt would be recognized unless all charges were paid was a “non-negotiable warehouse receipt” which complied as to form with provisions of the Uniform Warehouse Receipts Act. R.S. 1939, § 15526 (V.A.M.S. § 406.280).—*Smith v. Katherhens Moving & Storage Co.*, 163 S.W.2d 128, 236 Mo.App. 921.—Wareh 12.

### NONNEGOTIABLE WRITTEN CONTRACT FOR THE PAYMENT OF MONEY

Idaho 1921. Within C.S. § 6063, providing that a “nonnegotiable written contract for the payment of money” may be transferred by indorsement, time checks in the form of statement of the amount due, payable at a bank held to be nonnegotiable written contracts for payment of money.—*Robinson v. St. Maries Lumber Co.*, 204 P. 671, 34 Idaho 707.

### NONNEUTRALS

D.Mass. 1956. For purposes of doctrine of “nonneutrals,” “concerned” means related or connected through activities, and “common management and control” is not the proper test; and therefore it was no justification for secondary boycott that building supply house which furnished lumber precut by nonunion carpenters was owned by same individuals as general contracting firm

which had agreed with union not to require its employees to work on lumber precut by nonunion carpenters. National Labor Relations Act, § 8(b) as amended 29 U.S.C.A. § 158(b).—*Alpert v. United Broth. of Carpenters and Joiners of America, AFL-CIO*, 143 F.Supp. 371.—Labor 344.

### NON-NOTIFICATION FINANCING

U.S.Pa. 1943. Where creditors made loans to bankrupt in Pennsylvania within four months before filing of involuntary petition in bankruptcy, and concurrently took assignments of accounts receivable from bankrupt as collateral security without giving notice of assignments to parties owing accounts, which transaction was an instance of “non-notification financing”, the assignments, for purposes of administering bankrupt’s estate, were to be deemed to have been made “for or on account of an antecedent debt” of bankrupt within subdivision a of section 60 of the Bankruptcy Act, and were to be treated as “preferences” “voidable” at instance of trustee, since the transfers had never been “perfected” as against good-faith purchasers by notice to debtors as required by Pennsylvania law. *Bankr. Act* §§ 1(30), 60, subs. a, b, 11 U.S.C.A. §§ 1(30), 96, subs. a, b.—*Corn Exchange Nat. Bank & Trust Co.*, Philadelphia v. Klauder, 63 S.Ct. 679, 318 U.S. 434, 87 L.Ed. 884, 144 A.L.R. 1189.—*Bankr* 2601.

### NON-OBJECTING BENEFICIAL OWNERS

N.C.App. 1992. Beneficial owners of shares are “shareholders,” within meaning of statute allowing qualified shareholder to inspect and copy corporation’s record of “shareholders,” when corporation has obtained “non-objecting beneficial owners” list pursuant to federal regulation that contains owner’s name or when there is nominee certificate regarding owner on file with corporation. G.S. § 55-16-02(b)(3).—*Parsons v. Jefferson-Pilot Corp.*, 416 S.E.2d 914, 106 N.C.App. 307, review allowed 421 S.E.2d 152, 332 N.C. 346, review allowed 421 S.E.2d 152, 332 N.C. 346, affirmed in part, reversed in part 426 S.E.2d 685, 333 N.C. 420.—*Corp* 181(3).

### NONOBJECTIVE TYPES OF DAMAGES

N.J.Super.L. 1995. Injuries involving emotional distress are “nonobjective types of damages,” constituting pain and suffering, and, thus, are noncompensable under Tort Claims Act. N.J.S.A. 59:9-2, subd. d.—*Collins v. Union County Jail*, 677 A.2d 285, 291 N.J.Super. 318, affirmed 677 A.2d 210, 291 N.J.Super. 169, certification granted 683 A.2d 1161, 146 N.J. 565, reversed 696 A.2d 625, 150 N.J. 407.—*Mun Corp* 743.

### NON OBSTANTE VEREDICTO

Ga.App. 1961. Function of motion for judgment “non obstante veredicto” is not same as that of motion for new trial; it is a summary method of disposing of entire litigation where it is obvious that party against whom motion is directed cannot under any circumstances win.—*Salley v. Hogan*, 123 S.E.2d 313, 104 Ga.App. 876.—*Judgm* 199(1).

N.C. 1939. A motion for judgment “non obstante veredicto” is but a belated motion for judgment on the pleadings.—*MacMillan Buick Co. v. Rhodes*, 2 S.E.2d 699, 215 N.C. 595.—Judgm 199(5).

S.C. 1913. A judgment “non obstante veredicto” is a judgment on the pleadings without regard to the verdict, and a judgment upon the special findings, but against the general verdict, is not a judgment non obstante veredicto.—*Ellison v. Greenville, S. & A. Ry. Co.*, 77 S.E. 723, 94 S.C. 425, modified on rehearing 78 S.E. 231, 94 S.C. 425.—Judgm 199(2).

Tex.Com.App. 1940. Under statute providing that judgment shall conform to verdict, “Provided, that upon motion and reasonable notice the Court may render judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any Special Issue Jury Finding that has no support in the evidence,” a motion for judgment “non obstante veredicto” means a motion for judgment notwithstanding the entire verdict, and a motion under the second proviso to disregard special issue jury findings is of character like to that of a motion for judgment notwithstanding the entire verdict, but it is a motion for judgment notwithstanding a part of the verdict and is often referred to as a motion for a judgment non obstante veredicto. Rules of Civil Procedure, rule 301.—*Myers v. Crenshaw*, 137 S.W.2d 7, 134 Tex. 500.—Judgm 199(1).

Tex.Civ.App.—Beaumont 1938. In action on note and for foreclosure of chattel mortgage, wherein pleadings and evidence raised issue of usury which was found by the jury in favor of the defendants, a judgment rendered by the trial court for the plaintiff on the note and for foreclosure of the chattel mortgage was erroneous because constituting a judgment “non obstante veredicto” for which no proper motion had been made. Rules of Civil Procedure, rule 301.—*Valley Dredging Co. v. Sour Lake State Bank*, 120 S.W.2d 875, writ dismissed.—Judgm 199(5).

Tex.Civ.App.—Beaumont 1938. In action on note and for foreclosure of chattel mortgage wherein jury found that the note and mortgage were executed as the result of false representations made by the plaintiff in bad faith and without intending to keep them, judgment rendered by the trial court for the plaintiff on the note and for foreclosure of the chattel mortgage was erroneous because constituting a judgment “non obstante veredicto” for which no proper motion had been made. Rules of Civil Procedure, rule 301.—*Valley Dredging Co. v. Sour Lake State Bank*, 120 S.W.2d 875, writ dismissed.—Judgm 199(5).

## NON-OBVIOUS

N.D.Ill. 1987. For “patent” to satisfy requirements of validity that it must be “novel” and “non-obvious” there must be difference between each prior art reference and challenged patent device so that device can be deemed new, and differences between subject matter of challenged device and

prior art must be such that subject matter as whole would not have been obvious at time invention was made to person having ordinary skill in art to which subject matter of invention pertains. 35 U.S.C.A. §§ 102, 103.—*Pittway v. Black & Decker*, 667 F.Supp. 585.—Pat 16.1, 37.

## NON-OBVIOUSNESS

D.N.J. 1973. “Non-obviousness,” within the meaning of patent statute, means that the differences between the subject matter of the patent claim and the prior art relied upon are such that the subject matter of the claim, taken as a whole, would not have been obvious at the time the invention was made to a person having ordinary skill in the art to which the subject matter pertains. 35 U.S.C.A. § 103.—*Anchor Plastics Co., Inc. v. Dynex Indus. Plastics Corp.*, 363 F.Supp. 582, affirmed 492 F.2d 1238, certiorari denied 94 S.Ct. 3083, 417 U.S. 955, 41 L.Ed.2d 674.—Pat 16(3).

## NONOCCUPANCY

Iowa 1908. In an action on an insurance policy providing that it was to become void if the buildings became vacant or unoccupied, the answer alleged that the possession and occupancy of the buildings described and of the insured premises was changed, and said premises ceased to be occupied as provided in the policy. Held, that the answer was sufficient to raise the question of a vacancy, for the terms “vacancy” and “nonoccupancy” are used interchangeably and are equivalent in meaning.—*Cone v. Century Fire Ins. Co.*, 117 N.W. 307, 139 Iowa 205.—Insurance 3571.

## NONOCCUPANT

Mich.App. 1991. For purposes of determining priority of insurers potentially liable for accident benefits, pedestrian who was struck and killed by automobile was a “nonoccupant.” M.C.L.A. § 500.3115(1).—*Allstate Ins. Co. v. Sentry Ins. Co.*, 477 N.W.2d 422, 191 Mich.App. 66.—Insurance 2669.

Mich.App. 1989. For purposes of determining priority of insurers who would be liable to pay benefits, individual who was pedestrian at time she was struck by motor vehicle was “nonoccupant.” M.C.L.A. § 500.3115(1)(a).—*Cason v. Auto Owners Ins. Co.*, 450 N.W.2d 6, 181 Mich.App. 600.—Insurance 2669.

## NON-OCCUPATIONAL

La.App. 2 Cir. 1945. Group policy providing benefits for disability due to “nonoccupational” accidental injury used quoted word as meaning not of or pertaining to an occupation, trade or work.—*Morgan v. Equitable Life Assur. Soc. of U. S.*, 22 So.2d 595.—Insurance 2543.

La.App. 4 Cir. 1969. Employee’s bronchial asthma, which was aggravated by, but was not caused by, his employment in grain elevator was “nonoccupational” injury or sickness and was compensable under group health and accident policy.—*Blue v. Bunge Corp.*, 225 So.2d 145.—Insurance 2463.

Minn. 1963. As used in policies complementing protection afforded employees by Workmen's Compensation Act, "occupational" is defined as "of or pertaining to an occupation, trade or work," and "non-occupational" means "not of or pertaining to an occupation, trade or work." M.S.A. § 176.01 et seq.—Equitable Life Assur. Soc. of U.S. v. Bachrach, 120 N.W.2d 327, 265 Minn. 83.—Insurance 2543.

N.Y.Sup. 1967. Amount of employee disability benefits paid under Workmen's Compensation Law for same injuries for which claims were made against motor vehicle accident indemnification corporation, with status as insured persons, was not "non-occupational" within automobile accident indemnification endorsement condition that amount payable pursuant to uninsured motorist coverage shall be reduced by amount paid on account of same injury under any Workmen's Compensation Law, exclusive of non-occupational disability benefits, although the benefits were occasioned by a non-occupational accident. Workmen's Compensation Law, § 227.—Vartanian v. Motor Vehicle Acc. Indemnification Corp., 283 N.Y.S.2d 762, 54 Misc.2d 983.—Autos 251.1.

Ohio 2001. Hostage leave payments received by corrections officer pursuant to collective bargaining agreement were designed to address risk that was occupational, and as such, hostage leave payments were not "nonoccupational" and, thus, were not within purview of workers' compensation statute requiring setoff of any payments received by the claimant from an employer-funded nonoccupational accident and sickness insurance or program against temporary total disability (TTD) compensation paid for the same period. R.C. § 4123.56(A).—State ex rel. Clark v. Indus. Comm., 751 N.E.2d 967, 92 Ohio St.3d 455, 2001-Ohio-1265.—Work Comp 905.

#### **NONOCCUPATIONAL ACCIDENT AND SICKNESS PROGRAM**

Ohio 2001. Under collective bargaining agreement between state and corrections officers' union, hostage leave was not a "nonoccupational accident and sickness program," and thus, it was not within the purview of workers' compensation statute requiring setoff of any payments received by the claimant from an employer-funded nonoccupational accident and sickness insurance or program against temporary total disability (TTD) compensation paid for the same period. R.C. § 4123.56(A).—State ex rel. Clark v. Indus. Comm., 751 N.E.2d 967, 92 Ohio St.3d 455, 2001-Ohio-1265.—Work Comp 905.

#### **NON-OCCUPATIONAL DISABILITY POLICY**

D.D.C 1962. Policy insuring against disability preventing insured from engaging in any occupation or employment for financial gain was "non-occupational disability policy".—Blaustein v. Connecticut General Life Ins. Co., 207 F.Supp. 223.—Insurance 2561(5).

#### **NON-OCCUPATIONAL POLICIES**

Oklahoma 1962. "Non-occupational policies" insure against disability to perform duties of any occupa-

tion while "occupational policies" insure against disability to perform duties of particular occupation.—Metropolitan Life Ins. Co. v. Fisher, 382 P.2d 434, 1962 OK 260.—Insurance 2561(2).

#### **NONOCCUPATIONAL POLICY**

Cal. 1942. Where life policy providing for benefits in case of total and permanent disability defined total disability as meaning whenever insured became wholly disabled by bodily injury or disease so that he was prevented thereby from engaging in any occupation or performing any work for remuneration or profit, the policy was a "nonoccupational policy", and where insured who was injured by accident, although a farm executive, had had little formal education and was not qualified for any other occupation and probably could not prepare himself for other remunerative employment because of age and experience, insured was "totally disabled" within policy if no longer able to pursue occupation of farmer or farm supervisor.—Erreca v. Western States Life Ins. Co., 121 P.2d 689, 19 Cal.2d 388, 141 A.L.R. 68.—Insurance 2561(5).

Ky. 1961. Group policy providing that if any insured employee should become wholly disabled and permanently prevented from engaging in any occupation was "nonoccupational policy" and insured must prove inability to engage in any occupation to recover, albeit the gain or profit to be derived must be substantial.—Travelers Ins. Co. v. Thompson, 354 S.W.2d 519.—Insurance 2561(5).

#### **NONOCCUPATIONAL SICKNESS OR ACCIDENT**

N.J.Super.A.D. 1958. Where employee was disabled as result of self-inflicted gunshot wound, his inability to work was not an "involuntary unemployment" within meaning of Temporary Disability Benefits Law, nor was his condition a "nonoccupational sickness or accident" within the meaning of such law. R.S. 43:21-1 et seq., N.J.S.A.; N.J.S.A. 43:21-26, 27, 29.—Potts v. Barrett Division, Allied Chemical & Dye Corp., 138 A.2d 574, 48 N.J.Super. 554.—Social S 242.20.

#### **NON-OPERATING**

Ky. 1967. Assuming that a valid distinction can be drawn between "operating" and "non-operating" income in determining whether foreign corporations' dividend income from other foreign corporations whose stock was wholly owned by them was within business category, such dividend income was not "non-operating." KRS 141.120(3).—Square D Co. v. Kentucky Bd. of Tax Appeals, 415 S.W.2d 594.—Tax 1004.

#### **NON-OPERATING NET INCOME**

C.A.D.C. 1959. Rents and royalties from non-operating activities were from District of Columbia sources and should be specifically allocated to the District in computing District franchise tax on newspaper which engaged in activities both within and without the District, and this net income should be calculated by subtracting from the gross income attributable to these sources the expenses incurred

## NON-ORAL DISCIPLINE

in their receipt and this net income figure would be "non-operating net income". D.C.Code 1951, §§ 47-1580, 47-1580a.—District of Columbia v. Evening Star Newspaper Co., 273 F.2d 95, 106 U.S.App.D.C. 360.—Dist of Col 33(6).

### **NON-OPERATING PROPERTY**

Iowa 1985. Stock and debt approach for determining property values involves estimating market value of operating property; "operating property" is property used and needed to operate a business and includes intangibles such as cash because cash is necessary for carrying on a business; "non-operating property" is other property.—Michigan Wisconsin Pipe Line Co. v. Iowa State Bd. of Tax Review, 368 N.W.2d 187.—Tax 375(1).

Wash. 1941. The statute requiring tax assessment of railroad companies' operating property by State Tax Commission and assessment of their non-operating property by county assessors contemplates that property held and made available by railroad company for customary railroad use and reasonably necessary for efficient operation of railroad be considered "operating property" and that property not so held, made available, and necessary be considered "non-operating property". Rem. Rev.Stat. §§ 11156-1(17, 18), 11156-2, 11156-7, 11156-17.—Smith v. Northern Pac. Ry. Co., 110 P.2d 851, 7 Wash.2d 652.—Tax 317(3.1).

Wash. 1941. The State Tax Commission's determination of what is railroad company's "operating property" and "non-operating property" for tax assessment purposes is controlling, in absence of fraud or arbitrary or capricious action. Rem. Rev. Stat. § 11156-2.—Smith v. Northern Pac. Ry. Co., 110 P.2d 851, 7 Wash.2d 652.—Tax 317(3.1).

Wash. 1941. The State Tax Commission's classification of materials, supplies, shop machinery, tools and equipment, acquired by railroad company for operation, maintenance and repair of its interstate railroad in state, and held in storage exclusively in anticipation and with intention of subsequently installing it as part of railroad or utilizing it in maintenance and operation thereof, as "operating property", subject to assessment for taxation by such commission, rather than "non-operating property", assessable by county assessors, is controlling, in absence of showing that commission exceeded its jurisdiction, perpetrated fraud on county, or proceeded in arbitrary or capricious manner. Rem. Rev.Stat. §§ 11156-1(17, 18), 11156-2, 11156-7, 11156-17, 10345-10347; Interstate Commerce Act § 1(4, 11), 49 U.S.C.A. § 1(4, 11).—Smith v. Northern Pac. Ry. Co., 110 P.2d 851, 7 Wash.2d 652.—Tax 317(3.1).

Wash. 1941. The word "used" in statutory definitions of railroad companies' "operating property" and "non-operating property" for tax assessment purposes as property used and not used in conduct of companies' operations does not refer only to property actually used by such companies, regardless of time, method or purpose of its acquisition or manner in which it is held, but word is employed in its adjective or descriptive sense, referring to pres-

ent nature or character of thing as determined by customary, frequentative use of similar things, rather than in its past participial sense, referring to actual use of specific thing or things in the past. Rem. Rev.Stat. § 11156-1(17, 18).—Smith v. Northern Pac. Ry. Co., 110 P.2d 851, 7 Wash.2d 652.—Tax 317(3.1).

### **NONOPERATIONAL ACTIVITY**

Pa.Cmwlth. 1987. Use of corporate aircraft to transport customers, executives and employees of taxpayer constituted "nonoperational activity" within meaning of statute providing that manufacturing use tax exclusion shall not apply to "property or services to be used or consumed in managerial sales or other nonoperational activities." 72 P.S. § 7201(o)(4)(B)(iv), (o)(5).—H.K. Porter Co., Inc. v. Com., 534 A.2d 169, 111 Pa.Cmwlth. 463.—Tax 1245.

### **NONOPERATORS**

Tex.App.—Austin 1985. Interest owned by corporations in gas well when they went "nonconsent" was a Manhan-type carried interest and, hence, was not sufficient as a divestiture of title to remove corporations from definition of "nonoperators" within provisions of Natural Resources Code defining nonoperators who may be ordered by the Railroad Commission to plug a well as persons owning a working interest in the well at the time it is about to be abandoned or ceases operation. V.T.C.A., Natural Resources Code §§ 89.002(a)(3), (b), 89.042.—Railroad Com'n of Texas v. Olin Corp., 690 S.W.2d 628, ref. n.r.e. 701 S.W.2d 641.—Mines 92.56.

### **NONOPTIONAL OPERATOR SERVICES**

Colo. 1998. Department of Corrections (DOC) was not a provider of statutory "nonoptional operator services" to inmates with respect to a restricted telephone service for inmates' personal telephone calls, as basis for regulation of the DOC by the Public Utilities Commission (PUC) as a reseller of toll services; the service did not use live or recorded operators, the service occurred within customer premises equipment (CPE) before the proposed call actually exited the correctional facility by phone lines, and inmates were charged the same tariffed rates that applied to direct dial customers. West's C.R.S.A. § 40-15-102; 4 Colo.Code Regs. § 723-18, Rules 3.1.3, 3.3.—Powell v. Colorado Public Utilities Com'n, 956 P.2d 608, rehearing denied.—Tel 266.

### **NON-ORAL DISCIPLINE**

Ohio App. 8 Dist. 1987. Written memorandum which did not purport to impose any specific disciplinary measures on employee but merely suggested that she would have to start being definite about her working hours was not "non-oral discipline" and incidents occurring prior to date of that memorandum could be used to support subsequent discipline.—Cuyahoga County Bd. of Com'r's v. Ford, 520 N.E.2d 1, 35 Ohio App.3d 88.—Offic 69.7.

**NONORAL HEARING**

Ohio App. 10 Dist. 1992. “Nonoral hearing” is hearing at which issue is determined by court upon written argument and evidence, without appearance of either party.—*Breeding v. Herberger*, 611 N.E.2d 374, 81 Ohio App.3d 419.—Motions 36.

**NON-ORDINARY**

S.D.N.Y. 1993. Fact that debtor, which had custom of paying late the amounts due gem distributor, paid bill 25 days after note was due which had been issued to distributor did not make transaction presumptively “non-ordinary,” for purposes of ordinary course of business exception to avoidability of preferences; rather, what mattered was whether there was consistent course of dealings, and if distributor could establish tradition of late payment on promissory notes it could qualify for ordinary course of business exception. *Bankr.Code*, 11 U.S.C.A. § 547(b, c).—*In re Faleck & Margolies, Inc.*, 153 B.R. 123.—*Bankr* 2616(2).

**NO NOTICE**

Tex.Civ.App.—Austin 1981. Nothing in section of State Structural Pest Control Act withholding authority to issue or renew license until applicant files “policy or contract of insurance” “insuring him against liability” provides or even remotely suggests that notice of suit conditions in insurance policies are unenforceable and thus section does not require a “no notice” judgment bond; rather, section employs indemnity insurance phrases and requires indemnity insurance contract. Vernon’s Ann.Civ.St. arts. 135b–6, § 7(a)(1), 5221f(13).—*Baker v. Guaranty Nat. Ins. Co.*, 615 S.W.2d 303, ref. n.r.e.—Licens 26.

**NO NOTICE CREDITORS**

Bkrty.S.D.N.Y. 1985. “No notice creditors,” or those creditors who did not have notice or actual knowledge of bankruptcy case in time for timely filing of proof of claim, may file claim entitled to pari passu distribution status at any time before final distribution is made.—*In re Columbia Ribbon & Carbon Mfg. Co., Inc.*, 54 B.R. 714.—*Bankr* 2900(2).

**NO NOTICE-NO DEFICIENCY RULE**

Mo.App. W.D. 2000. “No notice-no deficiency rule,” under which secured party’s failure to give reasonable notice of sale of collateral as mandated by statute precludes that party from obtaining deficiency judgment, did not apply to extinguish makers’ debt on promissory note after holder sold portion of collateral for note without giving notice of sale, and did not entitle makers to damages for their payment in satisfaction of amount due on note, where collateral remained to satisfy debt and holder of note had not filed action seeking deficiency judgment but had only threatened possible legal action. V.A.M.S. § 400.9–504(3).—*Victory Hills Ltd. Partnership I v. NationsBank, N.A. (Midwest)*, 28 S.W.3d 322, rehearing, transfer denied, and transfer denied.—Sec Tran 240.

**NONOUTSIDER**

E.D.N.C. 1993. In North Carolina, action in tort lies against outsider who knowingly, intentionally, and unjustifiably induces one contracting part to breach contract to other contracting party’s damage, and “outsider” is one who is not party to contract in question and who has no legitimate business interest in subject matter of contract; conversely, one who has legitimate business interest in subject matter of contract to which he is not a party is “nonoutsider.”—*Allied Distributors, Inc. v. Latrobe Brewing Co.*, 847 F.Supp. 376.—Torts 12.

**NON-OWNED**

C.A.5 (Tex.) 1972. Where car buyer returned car to dealer for resale when repossession was threatened, second buyer paid cash to dealer, signed contract for sale, signed application for certificate of title, and took delivery, car was not “non-owned” within terms of insurance policy issued to second buyer’s father, even though no certificate of title had been delivered to second buyer. Vernon’s Ann.Tex.Pen.Code, art. 1436–1 et seq.—*Smith v. Allstate Ins. Co.*, 467 F.2d 104.—Insurance 2656.

C.A.7 (Wis.) 1961. Automobile which was being driven by owner’s son on behalf of son’s employer, with consent of owner, was “nonowned” by employer and was not “hired automobile” within “excess insurance” clause on employer’s policy, hence employer’s policy was excess insurance with respect to accidental injury for which owner’s insurer was liable, and employer’s insurer was not liable.—*Faribault Canning Co. v. Northwestern Nat. Cas. Co.*, 298 F.2d 58.—Insurance 2761.

E.D.Tex. 1980. Where vehicle which named insured’s daughter was driving at time she was involved in collision with plaintiff’s vehicle had been furnished to the father for his regular use, such vehicle was not a “non-owned” automobile within meaning of father’s insurance policy defining a nonowned vehicle as an automobile owned by or furnished for regular use of the insured and, also, omnibus provision did not provide coverage.—*Benjamin v. Plains Ins. Co.*, 500 F.Supp. 919, affirmed 650 F.2d 98.—Insurance 2657.

Cal.App. 1 Dist. 1990. Automobile policy providing coverage for damages legally incurred “arising out of the ownership, maintenance or use of an owned automobile or a nonowned automobile” was not ambiguous simply because definition of “non-owned automobile,” excluding coverage for unlisted vehicles owned by residents of insured’s household, was included in definitional section on page three of policy; while coverage clause did not alert lay-reader to fact that term “nonowned automobile” had special definition found later in policy, insured was nonetheless responsible for reading policy, since reading made meaning readily apparent—that coverage of “nonowned” automobile meant coverage for automobile not owned either by named insured or resident of household.—*National Auto. & Casualty Ins. Co. v. Stewart*, 272 Cal.Rptr. 625, 223 Cal.App.3d 452.—Insurance 2656.

## NON-OWNED AUTOMOBILE

Colo.App. 1994. Motor vehicle which was owned by insured's sole proprietorship was not a "non-owned" vehicle under the insured's personal automobile policy, and thus insured did not have liability coverage under that policy for vehicle; insured's use of trade name in connection with sole proprietorship, his "policy" of not using vehicle, and fiction of giving himself permission to use it on one occasion did not require different result.—Allstate Ins. Co. v. Willison, 885 P.2d 342.—Insurance 2656.

Fla.App. 1 Dist. 1974. Automobile which was registered in insured's name and owned by insured's son who resided in insured's household and was thus available for insured's frequent or regular use was not a "non-owned" automobile within insured's automobile policy.—State Farm Mut. Auto. Ins. Co. v. Holland, 296 So.2d 100.—Insurance 2656.

Ind.App. 3 Dist. 1983. Daughter did not fall within policy definition of "insured" where car involved in accident was neither "owned" or "non-owned" automobile as defined in policy in light of fact that car involved was daughter's car, was not described in her father's policy, father did not acquire car for daughter, and facts did not show that it was provided merely as substitute or merely furnished for her use.—Connell v. American Underwriters, Inc., 453 N.E.2d 1028.—Insurance 2654, 2661.

Kan. 1967. Where plaintiff insurer's policy provided coverage for its insured in use of an "owned" or "non-owned automobile" but contained no automobile insurance clause for a replacement vehicle, and plaintiff's insured purchased automobile without complying with statute making it unlawful to sell registered vehicle without assigning certificate of title thereto, plaintiff's insured was not the "owner" of such automobile under plaintiff's policy, and plaintiff's insured was covered under plaintiff's policy as driver of a "non-owned" automobile and by seller's insurer's policy as an additional insured under the omnibus clause. K.S.A. 8-135(c) (6).—Maryland Cas. Co. v. American Family Ins. Group of Madison, Wis., 429 P.2d 931, 199 Kan. 373.—Insurance 2656.

N.C.App. 1977. All cars which are not owned within meaning of statute requiring properly executed certificate assigning and warranting title are insured "non-owned" automobiles except those which are furnished for regular use of insured or his relative. G.S. § 20-72(b).—Gaddy v. State Farm Mut. Auto. Ins. Co., 233 S.E.2d 613, 32 N.C.App. 714.—Insurance 2656.

Wash.App. Div. 3 1978. For purposes of determining whether son, who bought car subsequently involved in collision, had been an uninsured motorist, fact that such car was not a "non-owned" vehicle, within meaning of policy issued to father, did not render the car an "owned automobile" within meaning of such policy, in light of fact that the car was not described in policy, that premium was not paid on it, that son was not named insured and that the car was not a temporary substitute

vehicle. RCWA 26.28.030, 46.12.250, 46.12.270.—Finney v. Farmers Ins. Co., 586 P.2d 519, 21 Wash. App. 601, review granted 91 Wash.2d 1017, affirmed 600 P.2d 1272, 92 Wash.2d 748.—Insurance 2786.

### NON-OWNED AUTO

Fla.App. 4 Dist. 1992. Automobile which was not listed in policy, and which was jointly owned by resident relative and named insured, was not an "insured auto" or a "non-owned auto," and therefore policy excluded liability coverage for resident relative while she was driving that automobile.—Progressive American Ins. Co. v. Hunter, 603 So.2d 1301.—Insurance 2654, 2656.

Fla.App. 5 Dist. 1994. Automobile which daughter was driving was not "owned auto" or "non-owned auto" within mean of insured's automobile liability insurance policy and, therefore, policy did not provide liability coverage to daughter involved in automobile accident, where premium charge was not shown for automobile and where automobile was owned by daughter.—Government Employees Ins. Co. v. Jenkins, 642 So.2d 1193, review granted 654 So.2d 919, review dismissed 658 So.2d 991.—Insurance 2654, 2656.

La.App. 2 Cir. 1995. Subcontractor's vehicle that was being towed by contractor at time of accident was not "nonowned auto" within meaning of contractor's business automobile policy and, therefore, was not covered as "nonowned auto" under the policy; since contractor did not engage in its business of log cutting for that day and was towing truck to subcontractor's house, vehicle was not being used in course and scope of contractor's business when accident occurred.—Gore v. State Farm Mut. Ins. Co., 649 So.2d 162, 26,417, 26,418 (La.App. 2 Cir. 1/25/95), writ not considered 653 So.2d 555, 1995-0503 (La. 4/21/95), writ denied 653 So.2d 555, 1995-0481 (La. 4/21/95).—Insurance 2656.

Mo.App. W.D. 1998. Vehicle that was owned by the named insured and spouse as tenants by the entirety was not a "hired auto" or a "non-owned auto" when driven by the named insured and, therefore, was not a covered automobile under a garage liability insurance policy; the tenancy by the entirety did not create an ownership distinct from the named insured, and the spouse was an employee of the garage.—Rinehart v. Anderson, 985 S.W.2d 363, transfer denied.—Insurance 2656, 2659.

### NON-OWNED AUTOMOBILE

C.A.5 (Ga.) 1973. Evidence that daughter of insured was staying with sister and brother-in-law during summer, prior to starting college, and had driven brother-in-law's car to and from work for approximately 25 days but had never used it for any other purpose supported findings that such automobile was not furnished to her for her "regular use" within "non-owned automobile" coverage of her father's policy, which defined such an automobile as one not furnished for the regular use of the named insured or any relative.—Southern Ry. Co. v. State

Farm Mut. Auto. Ins. Co., 477 F.2d 49, rehearing denied 477 F.2d 596.—Insurance 2657.

C.A.5 (La.) 1979. Agreement between two persons who operated seafood businesses that they would acquire a truck to be used to deliver oysters to their businesses and that they would share the operating expenses for the truck was not an agreement whereby the one joint venturer who was to provide insurance coverage for the truck leased, hired, or borrowed the truck from the other joint venturer, who was the title owner, for his own personal and exclusive use so that the agreement did not render the vehicle a hired vehicle so that, since it was not a hired vehicle, it fell within the definition of a "nonowned automobile" for purposes of policy exclusion.—*Sprow v. Hartford Ins. Co.*, 594 F.2d 418.—Insurance 2659.

C.A.6 (Mich.) 1969. Right to control of equipment is generally regarded as critical distinction between "hired automobile" and "nonowned automobile" for insurance purposes.—*Wolverine Ins. Co. v. State Auto. Mut. Ins. Co. of Columbus*, 415 F.2d 1182.—Insurance 2659.

C.A.8 (N.D.) 1970. Where automobile liability policy defined "owned automobile", "hired automobile" and "non-owned automobile", automobile leased by a named insured was a "hired automobile" rather than "non-owned automobile", which was defined as "any other automobile", and policy provision that coverage is excess if loss arises from use of any nonowned automobile was not applicable.—*State Farm Mut. Auto. Ins. Co. v. American Cas. Co.*, 433 F.2d 1007.—Insurance 2659, 2761.

C.A.9 (Or.) 1987. Tractor owned by lessee and used to pull rented trailer was "non-owned automobile" within meaning of lessor's liability policy, which excluded from coverage those persons who used their automobile in conjunction with rented vehicle.—*Flexi-Van Leasing, Inc. v. Aetna Cas. & Sur. Co.*, 822 F.2d 854.—Insurance 2656.

C.A.9 (Or.) 1980. Agreement to share automobile expenses as part of joint venture between insured under two policies and corporation with which insured had agreed to merge did not have to be treated as contract of hire so as to bring automobile within hired automobile coverage of insured's policy, and thus, under Oregon law, automobile involved in accident was "non-owned automobile" used in conduct of joint venture within meaning of policy excluding coverage for damage arising out of use of such automobiles.—*Transport Indem. Co. v. Liberty Mut. Ins. Co.*, 620 F.2d 1368.—Insurance 2659.

S.D.Fla. 1970. Automobile which was being driven by judgment debtor at time of accident with judgment creditor, a pedestrian, and which was owned by debtor's wife, a named insured under debtor's own liability policy, did not fall within "non-owned automobile" provision of such policy which excluded vehicles owned by named insured and, thus, insurer could not be garnished for remaining unpaid portion of judgment.—*Boyd v. Bowman*, 313 F.Supp. 579, question certified 443 F.2d 848, certified question answered 256 So.2d 1,

answer to certified question conformed to 455 F.2d 927.—Insurance 2656.

N.D.Ga. 1970. Where New York insured was provided by employer with leased automobile for anticipated one month's work in Georgia, even though insured had uninhibited use of automobile for personal and business purposes, the automobile was not "furnished for the regular use" of insured and therefore was a "non-owned automobile" within policy covering insured as to use of nonowned automobile, which was defined as automobile not furnished for regular use of named insured, and insurer was required to defend action brought against insured arising out of use of that automobile in Georgia.—*Grace v. Hartford Acc. & Indem. Co.*, 324 F.Supp. 953, affirmed 440 F.2d 411.—Insurance 2657.

S.D.Ill. 1959. Where defendant issued liability policy to owner covering tractor and trailer and plaintiff was liability insurer of lessee of the tractor, and trailer was involved in an accident while being driven by an employee of the owner, and both plaintiff's and defendant's policies contained "other insurance" endorsement essentially identical, plaintiff became an insurer only by reason of the "hired automobile" and "non-owned automobile" clauses of its policy and an "excess" insurer and plaintiff's policy did not constitute "other valid and collectable insurance" but was only excess coverage and defendant was the primary insurer and plaintiff was entitled to recover the amount paid in satisfaction of the judgment.—*Continental Cas. Co. v. American Fidelity & Cas. Co.*, 186 F.Supp. 173, amended 190 F.Supp. 236, affirmed 275 F.2d 381.—Insurance 2900.

D.Mont. 1964. Automobile for which entire consideration had been paid to seller who gave possession thereof to buyer was a "non-owned automobile" under buyer's liability policies extending coverage to operation of non-owned automobile by insured or any relative, where seller had not signed transfer on certificate of title and no new certificate of title to automobile had been issued to buyer. R.C.M.1947, § 53-109(a, b, d, e).—*Colbrese v. National Farmers Union Property & Cas. Co.*, 227 F.Supp. 978.—Insurance 2656.

S.D.W.Va. 1961. Under automobile policy extending coverage, with respect to a non-owned automobile, to named insured or any relative, and defining a non-owned automobile as one not owned or furnished for use of either named insured or any relative and defining relative as a resident of named insured's household, named insured's brother-in-law, who resided in household for several months in 1959 but only three or four days before named insured's son was involved in accident while driving his uncle's automobile, was not a "resident" of the household and son was driving a "non-owned automobile" and was covered by policy.—*American Cas. Co. of Reading Pa. v. Crook*, 197 F.Supp. 345, affirmed 301 F.2d 846.—Insurance 2656, 2661.

Cal.App. 1 Dist. 1990. Automobile policy providing coverage for damages legally incurred "arising out of the ownership, maintenance or use of an

## NON-OWNED AUTOMOBILE

owned automobile or a nonowned automobile" was not ambiguous simply because definition of "non-owned automobile," excluding coverage for unlisted vehicles owned by residents of insured's household, was included in definitional section on page three of policy; while coverage clause did not alert lay-reader to fact that term "nonowned automobile" had special definition found later in policy, insured was nonetheless responsible for reading policy, since reading made meaning readily apparent—that coverage of "nonowned" automobile meant coverage for automobile not owned either by named insured or resident of household.—National Auto. & Casualty Ins. Co. v. Stewart, 272 Cal.Rptr. 625, 223 Cal.App.3d 452.—Insurance 2656.

Cal.App. 1 Dist. 1969. Where automobile involved in accident while being driven by insured's son was owned by insured's son, automobile was not "non-owned automobile" within automobile liability policy and policy did not provide coverage for insured's acceptance of liability in connection with minor son's application for operator's license. West's Ann.Vehicle Code, §§ 16452, 17707.—Allstate Ins. Co. v. Chiinn, 76 Cal.Rptr. 264, 271 Cal.App.2d 274.—Insurance 2656.

Cal.App. 2 Dist. 1969. Rented motorcycle was "non-owned automobile" within meaning of provision of renter's automobile liability policy that extended coverage to nonowned automobiles. West's Ann.Ins. Code, §§ 11580.1, 11580.1(e), 11580.2; West's Ann.Vehicle Code, §§ 400, 16451, 16452.—Mid-Century Ins. Co. v. Hernandez, 80 Cal.Rptr. 448, 275 Cal.App.2d 839.—Insurance 2659.

Colo.App. 1972. Vehicle involved in accident was not "furnished or available for the frequent or regular use of the insured," within meaning of nonowned automobile clause of policy covering another of defendant's vehicles, so that vehicle involved was a "non-owned automobile" and defendant driver was entitled to coverage, where defendant driver had transferred vehicle involved to third party by means of an oral sales agreement, third party had been given possession of the vehicle, and where evidence showed that automobile in question was not used by defendant more than two or three times in the four-month interval between the sale and the accident, and that defendant had obtained permission from third party to use the automobile on the day of the accident.—Waggoner v. Wilson, 507 P.2d 482, 31 Colo.App. 518.—Insurance 2657.

Fla.App. 1 Dist. 1968. Under automobile policy designating driver's mother and father as "named insureds" and defining "non-owned automobile" within coverage of policy as automobile not owned by named insured or any relative, mother's brother, who resided with named insureds and who owned uninsured automobile involved in collision while it was being operated by named insureds' daughter, was a "relative" of named insured and automobile was not a "non-owned automobile" under policy definitions and was not within coverage of policy.—Home Indem. Co. v. Alday, 213 So.2d 13.—Insurance 2656.

Fla.App. 2 Dist. 1978. Trailer, which was designed to be pulled by truck, did not constitute a "non-owned automobile" within meaning of automobile liability policy whose nonowned automobile provision provided coverage for a trailer designed for use with a private passenger automobile.—American Emp. Ins. Co. v. Yeomans, 356 So.2d 1281, dismissed Yeomans v. American Employers Ins. Co., 364 So.2d 894.—Insurance 2653.

Fla.App. 2 Dist. 1969. Pickup truck equipped with camper body, which insured had borrowed, constituted "nonowned automobile" within coverage of collision policy providing that covered non-owned automobile must be a "private passenger automobile," which was defined as "four wheel private passenger, station wagon or jeep type automobile."—American Fire & Cas. Co. v. Williams, 226 So.2d 141.—Insurance 2653.

Ill. 1976. Within meaning of automobile insurance policy covering property damage arising out of the use of the described automobile or a nonowned automobile, and defining a "non-owned automobile" to be an automobile not owned by or regularly or frequently used by the named insured, the insured's leased automobile, which was not the "described automobile" nor owned by him, was not a "non-owned automobile" covered by the policy, since the lease agreement was for a 24-month period, since the leased automobile was for the insured's sole and exclusive use, and since he was going to regularly and frequently use it, even though he had driven it for only two days prior to the accident.—Econo Lease, Inc. v. Noffsinger, 349 N.E.2d 1, 63 Ill.2d 390.—Insurance 2657.

Ill.App. 1 Dist. 1985. Automobile owned by insured's son was outside the scope of coverage for "non-owned automobile" in policy which defined a nonowned automobile as one not owned by or furnished for the regular use of either the named insured or any relative.—Simioni by Cagney v. Continental Ins. Companies, 90 Ill.Dec. 615, 482 N.E.2d 434, 135 Ill.App.3d 916.—Insurance 2656.

Ill.App. 1 Dist. 1975. Leased automobile which insured had been driving for two days was a "non-owned automobile" as defined by policy to mean an automobile not owned by or regularly or frequently used by named insured or any resident of same household, other than a substitute automobile.—Econo Lease, Inc. v. Noffsinger, 332 N.E.2d 470, 30 Ill.App.3d 339, reversed 349 N.E.2d 1, 63 Ill.2d 390.—Insurance 2659.

Ill.App. 1 Dist. 1959. For purposes of automobile liability policy provision providing that coverages should be inapplicable to any non-owned automobile, while used in business or occupation of insured, except a private passenger automobile operated or occupied by insured, the military truck being operated by insured at time of accident was a "nonowned automobile" and was not a "private passenger automobile", and even though insured had other employment upon which he depended for his livelihood, truck was being used in his "business or occupation" while he was on active duty as a member of State National Guard and operating

truck en route from encampment to home armory. S.H.A. ch. 129, § 271.—Allstate Ins. Co. v. Hoffman, 158 N.E.2d 428, 21 Ill.App.2d 314.—Insurance 2653, 2656, 2684.

Ill.App. 2 Dist. 1975. Under automobile liability policy extending coverage to the named insureds and their spouses with respect to the described vehicle and nonowned automobiles, and, in relevant part, defining a "non-owned automobile" to mean any automobile other than one furnished or available for regular use of either the named insured or any resident of the same household, the named insured and his wife were not "residents of the same household" with wife's parents at time she was involved in a collision while driving her father's automobile, and it was therefore a nonowned automobile within coverage of the policy, where the wife and her husband were staying at her parents' house on a temporary basis only, that is, until the husband obtained employment and they found a suitable apartment.—MFA Mut. Ins. Co. v. Harden, 325 N.E.2d 102, 26 Ill.App.3d 360.—Insurance 2656.

Ill.App. 2 Dist. 1969. Where family automobile policy containing uninsured motorist coverage excluded coverage for injuries sustained while occupying automobile owned by insured or relative and policy defined "insured automobile" to include nonowned automobile while being operated by named insured and defined "non-owned automobile" as one not owned or furnished for regular use of either named insured or relative, mail truck used by insured who was employed by Post Office was not a "non-owned automobile" and was excluded from coverage under uninsured motorist provision.—Fletcher v. State Sec. Ins. Co., 254 N.E.2d 650, 114 Ill.App.2d 91.—Insurance 2656.

Ill.App. 4 Dist. 1970. Where automobile liability insurer's policy, by truckmen's endorsement, classified automobiles as (1) automobile owned by named assured, (2) automobile hired on behalf of named assured, with two exceptions, and (3) non-owned automobile defined as "any other automobile", two exceptions to "hired automobile" category fell into classification of "any other automobile" and any automobile falling within either exception was "non-owned automobile."—Kern v. Michigan Mut. Liability Co., 263 N.E.2d 134, 129 Ill.App.2d 423.—Insurance 2656.

Kan.App. 1991. Term "regular use" as used in policy definition of "nonowned automobile," could properly be defined as continuous use, uninterrupted normal use for all purposes, without limitation as to use, and customary use as opposed to occasional use or special use.—Snodgrass v. State Farm Mut. Auto. Ins. Co., 804 P.2d 1012, 15 Kan.App.2d 153, review denied.—Insurance 2657.

Ky.App. 1977. Automobile belonging to son, because it was owned by son of husband and wife to whom liability insurance policy had been issued, was not insured vehicle within policy definition of "non-owned automobile."—Aetna Life & Cas. Co. (Aetna Cas. & Sur. Co.) v. Layne, 554 S.W.2d 407.—Insurance 2656.

La.App. 1 Cir. 1982. Automobile which insured was considering purchasing and which named insured's son was driving at the time of accident was a "non-owned automobile."—White v. State Farm Mut. Auto. Ins. Co., 419 So.2d 1279, writ denied 422 So.2d 164.—Insurance 2656.

La.App. 1 Cir. 1974. Unemancipated minor son who was driving an automobile which he owned at time he was involved in accident was not driving a "non-owned automobile," where policy defined such an automobile as one not owned by or furnished for regular use of either named insured or any relative and, the automobile not having been an owned automobile, insured's policy did not provide coverage to automobile which son was driving.—Jones v. Falcon, 297 So.2d 746.—Insurance 2656.

La.App. 1 Cir. 1963. Automobile which unemancipated and unmarried minor had purported to purchase and which he was driving when he became involved in a collision as he was returning it to the seller pursuant to his father's directions was a "non-owned automobile" within his father's automobile liability policy covering the family automobile.—Ellis Elec. Co. v. Allstate Ins. Co., 153 So.2d 905.—Insurance 2656.

La.App. 3 Cir. 1972. Automobile which was furnished for exclusive use and benefit of insured's minor son was not a "non-owned automobile" within meaning of automobile liability policy defining nonowned automobile to be an automobile or trailer not owned by or furnished for regular use of either named insured or any relative, other than for use as temporary substitute automobile. LSA-C.C. arts. 237, 2318.—Daigle v. Chastant, 271 So.2d 290.—Insurance 2657.

La.App. 3 Cir. 1971. Where automobile policy listed two automobiles and provided coverage for nonowned automobile but only with respect to private passenger automobile or trailer and defined nonowned automobile as automobile or trailer not owned by or furnished for regular use of named insured or any relative, term "non-owned automobile" did not include motorcycle notwithstanding death and disability part of policy defined automobile as land motor vehicle and another part of policy provided coverage for expenses of medical service while insured was in or upon insured automobile.—Guillory v. Deshotel, 251 So.2d 91, writ refused 253 So.2d 67, 259 La. 810.—Insurance 2653.

La.App. 3 Cir. 1964. Automobile which dealer furnished buyer for use until delivery of her new automobile was not one furnished for her "regular use", and was "non-owned automobile" within her liability policy defining nonowned automobile as one not owned by or furnished for regular use of insured.—Lincombe v. State Farm Mut. Auto. Ins. Co., 166 So.2d 920, writ refused 168 So.2d 820, 246 La. 904.—Insurance 2657.

La.App. 4 Cir. 1981. Insured's son's automobile did not qualify as "non-owned automobile" under automobile liability policy, since automobile was owned by relative of insured.—Horridge v. Cooney, 405 So.2d 1276.—Insurance 2656.

## NON-OWNED AUTOMOBILE

La.App. 4 Cir. 1977. Where company automobile involved in accident was furnished by employer for regular use of its employee who was named insured under liability policy, vehicle was not "non-owned automobile" within provision defining same as automobile or trailer not owned by or furnished for regular use of named insured other than temporary substitute automobile, nor was vehicle "temporary substitute automobile" or an "owned automobile" within meaning of such policy issued to employee, and employee's automobile liability insurer was not liable.—Crandall v. Scott, 350 So.2d 922.—Insurance 2656, 2658.

Md.App. 1982. Van, which was owned by insured's employer and used as a dispensary vehicle to transport injured employees to hospitals or other medical facilities, and which was driven only occasionally and irregularly by insured, was not "furnished for the regular use" of insured for purposes of his personal automobile policy and thus was a "non-owned automobile" within meaning of his policy.—Insurance Co. of North America v. Coffman, 451 A.2d 952, 52 Md.App. 732.—Insurance 2657.

Mich.App. 1978. For purpose of automobile insurance policy provision which defined "non-owned automobile" as any automobile "not owned by, furnished or available for the frequent or regular use of the named insured, relative or other resident of the same household of such named insured," automobile owned by the son-in-law of the named insured who resided with the named insured was not a "non-owned automobile."—Detroit Auto. Inter-Insurance Exchange v. Reynolds, 265 N.W.2d 799, 81 Mich.App. 710, reversed 295 N.W.2d 228, 409 Mich. 876.—Insurance 1825.

Minn. 1978. Where uncontradicted evidence indicated that insured used employer's automobile for 15 hours per week over a period exceeding one year, automobile was furnished or available for insured's "regular use" within meaning of automobile liability policy definition of "non-owned automobile" as "an automobile not owned by or furnished or available for the regular use of either the named insured or any resident of the same household," and thus policy did not provide coverage for accident which occurred when insured was driving employer's automobile.—LeDoux v. Iowa Nat. Mut. Ins. Co., 262 N.W.2d 418.—Insurance 2657.

Minn. 1977. Automobile, which belonged to garage, which was furnished plaintiff as temporary substitute automobile while his automobile was being repaired and which was driven by plaintiff for approximately two weeks before collision, was a "non-owned automobile" within meaning of policy which covered plaintiff's pickup, the only insured motor vehicle owned by plaintiff, and which defined nonowned automobile as automobile not owned by, registered in name of, or furnished or available for frequent or regular use of named insured, and thus was covered by such policy.—Leegaard v. Universal Underwriters Ins. Co., 255 N.W.2d 819.—Insurance 2657.

Mo. 1995. Vehicle that insured leased from acceptance company and purchased insurance on could be found to be "furnished for the regular use" of insured, and, thus, vehicle was not "non-owned automobile" and, therefore, was excluded from liability coverage.—First Nat. Ins. Co. of America v. Clark, 899 S.W.2d 520.—Insurance 2657.

Mo. 1985. Trial court's determination that pickup truck borrowed by insured was not furnished for regular use of insured, and thus was a "nonowned automobile" covered under insured's policy was supported by evidence, including testimony that pickup truck was furnished to insured so that he could haul building supplies while insured was working on his basement, that truck was used approximately 12 times, and that basement was nearly completed at time of accident.—Wojtkowski v. Shelter Ins. Companies, 702 S.W.2d 74.—Insurance 2694.

Mo.App. 1976. Evidence in declaratory judgment action by automobile insurer showed that insured's son's automobile, which insured's wife was driving when she was involved in particular collision, was "regularly or frequently used" by her, and that such automobile therefore was not "non-owned automobile" as to which policy would afford coverage. V.A.M.R. Civil Rule 73.01.—Farmers Ins. Co., Inc. v. Morris, 541 S.W.2d 66.—Insurance 2694.

Mo.App. 1975. 1945 three-quarter ton army vehicle with canvas top and doors on side was a "non-owned automobile" with respect to National Guardsman's automobile policy which defined a "non-owned automobile" as an automobile not owned by or furnished for regular use of named insured, where insured had not driven truck prior to being assigned one day before accident to drive truck to an encampment, there was no showing that duties of insured at summer camp or in monthly meetings involved driving the truck or other vehicles and insured's assignment at armory was that of heavy equipment mechanic.—Michigan Mut. Liability Co. v. Stallings, 523 S.W.2d 539.—Insurance 2657.

N.H. 1982. Since, for an indefinite period before insured was involved in accident while driving van owned by another, insured had free use of van, the van had been furnished for regular use of named insured, so it was not "non-owned automobile" within definition of automobile liability policy.—Spaulding v. Concord General Mut. Ins. Co., 446 A.2d 1172, 122 N.H. 515.—Insurance 2657.

N.J. 1979. Where, though automobile was owned by service station partnership which used it for business errands and occasionally loaned it to customers whose vehicles were being repaired, named insured, a general partner in the service station, drove the automobile home every night unless it was needed by a customer and where the partnership's automobile was insured's only means of getting to and from work and no restriction whatsoever was placed on insured's use of the automobile, the automobile was "furnished for the

regular use of" insured, for purpose of family automobile policy provision affording coverage for liability arising out of the use of a nonowned automobile but defining "non-owned automobile" so as to exclude any automobile "furnished for the regular use of" the named insured or any relative.—*DiOrio v. New Jersey Mfrs. Ins. Co.*, 398 A.2d 1274, 79 N.J. 257, 8 A.L.R.4th 374.—Insurance 2657.

N.J. 1979. Where, while insured's actual use of automobile that was owned by partnership in which insured was one of two general partners may not have been frequent, insured had an entirely unrestricted right to use the automobile for any purpose or to permit any other person to use it for any purpose, save for rare occasions when insured's partner or customer needed the automobile, automobile was "furnished for the regular use of" the insured and, therefore, was not a "non-owned automobile" for purpose of standard family automobile policy provision defining a "non-owned automobile" as any automobile not owned by or furnished for the regular use of either the named insured or any relative; therefore, use by insured's son of the automobile was not covered under provision affording coverage for liability arising out of ownership, maintenance or use of any "non-owned automobile."—*DiOrio v. New Jersey Mfrs. Ins. Co.*, 398 A.2d 1274, 79 N.J. 257, 8 A.L.R.4th 374.—Insurance 2657.

N.J.Super.Ch. 1962. Under automobile liability policy issued to mother insuring any other person using automobile with her permission and containing an "other insurance" clause, the term "non-owned automobile" was intended to relate to the party with whom the contract of insurance was made, and insured automobile driven by son at time of accident was not a non-owned automobile.—*London & Lancashire Ins. Co. v. Allstate Ins. Co.*, 178 A.2d 372, 72 N.J.Super. 369.—Insurance 2656.

N.Y.A.D. 2 Dept. 1985. Driver was not operating a "non-owned automobile" as that term was defined in his insurance policy, as owner's automobile was available for driver's use and was regularly operated by him, and therefore, his insurer was not obligated to provide coverage after automobile owner's insurer satisfied settlement of wrongful death action brought by deceased passenger's estate against driver and automobile owner to the extent of its policy, notwithstanding owner's excess liability insurer's contention that driver's insurer should be required to provide coverage too.—*Federal Ins. Co. v. Allstate Ins. Co.*, 488 N.Y.S.2d 780, 111 A.D.2d 146.—Insurance 2657.

N.C. 1963. Automobile owned by insured's relatives was neither an "owned automobile" nor a "non-owned automobile" within policy defining owned automobile as that owned by insured and non-owned automobile as that not owned by either insured or any relative, and relatives' automobile was not covered under collision clause providing for payment for damage to owned or non-owned automobile.—*Newcomb v. Great Am. Ins. Co.*, 133 S.E.2d 3, 260 N.C. 402.—Insurance 2652, 2656.

N.C.App. 1985. Automobile for which certificate of title was retained by another was not covered by "non-owned automobile" clause of liability policy, where policyholder was given unrestricted use and possession of vehicle.—*Indiana Lumbermens Mut. Ins. Co. v. Unigard Indem. Co.*, 331 S.E.2d 741, 76 N.C.App. 88, review denied 335 S.E.2d 494, 314 N.C. 666.—Insurance 2657.

N.C.App. 1973. In automobile liability policy provision defining "non-owned automobile" as automobile not owned by or furnished for regular use of insured or relative, other than temporary substitute automobile, phrase "furnished for the regular use" was not limited to situation where insured is furnished vehicle by his employer; clear import of "regular use" exclusion was to provide coverage to insured while engaged in only infrequent or merely casual use of another's automobile for some quickly achieved purpose but to withhold it where insured uses vehicle on more permanent and reoccurring basis.—*Devine v. Aetna Cas. & Sur. Co.*, 198 S.E.2d 471, 19 N.C.App. 198, certiorari denied 200 S.E.2d 653, 284 N.C. 253.—Insurance 2657.

Pa. 1961. Policy covering liability arising out of ownership, maintenance or use of owned automobile or any non-owned automobile, but specifically defining "non-owned automobile" as automobile or trailer not owned by or furnished for regular use of either named insured or any relative, other than temporary substitute automobile, was not ambiguous and automobile of insured's brother who was member of her household was not covered.—*Carr v. Home Indem. Co., N. Y.*, 170 A.2d 588, 404 Pa. 27, 83 A.L.R.2d 922.—Insurance 2656.

Tex.Civ.App.—Austin 1971. The definition of "non-owned automobile" in an insurance policy not only excludes from coverage vehicles "regularly used," but also those "furnished for" the insured's regular use.—*International Service Ins. Co. v. Walther*, 463 S.W.2d 774.—Insurance 2657.

Va. 1968. Automobile, which was owned by government agency, and which was used regularly by insured in connection with his employment with such agency, was not "non-owned automobile" within provision of insured's automobile liability policy affording coverage for nonowned automobiles driven by insured but defining nonowned automobile as automobile "not owned by, or furnished for the regular use of the named insured by any government unit or agency", and thus insured was not covered by his policy at time of accident between government owned automobile driven by insured and third party.—*Quesenberry v. Nichols*, 159 S.E.2d 636, 208 Va. 667.—Insurance 2657.

Va. 1965. Insured, who had been living in California and who had traveled, with her two infant sons, to live with her sister in Virginia for the remaining period of her pregnancy and who had use of uninsured automobile belonging to sister's husband, was driving a "non-owned automobile" within coverage of her policy which extended coverage to a non-owned automobile if it was not owned by a relative of insured, defined as a relative who is a resident of same household, as evidence did not

support finding that insured was a resident of sister's household.—State Farm Mut. Auto. Ins. Co. v. Smith, 142 S.E.2d 562, 206 Va. 280.—Insurance 2656.

Wash.App. Div. 3 1978. For purposes of determining whether son, who bought car subsequently involved in collision, was an uninsured motorist, the car was not a "non-owned" vehicle within terms of policy, which had been issued to father and which defined a "non-owned automobile" as an "automobile \* \* \* not owned or furnished for the regular use of either the named insured or any relative" where, though son had been under the age of 18 when he bought car, the purchase had not been disaffirmed. RCWA 26.28.030, 46.12.250, 46.12.270.—Finney v. Farmers Ins. Co., 586 P.2d 519, 21 Wash.App. 601, review granted 91 Wash.2d 1017, affirmed 600 P.2d 1272, 92 Wash.2d 748.—Insurance 2657, 2786.

Wyo. 1962. Under policy providing that "described automobile" meant automobile described therein and included "substitute automobile" and/or newly acquired automobile and that "non-owned automobile" was any other automobile except one owned by or furnished for regular use of insured, automobile furnished by lessor as substitute for regularly leased automobile described in policy was properly classed as a substitute automobile for which coverage was afforded, notwithstanding provision that policy should not apply to accident occurring after named insured had relinquished custodianship or bailment of described automobile.—Farmers Ins. Exchange v. Fidelity & Cas. Co. of New York, 374 P.2d 754.—Insurance 2659.

#### **NON-OWNED AUTOMOBILES USED IN ANY OTHER BUSINESS OR OCCUPATION**

E.D.Cal. 1969. While logger may have been using truck owned and driven by his employee at time it was involved in collision on way to job site, so that primary coverage was afforded under logger's automobile policy, exclusion applicable to "non-owned automobiles used in any other business or occupation," except a private passenger automobile operated or occupied by insured or relatives living with him, clearly encompassed situation and absolved automobile insurer of liability.—Jones v. Globe Indem. Co., 305 F.Supp. 242.—Insurance 2684.

#### **NON-OWNED CAR**

Ariz.App. Div. 2 1985. Exclusion in automobile policy for temporary, substitute car or "non-owned car" if owned by car business and if owner had liability coverage did not disqualify policy which covered personal vehicles of driver of substitute automobile from being "valid and collectible primary coverage" under statutes [A.R.S. §§ 20-1123.01, 28-1170.01] which conclusively presume policy of automobile dealer covering automobile driven by customer or person associated with customer to be excess; thus, exclusion was void and unenforceable.—State Farm Mut. Auto. Ins. Co. v. Fireman's Fund Ins. Co., 717 P.2d 909, 149 Ariz.

230, approved as modified 717 P.2d 858, 149 Ariz. 179.—Insurance 2763.

Fla.App. 2 Dist. 1999. Car that named insured rented for one day of pleasure use was not "leased by" her and was a "non-owned car," and, thus, automobile insurance policy provided coverage for named insured's vicarious liability to lessor for accident caused by permissive user; the policy excluded from the definition a rental car used for employment or business or possessed for at least 21 days, and these definitions implied that car leased for private use for less than 21 days was a nonowned vehicle.—Budget Rent-A-Car Systems, Inc. v. State Farm Mut. Auto. Ins. Co., 727 So.2d 287.—Insurance 2659.

Ga.App. 2001. Car owned by insured and driven by insured's daughter was not a "non-owned car" under insurance policy for van owned by insured, although daughter did not own car, as policy clearly provided that a nonowned car could not be a car owned by the insured, and thus there was no coverage under the van policy, which extended coverage for medical expenses for bodily injury sustained while using a nonowned car.—Lewis v. State Farm Mut. Auto. Ins. Co., 544 S.E.2d 212, 247 Ga.App. 518.—Insurance 2656.

Ill.App. 5 Dist. 1991. Although "regular and frequent use," within meaning of automobile policy defining "nonowned car" as car not furnished or available for "regular or frequent use," is not subject to absolute definition, such question of fact does not create ambiguity which must be construed in favor of insured.—Sheary v. State Farm Mut. Auto. Ins. Co., 152 Ill.Dec. 917, 566 N.E.2d 794, 207 Ill.App.3d 1067.—Insurance 2657.

Mich.App. 1991. Insured, a student at a Florida college who regularly used his automobile in Florida, and used his parents' automobiles in Michigan during semester breaks, did not have father's automobile available for his regular or frequent use and father's automobile was not excluded from definition of "non-owned car" as used in insurer's policy, and owned-vehicle exclusion was inapplicable to accident occurring when insured was driving his father's automobile.—State Farm Mut. Auto. Ins. Co. v. Burbank, 475 N.W.2d 399, 190 Mich.App. 93, appeal denied 483 N.W.2d 399, 439 Mich. 975.—Insurance 2657.

Miss. 1999. A vehicle driven by a child of divorced parents and owned by the driver's step-father was a "non-owned car," and, thus, the policy issued to the child's father provided liability coverage; the step-father did not become a member of the father's household merely because the child temporarily resided with the step-father and drove his vehicle.—State Farm Mut. Auto. Ins. Co. v. McGee, 759 So.2d 358, rehearing denied.—Insurance 2656.

Mo.App. W.D. 1997. Automobile owned by insured's employer did not fall within definition of "non-owned car" for which coverage was provided under automobile policies of employee's parents where definition did not include a vehicle owned by an employer of a named insured, a named insured's

spouse or any relative of named insured.—State Farm Mut. Auto. Ins. Co. v. Bainbridge, 941 S.W.2d 546, rehearing, transfer denied, and transfer denied.—Insurance 2656.

N.Y.A.D. 3 Dept. 2001. Truck driven by insured who collided with motorists was not a “non-owned car” within meaning of provision in insured’s individual liability insurance policy which had effect of extending coverage of insured for occasional or infrequent use of a vehicle not owned by him, even though truck was not owned by insured or registered in his name but was covered under separate business liability insurance policy, where insured used truck whenever he wished, often took it on personal errands, and drove it home almost every night.—Hartman v. State Farm Ins. Companies, 720 N.Y.S.2d 607, 280 A.D.2d 840.—Insurance 2657.

Ohio App. 9 Dist. 1996. Vehicle which named insured was operating instead of his own vehicle when accident occurred did not satisfy his automobile policy’s definition of “non-owned car,” and thus he was not entitled to liability coverage for the accident, where it was owned by, registered to, and used regularly by his mother with whom he lived, regardless of whether he used it frequently. R.C. § 3937.18.—Wayne Mut. Ins. Co. v. Mills, 692 N.E.2d 213, 118 Ohio App.3d 146, appeal allowed 674 N.E.2d 374, 77 Ohio St.3d 1522, appeal dismissed as improvidently allowed 689 N.E.2d 44, 81 Ohio St.3d 1224, 1998-Ohio-346.—Insurance 2656.

S.C.App. 2001. Car owned by the named insured’s employer was not a “non-owned car” defined as a car not owned by or registered or leased in the name of an employer; thus, the insured’s policy provided no liability coverage while the insured was using it.—South Carolina Property and Cas. Guar. Ass’n v. Yensen, 548 S.E.2d 880, 345 S.C. 512, certiorari denied.—Insurance 2656.

Wash.App. Div. 1 1992. Automobile that insured borrowed from his father was “furnished for regular or frequent use” whenever one of insured’s other cars was not working and, therefore, father’s automobile was not “non-owned car” covered under automobile policy.—Progressive Northwestern Ins. Co. v. Hoverter, 829 P.2d 783, 65 Wash.App. 872.—Insurance 2657.

## NON-OWNED VEHICLE

Ill.App. 3 Dist. 1992. Van was “non-owned vehicle” under corporation’s policy, even though corporation made payments on van and paid its operating expenses, where shareholder bought van with separate funds, title was in name of shareholder and spouse, van was covered on shareholder’s home auto insurance policy, shareholder entered no legally binding agreement for acquisition of vehicle by corporation, shareholder did not make gift to corporation, and shareholder purchased replacement van with proceeds from loss of first van.—American States Ins. Co. v. Gawlicki & Hussey, Inc., 173 Ill.Dec. 96, 596 N.E.2d 720, 231 Ill.App.3d 199, appeal denied 180 Ill.Dec. 147, 606 N.E.2d 1224, 147 Ill.2d 625.—Insurance 2656.

La.App. 1 Cir. 2002. Vehicle that wife was driving at time of accident that killed her and daughter, which was titled in her name only, was not “non-owned vehicle,” for purposes of determining whether husband was entitled to recovery of uninsured motorist benefits under automobile insurance policy that covered his vehicle, which was not involved in accident; wife’s vehicle was part of the community property regime existing between husband and wife. LSA-R.S. 22:1406; LSA-C.C. art. 2336.—Pitts v. Fitzgerald, 818 So.2d 847, 2001-0543 (La.App. 1 Cir. 5/10/02).—Insurance 2656.

Pa.Super. 1982. Van used by wife of insured to transport school children constituted a “non-owned vehicle” within purview of motor vehicle liability policy as revealed by sentence in statement of facts executed by all parties referring to vehicle as one not furnished for regular use of insured; however, accident involving van was covered by policy where policy provided that exclusion for nonowned automobile did not apply to private passenger automobiles operated by named insured, wife of insured was named insured, and vehicle was a private station-wagon type vehicle.—Light v. Miller, 450 A.2d 51, 303 Pa.Super. 527.—Insurance 2656.

## NONOWNED VEHICLE CLAUSE

Wash.App. Div. 3 1994. “Nonowned vehicle clause” is intended to protect insured when he or she is driving another’s vehicle which may not be insured, and it is inclusionary clause which is to be liberally construed to provide coverage.—State Farm Fire & Cas. Co. v. Martin, 869 P.2d 79, 73 Wash.App. 189, review denied 881 P.2d 254, 124 Wash.2d 1018.—Insurance 2656.

## NONOWNER

9th Cir.BAP (Cal.) 1997. Chapter 7 debtor-travel agent was “nonowner” of funds, for purposes of embezzlement discharge exception, where funds given to debtor by client were not authorized to be used for anything other than travel arrangements, funds were not gift, and funds did not contain compensation for debtor’s services, even though debtor had lawful possession of funds and wide discretion to dispose of them on behalf of client. Bankr.Code, 11 U.S.C.A. § 523(a)(4).—In re Wada, 210 B.R. 572.—Bankr 3356.

## NON-OWNERSHIP POLICIES

E.D.Va. 1941. “Non-ownership policies” are procured by employers to protect themselves against liability for injuries sustained through negligence of their employees in the operation of automobiles not owned by the employers, but for which they would be liable under the doctrine of respondeat superior.—Miller v. Harleysville Mut. Cas. Co., 37 F.Supp. 983, affirmed Clarke v. Harleysville Mut. Casualty Co., 123 F.2d 499.

## NONPARK PURPOSE

Cal.App. 4 Dist. 2001. County’s construction of public golf course on park property purchased from the federal government did not violate the statute that prohibits a county from acquiring park proper-

## NON-PARTICIPATING ROYALTY

ty and using it for any nonpark purpose, even though the course destroyed a park once used for over four decades as an open space and an array of diverse recreational purposes; golf was a "park purpose," not a "nonpark purpose." West's Ann. Cal.Pub.Res.Code § 5401.—Save Mile Square Park Committee v. County of Orange, 112 Cal.Rptr.2d 536, 92 Cal.App.4th 1142, review denied.—Counties 107.

### **NONPARTICIPATING**

Miss. 1968. Under mineral deed providing that the instrument was to be "nonparticipating" both as to bonuses and lease rentals, quoted word indicated that the interest conveyed did not share in bonus or rental or in right to execute leases or to explore and develop.—Harris v. Griffith, 210 So.2d 629.—Mines 55(4).

Okl. 1957. In conveyance of mineral rights, provision giving grantees right of ingress and egress merely gave them right to go upon the land for purpose of drilling and was not inconsistent with, or repugnant to, provision that grantees should own no part of lease interests and future "rentals" and bonuses, which latter provision used quoted word as meaning "delay rentals", as distinguished from the term "gas rental" as used in preceding explanatory provision, and made grant a "nonparticipating" one, as distinguished from a "participating deed".—Crews v. Burke, 309 P.2d 291, 1957 OK 48.—Mines 55(4), 55(6).

### **NONPARTICIPATING EYEWITNESS**

Cal.App. 2 Dist. 1984. Informant who is a "non-participating eyewitness" is one who is not a participant or eyewitness to the issue of guilt as to the charged offense.—People v. Saldana, 204 Cal.Rptr. 465, 157 Cal.App.3d 443.—Crim Law 627.10(5).

### **NONPARTICIPATING MINERAL INTEREST**

Miss. 1968. A "nonparticipating mineral interest" is in substance a royalty interest.—Harris v. Griffith, 210 So.2d 629.—Mines 55(4).

### **NON-PARTICIPATING ROYALTY**

Ct.Cl. 1958. A "non-participating royalty" is interest in gross production of oil, gas and other minerals carved out of mineral fee estate as a free royalty which does not carry with it right to participate in execution of, bonus payable for, or delay rentals to accrue under, oil, gas and mineral leases executed by owner of mineral fee estate.—Federal Land Bank of Houston v. U. S., 168 F.Supp. 788, 144 Ct.Cl. 173.—Mines 55(4).

S.D.Ala. 1960. Under Texas law, a "non-participating royalty" is an interest in the gross production of minerals which is carved out of the mineral fee estate as a free royalty which does not carry with it the right to participate in the execution of the bonus payable for or delay rentals to accrue under oil, gas and mineral leases executed by an owner of the mineral fee estate.—Kilfoyle v. Wright, 188 F.Supp. 899, affirmed in part, reversed in part 300 F.2d 626.—Mines 55(4).

Fed.Cl. 1996. "Nonparticipating royalty" is defined as interest in gross production of oil, gas and other minerals carved out of mineral fee estate as free royalty, which does not carry with it right to participate in execution of, bonus payable for, or delay rentals to accrue under oil, gas or mineral leases executed by owner of mineral fee estate, who retains executive right; nonparticipating royalty interests may be created by grant or reservation, either prior or subsequent to lease of land for oil and gas purposes.—State of Alaska v. U.S., 35 Fed.Cl. 685, affirmed 119 F.3d 16, certiorari denied 118 S.Ct. 1035, 522 U.S. 1108, 140 L.Ed.2d 102.—Mines 55(4).

Colo.App. 2002. A "nonparticipating royalty" is an expense-free interest in oil or gas, if, as, and when produced.—Keller Cattle Co. v. Allison, 55 P.3d 257.—Mines 55(4).

Fla.App. 2 Dist. 1983. A "nonparticipating royalty" is an interest in gross production of oil, gas, and other minerals carved out of the mineral fee estate as a free royalty, which does not carry with it the right to participate in the execution of, the bonus payable for, or the delay rentals to accrue under oil, gas, or mineral leases executed by the owner of the mineral fee estate.—Welles v. Berry, 434 So.2d 982.—Mines 55(4).

Tenn.Ct.App. 1982. Right to receive rent from leasing can be granted or reserved separately from mineral estate prior to letting of lease; right so granted or reserved is called a "non-participating royalty" or "non-executive royalty".—J.M. Huber Corp. v. Square Enterprises, Inc., 645 S.W.2d 410.—Mines 55(4).

Tex.Civ.App.—Houston 1957. A "non-participating royalty" is an interest in minerals which is nonpossessory in that it does not entitle owner to produce minerals himself, or permit him to join in leases of the mineral estate to which royalty is appurtenant, and does not entitle owner to share in the bonus or delay rentals, if any, paid for such lease, but merely entitles owner to a certain share of production under lease free of expenses of exploration and production.—Arnold v. Ashbel Smith Land Co., 307 S.W.2d 818, ref. n.r.e.—Mines 55(4).

Wyo. 1994. "Non-participating royalty" is a right to or interest in oil and gas only after it has been removed from the ground.—Ferguson v. Coronado Oil Co., 884 P.2d 971.—Mines 55(4), 79.1(2).

Wyo. 1961. "Nonparticipating royalty" is nonpossessory interest in minerals and merely entitles owner to certain share of production under lease free of expenses of exploration and production and does not entitle him to share in bonus or delay rental.—Picard v. Richards, 366 P.2d 119.—Mines 70(1).

### **NON-PARTICIPATING ROYALTY INTEREST**

S.D.Ala. 1960. The distinguishing characteristics of a "non-participating royalty interest" are that such share of production is not chargeable with any of the costs of discovery and production, owner has

no right to do any act to discover and produce the oil and gas nor to grant leases and no right to receive bonuses or delay rentals.—*Kilfoyle v. Wright*, 188 F.Supp. 899, affirmed in part, reversed in part 300 F.2d 626.—*Mines* 55(4).

Miss. 1959. The distinguishing characteristics of a "non-participating royalty interest" are: (1) Such share of production is not chargeable with any of the costs of discovery and production; (2) the owner has no right to do any act or thing to discover and produce the oil and gas; (3) the owner has no right to grant leases; and (4) the owner has no right to receive bonuses or delay rentals.—*Mounger v. Pittman*, 108 So.2d 565, 235 Miss. 85.—*Mines* 55(4).

Utah 1985. Owner of royalty interest receives a perpetual interest, though term of years may be granted, entitling him to described fraction of oil and gas produced and saved, free of cost; this interest is commonly referred to as a "nonparticipating royalty interest".—*Resource Management Co. v. Weston Ranch and Livestock Co., Inc.*, 706 P.2d 1028.—*Mines* 79.1(2).

#### **NONPARTISAN**

Ct.Cl. 1974. As used in statute and regulations pertaining to charitable status of organization, "nonpartisan" need not refer to organized political parties. 26 U.S.C.A. (I.R.C.1954) §§ 170(c)(2), 501(c)(3).—*Haswell v. U. S.*, 500 F.2d 1133, 205 Ct.Cl. 421, certiorari denied 95 S.Ct. 779, 419 U.S. 1107, 42 L.Ed.2d 803.—Int Rev 4064.

Mont. 1949. "Nonpartisan" is a person appointed or elected without regard to political affiliations; not controlled by parties or party spirit or interests.—*State ex rel. Bonner v. District Court of First Judicial Dist. in and for Lewis and Clark County*, 206 P.2d 166, 122 Mont. 464.

#### **NONPARTISAN ANALYSIS, STUDY OR RESEARCH**

Ct.Cl. 1974. While an organization's advocacy of a particular position or viewpoint qualifies as "nonpartisan analysis, study or research" as bearing on organization's status as a charity so long as there is sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent opinion or conclusion, presentation of unsupported opinion does not qualify. 26 U.S.C.A. (I.R.C.1954) §§ 170(c)(2), 501(c)(3).—*Haswell v. U. S.*, 500 F.2d 1133, 205 Ct.Cl. 421, certiorari denied 95 S.Ct. 779, 419 U.S. 1107, 42 L.Ed.2d 803.—Int Rev 4064.

#### **NON-PARTISAN MERIT BASIS**

Ariz. 1941. The phrase "non-partisan merit basis" has acquired a distinct and well known meaning and its essentials are in substance that the appointment of all employees who come under the system should be made on the basis and as the result of open and competitive examinations arranged to determine which of the applicants for the position is best fitted to perform its duties regardless of political affiliations or past record and that once an

employment is made removal from the position should be based only on unfitness for the work for one reason or another and not upon personal considerations.—*Donaldson v. Sisk*, 113 P.2d 860, 57 Ariz. 318.—Offic 11.3, 69.1.

Ariz. 1939. The essentials of "nonpartisan merit basis," on which state Unemployment Compensation Law requires that positions in unemployment compensation commission's classified service be filled, are that all employees under merit system shall be appointed on basis and as result of open competitive examinations to determine which applicants for positions are best fitted to perform duties thereof, regardless of their political affiliations or past records, and that removal from positions shall be based only on unfitness for work, not personal considerations. Laws 1936, 1st Sp.Sess., c. 13, § 11(d).—*Taylor v. McSwain*, 95 P.2d 415, 54 Ariz. 295.—Offic 26(1).

Mont. 1949. Under the Unemployment Compensation Law suggesting to the Governor that members of the unemployment compensation commission shall be appointed on a "non-partisan merit basis", quoted phrase does not curb Governor's power of appointment or interfere with discretion, or control selection of appointees. Laws 1937, c. 137, § 10.—*State ex rel. Bonner v. District Court of First Judicial Dist. in and for Lewis and Clark County*, 206 P.2d 166, 122 Mont. 464.—Social S 531.

#### **NON PARTISAN POLITICAL**

N.D.Ill. 1971. Within civil service regulation providing that probationary employee may appeal termination allegedly based on political reasons, "political" does not mean "partisan political" but means "non partisan political." 5 U.S.C.A. §§ 7324(a, b), 7325, 7326.—*Peale v. U.S.*, 325 F.Supp. 193.—Offic 72.24.

#### **NON-PARTISAN PRIMARY ELECTION**

Ohio App. 8 Dist. 1955. The term "primary election", as used in general election law permitting electors to register at anytime except within 40 days preceding a primary or general election, and, when construed with charter provision adopting by reference the general election laws, had reference to and included a "non-partisan primary election" of the city and board of elections acted properly in refusing the registration of eligible electors during 40 days preceding city's non-partisan election date. R.C. §§ 3501.01, 3503.11.—*State ex rel. Horvath v. Haber*, 128 N.E.2d 865, 102 Ohio App. 425, 2 O.O.2d 444, 72 Ohio Law Abs. 195.—Elections 96.

#### **NONPARTY**

S.D.Ind. 1991. Putative employer that was immune from further claims by truck driver following settlement approved by Workers' Compensation Board was not "nonparty" within meaning of Indiana's Comparative Fault Act permitting defendant to assert defense that damages of claimant were caused in full or in part by nonparty; thus, terminal owner could not assert nonparty defense to truck driver's claim. West's A.I.C. 22-3-1-1 et

seq., 22-3-2-6, 22-3-2-15, 34-4-33-1 et seq., 34-4-33-2(a), 34-4-33-10(a).—*Wethington v. Wellington Industries, Inc.*, 781 F.Supp. 1379.—Neglig 549(8).

S.D.Ind. 1987. Indiana Department of Highways, against whom the plaintiff had a right to recover, but forfeited right by failure to give timely tort claims notice, was one “who is, or may be, liable to the claimant” and, as such, was a “nonparty” under Indiana Comparative Fault Act allowing fault of nonparty to be apportioned by jury along with relative fault of named defendants. IC 1971, 34-4-33-2(a); IC 34-4-16.5-1 to 34-4-16.5-20 (1982 Ed.)—*Huber v. Henley*, 656 F.Supp. 508.—Neglig 549(11).

Ind.App. 1998. Indiana Department of Transportation (IDOT), which was dismissed from motorist’s lawsuit for personal injuries sustained in IDOT construction zone by way of a judgment on the pleadings, was not a “nonparty” for purposes of fault allocation under Comparative Fault Act. West’s A.I.C. 34-6-2-88, 34-51-2-1 et seq.—Hanner v. State, 699 N.E.2d 1200.—Parties 65(3).

Ind.App. 1996. Under Comparative Fault Act, a jury is charged with allocating 100 percent of the fault among all culpable parties and nonparties; in this context, “nonparty” is a person who caused or contributed to the cause of the alleged injury but who has not been joined in the action as a defendant, and a dismissed party may not be a nonparty. West’s A.I.C. 34-4-33-2(a)(2), 34-4-33-5.—*Shand Min., Inc. v. Clay County Bd. of Com’rs*, 671 N.E.2d 477, rehearing denied, transfer denied *Shand Min. v. Clay Co. Brd. of Com’rs*, 683 N.E.2d 595.—Neglig 549(8).

## NONPARTY RECORDS

Tex.App.—Corpus Christi 2001. Personal and clinical records do not have to be in a nonparty’s possession to be described as “nonparty records,” they only have to be personal and clinical records regarding a nonparty. V.T.C.A., Health & Safety Code § 242.501; V.T.C.A., Human Resources Code § 102.001 et seq.; Tex.Admin. Code title 40, §§ 19.407, 19.1910, 19.1912(h)(2); Vernon’s Ann.Texas Rules Civ.Proc., Rule 196.1(c)(1).—In re Diversicare General Partner, Inc., 41 S.W.3d 788.—Pretrial Proc 372, 382.

## NONPARTY WITNESSES

Minn.App. 1991. Police are not “nonparty witnesses” in implied consent proceeding, and thus are not entitled to fees as condition of appearance on discovery subpoena. M.S.A. § 169.123, subd. 5a; 48 M.S.A., Rules Civ.Proc., Rule 45.06.—*Howard v. City of St. Louis Park*, 466 N.W.2d 759.—Pretrial Proc 134.

## NONPAYING GUEST

Or. 1962. To be “nonpaying guest” within guest statute, there must be acceptance of nonpaying guest status, and if one is legally incapable of making such acceptance, a nonpaying guest rela-

tionship cannot exist. ORS 30.110.—*Senechal v. Bauman*, 375 P.2d 60, 232 Or. 217.—Autos 181(2).

## NON-PAYMENT

C.A.7 (Ill.) 1968. Where consignee stated that bills of lading were not available and gave an indemnity bond to carriers, there was neither “misdelivery” nor “nonpayment” and carriers were not liable for any misdelivery or nonpayment. Interstate Commerce Act, § 20(11), 49 U.S.C.A. § 20(11).—*Iowa Beef Packers, Inc. v. Chicago Great Western Ry. Co.*, 402 F.2d 930.—Carr 83, 93.

C.A.5 (Tex.) 1990. Under international rules for collection, wine buyer’s American bank had duty to notify German seller’s agent of problem in collection when buyer failed to pay letter of collection on presentment and asked for more time, even though payment was not due until wine arrived in United States and buyer’s bank had no actual notice of wine’s arrival; arrival was not triggering event for notification duty to arise and buyer’s failure to pay on presentment was a “non-payment” under the rules.—*Rheinberg Kellerei GmbH v. Brooksfield Nat. Bank of Commerce Bank*, 901 F.2d 481, on rehearing in part, and rehearing denied, and rehearing granted.—Banks 191.10.

D.Or. 1973. Action of insured in stopping payment on check given in payment of initial premium for automobile policy after automobile accident and of insurer in notifying insured that no coverage was afforded under “nonpayment” provision of application for policy constituted an “agreement” to retroactively annul coverage in violation of Washington statute and policy, for which application had been made prior to accident, was in effect on date of accident despite contention that, under “nonpayment” provision, no insurance ever existed, where application provided that policy period was to begin as of specified time and date prior to accident and that “coverage was bound” as of the same time and date. RCWA 48.01.030, 48.18.291(1), 48.18.320; Fed.Rules Civ.Proc. rule 52(a), 28 U.S.C.A.—*Dairyland Ins. Co. v. Kankelberg*, 368 F.Supp. 996.—Insurance 1764(2), 1920.

## NON-PAYMENT OF PREMIUM

La.App. 2 Cir. 2000. Cancellation of automobile insurance policy because of an unpaid balance on a previous policy was not cancellation for “non-payment of premium” within the meaning of a statute and policy provision requiring the insurer to give ten days notice of cancellation for non-payment of premium and at least 30 days’ notice to cancel for other reasons; thus, the term “non-payment of premium” did not include a debt on a previously issued and cancelled policy. LSA-R.S. 22:636.1, subd. D.—*Fleming Novelty, Inc. v. Alexander*, 775 So.2d 643, 34,346 (La.App. 2 Cir. 12/20/00), writ denied 787 So.2d 1002.—Insurance 1929(3), 2044(1).

N.H. 2001. Insured’s failure to make his installment payment when due was a default or “nonpayment of premium,” even though the automobile insurer later recalculated the installment and stated a new deadline, and, thus, the insurer gave a notice

of cancellation more than ten days before the effective date; the recalculated bill that was sent after the insured had defaulted did not cure the default or waive the insurer's right to cancel the policy. RSA 417-A:1, subd. IV, 417-A:4, subd. 417-A:5, subd. III.—*Tucker v. Merchants Ins. Group*, 769 A.2d 357, 146 N.H. 168.—Insurance 2032, 2035.

N.H. 2001. “Nonpayment of premium” as used in a statute allowing an automobile insurer to cancel for nonpayment of premium means failure of the insured to discharge any obligation in connection with the payment of premiums on a policy or any installment of such premium. RSA 417-A:1, subd. IV.—*Tucker v. Merchants Ins. Group*, 769 A.2d 357, 146 N.H. 168.—Insurance 2042.

**NONPAY STATUS**

C.A.Fed. 2002. Term “nonpay status” is applied in the federal personnel system to refer to persons who have the status of employees, but who are not in pay status at the time, such as employees who are on leave without pay (LWOP) or furlough, and does not refer to person who is no longer an employee. 5 U.S.C.A. § 8411(d); 5 C.F.R. § 842.402.—*Roman v. C.I.A.*, 297 F.3d 1363.—Offic 94.

**NONPECUNIARY**

D.Alaska 1992. Jones Act limits recoverable damages to pecuniary losses; punitive damages are “nonpecuniary,” and therefore, are not recoverable under Jones Act. Jones Act, 46 App.U.S.C.A. § 688.—*Jackson v. Unisea, Inc.*, 824 F.Supp. 895.—Damag 91(1).

**NON-PECUNIARY DAMAGES**

N.D.Cal. 2001. In a wrongful death suit under maritime law, damages available include pecuniary and non-pecuniary damages; “pecuniary damages” include pre-judgment loss of wages, future loss of earning capacity, medical expenses, loss of support, loss of services and funeral expenses, while “non-pecuniary damages” that may be recovered by the decedent’s beneficiaries include loss of consortium and loss of society.—In re Air Crash Off Point Mugu, California, on January 30, 2000., 145 F.Supp.2d 1156.—Death 83, 87, 88.

La.App. 1 Cir. 1996. Under the Jones Act and general maritime law, recoverable losses are limited to pecuniary losses, precluding award of punitive damages which are classified as “nonpecuniary damages.” Jones Act, 46 App.U.S.C.A. § 688.—*Graves v. Businelle Towing Corp.*, 673 So.2d 311, 1995-1999 (La.App. 1 Cir. 4/30/96).—Damag 30, 87(1).

La.App. 1 Cir. 1996. Penalties in the amount of \$5,000 imposed against vessel owner and its insurer for tendering settlement funds to seaman seven days late were not recoverable under the Jones Act or general maritime law, since they were “nonpecuniary damages.” Jones Act, 46 App.U.S.C.A. § 688.—*Graves v. Businelle Towing Corp.*, 673 So.2d 311, 1995-1999 (La.App. 1 Cir. 4/30/96).—Damag 30; Insurance 3374.

N.Y.A.D. 1 Dept. 2002. “Pecuniary damages” compensate the victim for the economic consequences of the injury, such as medical expenses and lost earnings, while the definition of “non-pecuniary damages” is those damages awarded to compensate an injured person for the physical and emotional consequences of the injury.—*Wilson v. City of New York*, 743 N.Y.S.2d 30, 294 A.D.2d 290.—Damag 30.

**NONPECUNIARY LOSS PENALTY**

C.A.10 (Colo.) 1992. IRS’s ten percent exaction on premature withdrawal of pension plan funds was “nonpecuniary loss penalty,” rather than “tax,” and thus was not entitled to priority in distribution of Chapter 11 estate’s assets. Bankr.Code, 11 U.S.C.A. § 507(a)(7)(A)(i), (a)(7)(G); 26 U.S.C.A. § 72(t).—In re Cassidy, 983 F.2d 161.—Bankr 2957.

Bkrcty.D.Colo. 1991. Flat 10% penalty imposed for debtor taxpayer’s early withdrawal of funds from qualified retirement plan was “nonpecuniary loss penalty,” which was not entitled to priority under debtor’s reorganization plan. Bankr.Code, 11 U.S.C.A. § 507(a)(7)(G); 26 U.S.C.A. § 72(t).—In re Cassidy, 126 B.R. 94, subsequently affirmed 983 F.2d 161.—Bankr 2957.

**NON-PECUNIARY RELIEF**

C.A.9 (Cal.) 1997. Investigation by United States Postal Service which resulted in federal grand jury proceeding was proceeding brought for “non-pecuniary relief” within meaning of professional liability policy providing that insurer had duty to defend against proceedings brought by governmental regulatory agency seeking nonpecuniary relief, as such investigation does not necessarily result in indictment; moreover, even if proceeding sought restitution in addition to incarceration, insurer would be obligated to provide defense for nonpecuniary portion of proceeding.—*Bodell v. Walbrook Ins. Co.*, 119 F.3d 1411.—Insurance 2918, 2922(1).

**NON-PERFORMANCE**

D.Md. 1937. Libelants held not entitled to recover from purchaser of cargo of sugar for demurrage for unreasonable time consumed in unloading, in absence of proving actual damage, under charter party provision referring to penalty for nonperformance, since “non-performance” meant total failure to perform, that is, failure even to begin.—The Hartismere, 18 F.Supp. 767.

**NON-PERMANENT**

N.Y.Sup.App.Term 1980. To qualify plaintiff’s nonmedically determined, nonpermanent injury of substantially less than 90 days’ duration as a “significant limitation of use of a body function or system,” by a literal definition thereof, would render meaningless the legislature’s distinct description of the term “non-permanent” in defining “serious injury” in the no-fault statute and would create a third category of “serious injury” which would subvert the manifest legislative intent; accordingly, as a matter of law, the plaintiff’s injury from an automobile accident failed to meet the statutory defini-

## NONPOSSESSORY SECURITY INTEREST

tion of “serious injury” entitling her to maintain the present action for noneconomic loss or “pain and suffering.” Insurance Law § 671, subd. 4.—Hezekiah v. Williams, 431 N.Y.S.2d 744, 106 Misc.2d 407, affirmed 440 N.Y.S.2d 274, 81 A.D.2d 261.—Autos 251.15.

### **NONPERMISSIVE USE**

Pa.Super. 1994. “Nonpermissive use” of motor vehicle is not equivalent to criminal definition of unauthorized use of a vehicle and does not require actual operation of the vehicle; mere occupancy is sufficient to be nonpermissive use.—Nationwide Mut. Ins. Co. v. Cummings, 652 A.2d 1338, 438 Pa.Super. 586, appeal denied 659 A.2d 988, 540 Pa. 650.—Insurance 2663.

### **NON-PERSONAL SERVICES**

Ky. 1948. Among “non-personal services” within rule that an implied contract will arise to pay for such services even in favor of one occupying family and domestic relationship, are washing, ironing and other similar matters not included in such services as nursing.—Cheatham’s Ex’r v. Parr, 214 S.W.2d 95, 308 Ky. 183.—Impl & C C 41.1.

### **NONPERSON CRIME**

Kan.App. 1994. Designation as “person crime” or “nonperson crime” under sentencing guidelines depends upon nature of offense; crimes which inflict or could inflict physical or emotional harm to another are generally designated as person crimes, while crimes which inflict or could inflict damage to property are generally designated as nonperson crimes.—State v. Fifer, 881 P.2d 589, 20 Kan. App.2d 12, review denied.—Sent & Pun 780.

### **NONPOINT SOURCE**

D.Mont. 1995. Designation as “nonpoint source” of pollution under Clean Water Act (CWA) is limited to uncollected runoff water which is difficult to ascribe to single polluter. Clean Water Act, § 502(14), as amended, 33 U.S.C.A. § 1362(14).—Beartooth Alliance v. Crown Butte Mines, 904 F.Supp. 1168.—Environ Law 175.

### **NON-POINT SOURCES**

S.D.N.Y. 2001. “Non-point sources” under the Clean Water Act include uncollected runoff water from, for example, oil and gasoline on a highway, or storm water runoff from highways, construction sites or industrial parks, which are difficult to ascribe to a single polluter. Federal Water Pollution Control Act Amendments of 1972, § 502(14), as amended, 33 U.S.C.A. § 1362(14).—U.S. E.P.A. ex rel. McKeown v. Port Authority of New York and New Jersey, 162 F.Supp.2d 173, affirmed McKeown v. Delaware Bridge Authority, 23 Fed.Appx. 81, certiorari denied 122 S.Ct. 1963, 152 L.Ed.2d 1023.—Environ Law 175.

### **NONPOISONOUS**

N.J.Super.L. 1953. The word “nonpoisonous” as used in statute permitting the making and selling of

“nonpoisonous” patent or proprietary medicines by one not a registered pharmacist means a substance that, being in solution in the blood or acting chemically on the blood, neither destroys life nor impairs seriously the functions of one or more of the organs. R.S. 45:14-29, N.J.S.A.—Proprietary Ass’n v. Board of Pharmacy, 99 A.2d 52, 27 N.J.Super. 204, reversed 106 A.2d 272, 16 N.J. 62.—Health 178.

### **NONPOSSESSORY**

D.Kan. 1995. Chapter 13 debtors’ loss of possession of tool of trade as result of creditor’s repossession prior to filing for bankruptcy did not preclude debtors from avoiding creditor’s lien on tool of trade under Bankruptcy Code provision authorizing avoidance of “nonpossessory,” nonpurchase money security interest in tool of trade; Bankruptcy Code provision did not require that tool of trade be in debtor’s present physical possession to be nonpossessory. Bankr.Code, 11 U.S.C.A. § 522(f).—In re Vann, 177 B.R. 704.—Bankr 2789.

W.D.Va. 1987. In deciding whether lien may be avoided as “nonpossessory” lien, court should focus on how lien initially attached and became enforceable against debtor. Bankr.Code, 11 U.S.C.A. § 522(f).—In re Meadows, 75 B.R. 357.—Bankr 2787.

Ind.App. 1997. “Nonpossessory” mechanics’ lien on motor vehicle dispenses with common law requirement of possession, and, in order to perfect lien, person repairing, storing, servicing, or furnishing supplies or accessories for motor vehicles must file notice of intention to hold lien. West’s A.I.C. 32-8-31-1, 32-8-31-3.—Jones v. Harner, 684 N.E.2d 560.—Autos 384.

### **NON-POSSESSORY LIEN**

E.D.Mich. 1988. Attorney’s “non-possessory lien” (“charging lien”) is lien on judgment recovered by attorney.—Rubel v. Brimacombe & Schlechte, P.C., 86 B.R. 81.—Atty & C 182(2).

### **NON-POSSESSORY, NONPURCHASE MONEY SECURITY INTEREST**

E.D.Cal. 2000. Federal tax lien was not “judicial lien” or “non-possessory, nonpurchase money security interest,” of kind which Chapter 7 debtors could avoid as allegedly impairing their homestead exemption. Bankr.Code, 11 U.S.C.A. § 522(f)(1).—In re Khoe, 255 B.R. 581.—Bankr 2582, 2792.

### **NONPOSSESSORY SECURITY INTEREST**

Bkrcty.D.Kan. 1986. Bank’s right to possession of tools of trade in which it had security interest was created by agreement rather than by judicial process, and thus, upon repossession, bank’s “non-possessory security interest” became a “possessory security interest,” and interest was not subject to lien avoidance under section of Bankruptcy Code authorizing debtor to avoid nonpossessory, nonpurchase-money security interest and tools of trade to extent lien impairs exemption. Bankr.Code, 11

U.S.C.A. §§ 101(43), 522(f)(2)(B).—In re Sanders, 61 B.R. 381.—Bankr 2789.

**NON-PRICE**

C.A.5 (Tex.) 1982. Grant of an exclusive franchise is considered a “non-price” restraint because, of itself, it does not seek to impose resale price maintenance on the distributor. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.—Carlson Mach. Tools, Inc. v. American Tool, Inc., 678 F.2d 1253.—Monop 17(2.3).

**NONPRICE VERTICAL RESTRAINTS**

E.D.N.Y. 1987. Exclusive territory agreements, which are known as “nonprice vertical restraints,” are not illegal per se under Sherman Act; rather, their illegality is tested by rule of reason. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.—State of N.Y. by Abrams v. Anheuser-Busch, Inc., 673 F.Supp. 664.—Monop 17(1.3).

**NON-PRIMARY RESIDENCE PROCEEDING**

N.Y.City Civ.Ct. 1984. For purpose of determining tenant’s entitlement to renewal lease, “owner-occupancy holdover proceeding” is not analogous to “non-primary residence proceeding” under the Emergency Tenant Protection Act, in which no current lease is in effect; in former, landlord is seeking to terminate lease of tenant who uses subject premises as his home, while in latter, landlord is merely seeking to obtain possession of apartment which is under used or unused by party whose home is elsewhere and whose claim to possession of premises does not derive from currently effective lease. McK.Unconsol.Laws §§ 8621 et seq., 8625.—Park South Associates v. Mason, 474 N.Y.S.2d 672, 123 Misc.2d 750, affirmed 488 N.Y.S.2d 1020, 126 Misc.2d 945.—Land & Ten 278.4(3).

**NONPRISON EMPLOYER**

C.A.D.C. 1996. Federal prisoners who worked for Federal Prison Industries, Inc. (FPI) were not “employees” entitled to receive minimum wage under the FLSA, since labor they performed for FPI was not voluntary; moreover, FPI was not a “non-prison employer,” since FPI is a government corporation whose funds come from United States Treasury and whose profits return there. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.; 18 U.S.C.A. §§ 4123, 4126(a).—Nicastro v. Reno, 84 F.3d 1446, 318 U.S.App.D.C. 72.—Labor 1129.1.

**NONPRIVATE PASSENGER MOTOR VEHICLE**

Colo.App. 1999. Dump truck qualifies as a “nonprivate passenger motor vehicle” under the statute giving an insurer of a public school vehicle which has paid personal injury protection (PIP) benefits for an accident between the public school vehicle and a nonprivate passenger motor vehicle the right to seek recovery via a direct cause of action against the owner, user, or operator of the nonprivate passenger motor vehicle. West’s C.R.S.A. § 10-4-713(2).—Colorado School Dis-

tricts Self Ins. Pool v. J.P. Meyer Trucking and Const., Inc., 996 P.2d 257, certiorari granted, vacated, appeal dismissed 18 P.3d 198.—Insurance 3521.

Colo.App. 1997. Undefined phrase “nonprivate passenger motor vehicle,” as used in provision of automobile No-Fault Act permitting insurer to assert subrogation claim against owner, user, or operator of such vehicle, refers to all motor vehicles that are not included within provision’s technical definition of “private passenger motor vehicle,” and is roughly synonymous with “commercial vehicle.” West’s C.R.S.A. §§ 10-4-713(2), 10-4-713(2)(c).—Allstate Ins. Co. v. Schneider Nat. Carriers, Inc., 942 P.2d 1352, rehearing denied, and certiorari granted, affirmed Farmers Ins. Exchange v. Bill Boom Inc., 961 P.2d 465.—Insurance 3521.

Colo.App. 1997. Tractor-trailer is “nonprivate passenger motor vehicle,” within meaning of provision of automobile No-Fault Act permitting insurer to assert subrogation claim against owner, user, or operator of such vehicle. West’s C.R.S.A. §§ 10-4-713(2), 10-4-713(2)(c).—Allstate Ins. Co. v. Schneider Nat. Carriers, Inc., 942 P.2d 1352, rehearing denied, and certiorari granted, affirmed Farmers Ins. Exchange v. Bill Boom Inc., 961 P.2d 465.—Insurance 3521.

Colo.App. 1996. Semi-tractor trailer owned by private entity was not included in phrase “nonprivate passenger motor vehicle” under the No-Fault Act, which prevents insurer from claiming subrogation rights for no-fault benefits paid to insured unless the other vehicle is nonprivate passenger motor vehicle, and thus insurer that had paid no-fault benefits to its insured, who was injured in accident with private semi-tractor trailer, could not assert subrogation rights to insured’s settlement with the truck. West’s C.R.S.A. § 10-4-713.—Filippi v. Farmers Ins. Exchange, 943 P.2d 24, as modified on denial of rehearing, and certiorari granted.—Insurance 3521.

**NONPRIVATE PASSENGER MOTOR VEHICLES**

Colo. 1998. Commercial vehicles such as trucks and tractor-trailers are “nonprivate passenger motor vehicles” within meaning of statute allowing no-fault insurer for private passenger motor vehicle to pursue subrogation against owner, user, or operator of nonprivate passenger motor vehicle; prefix “non” modifies “private passenger motor vehicle,” not “private,” and phrase “nonprivate passenger motor vehicle” encompasses all motor vehicles not included within the statutory definition of “private passenger motor vehicle” and is not limited to governmentally-owned passenger motor vehicles; abrogating Filippi v. Farmers Insurance Exchange, 943 P.2d 24 (Colo.App.1996). West’s C.R.S.A. § 10-4-713(2)(a, c).—Farmers Ins. Exchange v. Bill Boom Inc., 961 P.2d 465.—Insurance 3521.

**NON-PROBATE ASSETS**

Ariz.App. Div. 2 1997. “Probate assets” are those transferred by testate or intestate succession, while “nonprobate assets” are those transferred outside of probate, such as life insurance proceeds and jointly owned property.—Matter of Estate of

**NONPROFITABLE PURPOSES**

Mason, 947 P.2d 886, 190 Ariz. 312, review denied, and reconsideration denied.—Ex & Ad 38.

Ohio Prob. 1957. “Probate assets” of estate are subject to creditors’ rights and distribution, whereas “non-probate assets” are included in estate only for inheritance and estate tax purposes and are not subject to rights of creditors or distribution.—*In re Schroeder’s Estate*, 144 N.E.2d 512, 75 Ohio Law Abs. 555.—Ex & Ad 38.

**NON PROFIT**

D.Vt. 2002. Mere fact that nonprofit entity involved in student loan program had received compensation for services that it performed in connection with program did not negate that entity’s “nonprofit” status, or mean that loan which Chapter 7 debtor received pursuant to program to finance his law school education was not made under program “funded in whole or in part by a governmental unit or nonprofit institution,” within meaning of dischargeability exception, as long as any compensation that entity received was not distributed to its members; accordingly, discharge exception applied, and debtor could not discharge his loan debt except on showing of “undue hardship.” Bankr.Code, 11 U.S.C.A. § 523(a)(8).—*In re Bolen*, 287 B.R. 127.—Bankr 3351.1.

Ark. 1971. Agreement under which investor advanced sum for administrative and printing cost to form a “nonprofit” corporation was not a “security”, within the Securities Act, and investor who was in pari delicto with organizers of the corporation was not entitled to rescission of agreement and restitution of money advanced after the corporation failed to become operational. Ark. Stats. §§ 67-1247(l), 67-1256.—*Long v. Mabry*, 470 S.W.2d 319, 250 Ark. 947.—Sec Reg 248, 249.1, 262.1.

Colo.App. 1976. To determine whether corporation is “nonprofit,” basic question to be answered is whether corporation is being exploited for direct monetary gain. C.R.S. ’73, 7-20-101 et seq.—*People ex rel. Meiresonne v. Arnold*, 553 P.2d 79, 37 Colo.App. 414.—Corp 3.

Iowa 1944. The term “non-profit” as applied to co-operatives means that such corporation is not designed primarily to pay dividends on invested capital, but to provide a system and method by which a member can effect sale of his products. Code 1939, § 8512.01 et seq.—*Greene County Rural Elec. Co-op. v. Nelson*, 12 N.W.2d 886, 234 Iowa 362.—Corp 3.

Md. 1966. Word “non-profit” as used in taxing statute was not meant to designate a separate category of exempt institutions but was only a restriction of the kinds of religious, charitable or educational institutions which were exempt. Code 1957, art. 81, § 326(i).—*Central Credit Union v. Comptroller of Treasury*, 220 A.2d 568, 243 Md. 175.—Tax 204(1).

N.H. 1950. Where Legislature authorized cooperative to exercise all rights of ownership in stock or bonds of any corporation engaged in any related

activity, and to establish reserves and invest funds thereof in bonds or other property, element of “nonprofit” in title of statute describing co-operatives was intended by Legislature to mean that all profit goes to its members rather than to investors, and did not limit powers of co-operative to invest in stock or bonds of any corporation engaged in any related activity. R.L. c. 273, §§ 1, 3, subds. 6, 7.—*Petition of White Mountain Power Co.*, 71 A.2d 496, 96 N.H. 144.—Assoc 15(3).

N.J.Super.A.D. 1998. Whether a corporation, society, or organization is “nonprofit,” within meaning of charitable immunity statute, is a separate question from whether the entity is also a charity or organized for charitable purposes. N.J.S.A. 2A:53A-7.—*Graber v. Richard Stockton College of New Jersey*, 713 A.2d 503, 313 N.J.Super. 476, certification denied 719 A.2d 641, 156 N.J. 409.—Char 45(2).

N.J.Super.A.D. 1998. College that was exempt from taxation and did not distribute profits to any shareholder, board member, or officer was a “nonprofit” organization, for purposes of charitable immunity statute, even though it collected tuition, had sports teams which provided entertainment to community, rented space at its facility for monetary fee, and did not have charter that stated that it was organized solely for nonprofit use. N.J.S.A. 2A:53A-7.—*Graber v. Richard Stockton College of New Jersey*, 713 A.2d 503, 313 N.J.Super. 476, certification denied 719 A.2d 641, 156 N.J. 409.—Colleges 5.

N.M.App. 1974. Designation of corporate taxpayer as “non profit” under Connecticut law, and facts that taxpayer did not pay dividends and that no part of its income was distributed to members, directors or officers were not conclusive in determining whether corporation was “non profit” for purposes of exemption from gross receipts and municipal taxes. 1953 Comp. § 72-16A-12.27.—*American Auto. Ass’n, Inc. v. Bureau of Revenue*, 525 P.2d 929, 86 N.M. 569, reversed 533 P.2d 103, 87 N.M. 330, on remand 538 P.2d 420, 88 N.M. 148, reversed 541 P.2d 967, 88 N.M. 462.—Mun Corp 967(1).

Ohio App. 2 Dist. 2001. In determining whether a development complies with zoning classification limiting use to nonprofit activities, defining “nonprofit” in context of use is to view it as the obverse of a use which must yield a profit to realize its purpose, which cannot be achieved unless a profit is ultimately realized; and such a purpose is most commonly pursued in trade, that is, the business of buying and selling of goods or services, which is the very definition of “commerce,” and therefore, any use which is plainly commercial in its nature and character is not one which is nonprofit.—*Vizzari v. Community Hosp.*, 751 N.E.2d 1082, 141 Ohio App.3d 494.—Zoning 278.1.

**NONPROFITABLE PURPOSES**

C.C.A.1 (Mass.) 1936. Club organized to acquire and maintain land as hunting and fishing preserve for its members held organized for “non-

profitable purposes" within statute exempting clubs organized for such purposes from income taxes, though one object of club was to raise and sell farm and garden products on its land (Revenue Act 1928, Secs. 13, 103, 26 U.S.C.A. 13, 103 and notes).—*Santee Club v. White*, 87 F.2d 5.—Int Rev 4058.

**NON-PROFIT ASSOCIATION**

N.C.App. 1985. A for-profit investor-owned corporation is not a "non-profit association," as that term is defined by the Municipal Hospital Facilities Act and used in statute authorizing a county to enter into a contract or other arrangement with any nonprofit association for the provision of hospital services. G.S. §§ 131–126.18(5), 131–126.20(c)(Repealed).—*National Medical Enterprises, Inc. v. Sandrock*, 324 S.E.2d 268, 72 N.C.App. 245.—Counties 111(1).

**NON-PROFIT CO-OPERATIVE ASSOCIATION**

Idaho 1954. A non-profit corporation, with no capital stock and composed of members whose interests were represented by membership certificates, organized for the purpose of furnishing electric service to its members in pursuance of the objects of the Rural Electrification Administration, was not a "public service corporation" within Public Utility Law but was a "non-profit co-operative association" required only to serve its members. I.C. §§ 30–1001 et seq., 61–104, 61–119.—*Sutton v. Hunziker*, 272 P.2d 1012, 75 Idaho 395.—Electricity 2.1, 11(2).

**NON-PROFIT CORPORATION**

Mich.App. 1989. Filing for status as tax-exempt charitable organization was not prerequisite to being "nonprofit corporation" within meaning of rule permitting suit in name of domestic nonprofit corporation to prevent illegal expenditure of state funds. MCR 2.201(B)(4)(a); M.C.L.A. § 450.2108(2), (2)(b).—*Highland Recreation Defense Foundation v. Natural Resources Com'n*, 446 N.W.2d 895, 180 Mich.App. 324, appeal denied.—Inj 114(2).

Neb. 1997. "Non-profit corporation" is commonly defined as corporation no part of the income of which is distributable to its members, directors or officers.—*Pig Pro Nonstock Co-op. v. Moore*, 568 N.W.2d 217, 253 Neb. 72.—Corp 3.

Neb. 1997. Term "non-profit corporation", as used in constitutional provision excepting such corporations from restrictions on corporate ownership of farm and ranch land, means corporate entity which does not distribute or otherwise confer any form of economic benefit upon its members, directors, or officers. Const. Art. 12, § 8(1)(B).—*Pig Pro Nonstock Co-op. v. Moore*, 568 N.W.2d 217, 253 Neb. 72.—Corp 435(1).

Neb. 1997. Entity formed pursuant to Nonstock Cooperative Marketing Act is not a "non-profit corporation" within meaning of constitutional provision excepting such corporations from restrictions on corporate ownership of farm and ranch land;

such an entity exists and operates for economic benefit of its members, despite language in Act stating that nonstock cooperatives "shall be deemed nonprofit, inasmuch as they are not organized to make profits for themselves as such or for their members as such but only for their members as producers." Const. Art. 12, § 8(1)(B); Neb.Rev. St. § 21–1401 et seq.—*Pig Pro Nonstock Co-op. v. Moore*, 568 N.W.2d 217, 253 Neb. 72.—Corp 435(1).

N.J.Super.L. 1966. Young Men's Christian Association of Rahway, New Jersey, was "nonprofit corporation" within statute relieving nonprofit corporation organized exclusively for religious, charitable, educational, or hospital purposes from liability to respond in damages for negligence to person who is a beneficiary of the works of the corporation. N.J.S. 2A:53A–7, N.J.S.A.—*Hauser v. Young Men's Christian Ass'n of Rahway*, N. J., 219 A.2d 532, 91 N.J.Super. 172.—Char 45(2).

N.Y.Sup. 1938. A school corporation which under contract of taking over insolvent predecessor business corporation for profit was required to pay predecessor's debts out of any assets owned by school corporation when it ceased to do business, and which was required at any time prior to dissolution to pay principal and interest from any surplus over and above reserve set up by board of directors in its sole discretion as necessary to meet existing liabilities, was not entitled to exemption from taxation as a "nonprofit corporation." Tax Law, § 4, subd. 6.—*Lawrence-Smith School v. City of New York*, 2 N.Y.S.2d 752, 166 Misc. 856, affirmed 7 N.Y.S.2d 486, 255 A.D. 762, appeal denied 7 N.Y.S.2d 1006, 255 A.D. 847, appeal granted 19 N.E.2d 685, 280 N.Y. 850, affirmed 21 N.E.2d 693, 280 N.Y. 805.

Ohio 1950. Where proposed nonprofit corporation was to have authority to acquire assets and liabilities of an existing corporation for profit, to purchase, convey, lease, develop, and operate realty, for purpose of securing benefits of home ownership to persons of modest financial status, and to devote surplus funds to a trust for benefit of citizens and development of community, was a corporation for "profit" and was not entitled to incorporate as a "nonprofit corporation." Gen.Code § 8623-97.—*State ex rel. Russell v. Sweeney*, 91 N.E.2d 13, 153 Ohio St. 66, 41 O.O. 143, 16 A.L.R.2d 1337.—Corp 14(1).

**NONPROFIT CORPORATION, ORGANIZED EXCLUSIVELY FOR HOSPITAL PURPOSES**

D.N.J. 1964. Neither United States nor Veterans' Administration was a "nonprofit corporation, organized exclusively for hospital purposes" within New Jersey statute limiting liability of such hospitals to \$10,000 for negligent injury to beneficiary of its services and such limitation upon recoverable damages was inapplicable to Veterans' Administration sued for wrongful death resulting from alleged malpractice at out-patient clinic. N.J.S. 2A:53A–7, 8, N.J.S.A.—*Taylor v. U.S.*, 233 F.Supp. 1008.—Health 834(1).

## NONPROFIT INSTITUTION

### **NONPROFIT EDUCATIONAL CORPORATION**

Mass. 1987. Nonprofit mental health corporation was “nonprofit educational corporation” within meaning of statute, which prohibits zoning ordinances that bar use of land for educational purposes by nonprofit educational corporation; corporation’s articles of organization stated that corporate purposes were to cooperate with private association and governmental agencies to promote program of mental health education and to aid in restoration of mental health and to aid in rehabilitation of mentally handicapped. M.G.L.A. c. 40A, § 3; c. 180, § 1 et seq.—Gardner-Athol Area Mental Health Ass’n, Inc. v. Zoning Bd. of Appeals of Gardner, 513 N.E.2d 1272, 401 Mass. 12.—Zoning 76.

Mass. 1987. “Educational,” in phrase “nonprofit educational corporation,” means that proposed educational activities must be within corporate purposes of nonprofit corporation referred to in statute, which prohibits zoning ordinances that bar use of land for educational purposes by nonprofit educational corporation. M.G.L.A. c. 40A, § 3.—Gardner-Athol Area Mental Health Ass’n, Inc. v. Zoning Bd. of Appeals of Gardner, 513 N.E.2d 1272, 401 Mass. 12.—Zoning 76.

### **NONPROFIT EDUCATIONAL INSTITUTION**

Pa.Cmwlth. 1991. Nonprofit corporation that conducted seminars and group study programs on accounting and related subjects did not educate the public and thus was not entitled to sales tax refund as “nonprofit educational institution”; although it opened its seminars to anyone interested in the courses it offered, it existed primarily or predominantly to benefit individuals with professional or occupational interest in accounting subjects. 72 P.S. § 7204(10).—PICPA Foundation for Educ. and Research v. Com., 598 A.2d 1078, 143 Pa. Cmwlth. 291, affirmed 634 A.2d 187, 535 Pa. 67.—Tax 1265.

### **NONPROFIT HOSPITAL**

Ohio App. 8 Dist. 1962. Hospital was not a “nonprofit hospital”, entitled to Blue Cross services, where, although it was incorporated as a nonprofit hospital, it returned revenues to its dominant incorporator in his capacities as referring physician, landlord, and proprietor of x-ray and laboratory concessions. R.C. §§ 1739.01(A), 1739.06.—Shaker Medical Center Hospital v. Blue Cross of Northeast Ohio, 183 N.E.2d 628, 115 Ohio App. 497, 21 O.O.2d 81.—Health 230; Insurance 1259(2).

### **NONPROFIT INDUSTRIAL DEVELOPMENT AGENCY**

Pa. 1992. County redevelopment authority was not a “nonprofit industrial development agency” within meaning of statute making transfers to industrial development agencies exempt from realty transfer tax. 35 P.S. § 1702(g); 72 P.S. §§ 8101-C to 8102-C.3; 73 P.S. §§ 303(g), 362(3); § 333(d) (Repealed).—Eastern Inv. Co. v. Com., Bd. of Finance and Revenue, 614 A.2d 223, 531 Pa. 510.—Tax 217.

Pa.Cmwlth. 1989. County redevelopment authority was not a “nonprofit industrial development agency” exempt from realty transfer tax. 72 P.S. §§ 8101-C to 8103-C.1; 73 P.S. § 303(f, g).—Eastern Inv. Co. v. Com., 554 A.2d 604, 123 Pa.Cmwlth. 510, adhered to 564 A.2d 1048, 129 Pa.Cmwlth. 114, affirmed 614 A.2d 223, 531 Pa. 510.—Tax 105.5.

### **NONPROFIT INSTITUTION**

D.Mass. 1995. Federal credit union was “nonprofit institution,” within meaning of Bankruptcy Code provision that discharge in bankruptcy does not discharge individual debtor from any debt for educational loan made under any program funded by government unit or nonprofit institution, and thus, student loans obtained from credit union were nondischargeable in Chapter 7 case. Bankr.Code, 11 U.S.C.A. § 523(a)(8); Federal Credit Union Act, §§ 1 et seq., 101(1), 117, 122, as amended, 12 U.S.C.A. §§ 1751 et seq., 1752(1), 1763, 1768.—TI Federal Credit Union v. Delbonis, 183 B.R. 1, affirmed 72 F.3d 921.—Bankr 3351.1.

Bkrcty.D.Mass. 1994. Fact that federal credit union, which made educational loan to Chapter 7 debtor, was exempted from nonproperty taxation on basis of its creation under Federal Credit Union Act or its freedom from taxation under Internal Revenue Code did not, of itself, qualify credit union as “nonprofit institution” for purposes of exception to discharge for educational loans made under program funded by nonprofit institution. Bankr.Code, 11 U.S.C.A. § 523(a)(8); Federal Credit Union Act, §§ 1 et seq., 122, as amended, 12 U.S.C.A. §§ 1751 et seq., 1768; 26 U.S.C.A. § 501(c)(1).—In re Delbonis, 169 B.R. 1, reversed TI Federal Credit Union v. Delbonis, 183 B.R. 1, affirmed 72 F.3d 921.—Bankr 3351.1.

Bkrcty.E.D.Mo. 1997. Apprenticeship committee, which extended loans to Chapter 7 debtor so that he could participate in union apprenticeship training program, was “nonprofit institution” within meaning of discharge exception for student loans; committee did not earn profit, committee’s only assets were those used in instruction of apprentices, and the Internal Revenue Service (IRS) recognized apprenticeship fund, which committee managed, as tax-exempt organization. Bankr.Code, 11 U.S.C.A. § 523(a)(8).—In re Dressel, 212 B.R. 611.—Bankr 3351.1.

Bkrcty.D.Or. 1995. Union “training trust” created to implement apprenticeship training programs was “nonprofit institution”, and thus Chapter 7 debtor’s related obligation for participating in program was debt for loan made under program funded by nonprofit institution, for purposes of student loan “nondischargeability” provision; training trust was exempt from taxation under tax code provision requiring that no part of entity’s net earnings inure to benefit of any private shareholder or individual, trust agreement did not authorize trustees to pay dividends, and trust’s cash reserves were intended for new facilities and equipment, not for distribution. Bankr.Code, 11 U.S.C.A. § 523(a)(8); 26

U.S.C.A. § 501(c)(3); ORS 660.002 et seq.—In re Rosen, 179 B.R. 935.—Bankr 3351.1.

Bkrcty.E.D.Va. 1994. Credit union which provided loan to Chapter 7 debtors, to enable debtor-husband to obtain educational instruction and training, was not a “nonprofit institution,” within meaning of statutory exception to discharge, given evidence that credit union competed directly with banks, had shareholders, and paid dividends similar to those paid by for-profit corporations. Bankr. Code, 11 U.S.C.A. § 523(a)(8).—In re Simmons, 175 B.R. 624.—Bankr 3351.1.

**NONPROFIT INSTITUTIONS**

D.Mass. 1995. Credit unions, by definition, are “nonprofit institutions.”—TI Federal Credit Union v. Delbonis, 183 B.R. 1, affirmed 72 F.3d 921.—B & L Assoc 1.

**NONPROFIT OPTOMETRIC SERVICE PLAN CORPORATIONS**

Fla.App. 1 Dist. 1980. Corporation, whose role was that of furnishing optometrists with services consisting of furnishing forms and renewal and reexamination notices and like administrative functions, did not provide “optometric service or care” to the public so as to bring corporation within purview of statute dealing with “Nonprofit Optometric Service Plan Corporations,” and, thus, corporation’s plan, under which participating optometrists agreed to furnish replacement contact lenses to their patients for an annual fee plus a fixed sum representing cost of the lenses, was not subject to regulation under such statute. West’s F.S.A. § 637.011 et seq.—Professional Lens Plan, Inc. v. Department of Ins., 387 So.2d 548.—Insurance 1254(1).

**NON-PROFIT ORGANIZATION**

C.A.9 (Alaska) 1996. City was “municipal corporation” for purposes of Alaska Native Claims Settlement Act (ANCSA) and, thus, city-owned public electric utility did not qualify as “nonprofit organization” for reconveyance of site of hydroelectric powerhouse located on land conveyed to Native village corporation; city was organized as “municipal corporation” under Alaska law, while neither city nor its utility was organized under nonprofit corporation statutes, and if city could qualify as both for ANCSA purposes, either subsections granting limited reconveyances to municipal corporations of all improved land on which Native village was located, together with airport sites, would be rendered superfluous, or such more specific provisions would prevail as exceptions to general provision for reconveyance to nonprofits of all occupied lands. Alaska Native Claims Settlement Act, §§ 3(i), 14(c)(1-4), 43 U.S.C.A. §§ 1602(i), 1613(c)(1-4); AS 10.20.005 et seq. 29.71.800(13).—City of Ketchikan v. Cape Fox Corp., 85 F.3d 1381.—Pub Lands 114(4).

C.C.A.2 1945. Where corporation was organized to provide educational, civic and cultural radio programs and by-laws prohibited use of profits or surplus as dividends, corporation was a “non-

profit organization” for income tax purposes, notwithstanding broadcast of some commercial programs.—Debs Memorial Radio Fund v. C.I.R., 148 F.2d 948.

Bkrcty.N.D.N.Y. 1995. Hospital was “non-profit organization,” for purposes of student loan discharge exception; hospital’s controller testified that hospital held tax exempt status under Internal Revenue Code (IRC) and that any excess revenues generated by hospital were left in corporation and not distributed to shareholders. Bankr.Code, 11 U.S.C.A. § 523(a)(8).—In re McFadyen, 192 B.R. 328.—Bankr 3351.1.

Ga.App. 1970. “Non-profit organization”, as respects application of Workmen’s Compensation Act, includes those devoted to religious, scientific, educational, literary and other purposes. Code, § 114-101.—Georgia Osteopathic Hospital, Inc. v. Strickland, 179 S.E.2d 560, 123 Ga.App. 86.—Work Comp 229.

Md. 1966. Credit union which distributes its income to its members in form of dividends, however beneficial to its members as to loans and encouragement of savings, does not come within concept of a “non-profit organization” so as to give it tax exempt status. Code 1957 and Code Supp. art. 11, §§ 135-162, 155.—Central Credit Union v. Comptroller of Treasury, 220 A.2d 568, 243 Md. 175.—Tax 229.

Mich.App. 1996. Government entity is not “nonprofit organization” within meaning of statute exempting insurers of such organizations from first priority for personal protection insurance benefits owed to injured bus passengers. M.C.L.A. § 500.3114(2)(d).—USAA Ins. Co. v. Houston General Ins. Co., 559 N.W.2d 98, 220 Mich.App. 386, appeal denied 570 N.W.2d 662, 456 Mich. 884.—Insurance 2841.

Tex.App.—Houston [1 Dist.] 1996. County flood control district was not “nonprofit organization” for purposes of declaration covenant stating that all properties dedicated to nonprofit organization shall be exempt from covenant requiring payment of assessment fees to homeowner association.—Harris County Flood Control Dist. v. Glenbrook Patio-home Owners Ass’n, 933 S.W.2d 570, rehearing overruled, and writ denied.—Covenants 84.

Wis.App. 2000. Condominium owners association that collected monthly fees from members for maintaining common areas of complex was “non-profit organization” for purposes of recreational immunity statute, even though association did not have purpose of acting in the public interest and did not gratuitously open its land to use by general public; determinative factor was that association was not organized or conducted for pecuniary profit. W.S.A. 895.52(1)(c).—Bethke v. Lauderdale of La Crosse, Inc., 612 N.W.2d 332, 235 Wis.2d 103, 2000 WI App 107, review denied, review denied 618 N.W.2d 750, 237 Wis.2d 260, 2000 WI 102.—Condo 14.

## **NON-PROFIT PRIVATE CORPORATION**

N.J.Super.L. 1962. Hospital was “non-profit private corporation” where profit, if any, accruing from its operation was required to be invested for or applied toward maintenance, betterment, or addition to, improvement and enlargement of buildings, grounds, equipment or increasing of endowment fund.—Greisman v. Newcomb Hospital, 183 A.2d 878, 76 N.J.Super. 149, affirmed 192 A.2d 817, 40 N.J. 389.—Health 230.

## **NON-PROFIT SHARING**

R.I. 1937. Words “non-profit sharing credit corporation or association,” in statute providing that act relating to practice of law should not prevent non-profit sharing credit corporation or association from adjusting, as incidental to its main purpose, the contract claims of its members, were intended to exempt from act a corporation or voluntary association without capital stock organized and carried on solely for mutual benefit of its members and not for profit whose membership was limited to persons doing business in whole or in part on a credit basis and having as its main purpose establishment and maintenance of credit-rating service that might be resorted to by its members to secure credit reports and other information of similar nature respecting credit safety of outstanding accounts or financial responsibility of customers. Gen.Laws 1923, c. 401, § 46, cl. B, par. (5), as amended by Pub.Laws 1935, c. 2190, § 1. Words “non-profit sharing” mean that there is to be no division of profits. The word “credit” in its broad sense denotes the ability to borrow on an opinion conceived by the lender that he will be repaid. “Credit” is defined as the capacity of being trusted. An “association” is generally considered as a voluntary organization without capital stock.—Creditors’ Service Corp. v. Cummings, 190 A. 2, 57 R.I. 291.

## **NONPROFIT SOCIAL ASSOCIATION OR CORPORATION**

Kan. 1994. Golf association was “nonprofit social association or corporation” within meaning of exemption from provisions of Act Against Discrimination. K.S.A. 44-1001 et seq.—Kansas Human Rights Com’n v. Topeka Golf Ass’n, 869 P.2d 631, 254 Kan. 767.—Civil R 124.

Kan.App. 1993. Nonprofit corporation that organized golf tournaments for its members was a “nonprofit social association or corporation” exempt from requirements of Kansas Act Against Discrimination (KAAD). K.S.A. 44-1001 et seq., 44-1002(h).—Kansas Human Rights Com’n v. Topeka Golf Ass’n, 856 P.2d 515, 18 Kan.App.2d 581, review granted, affirmed 869 P.2d 631, 254 Kan. 767.—Civil R 124.

## **NONPROFIT SOCIAL OR FRATERNAL CLUB OR CORPORATION**

N.J.Super.A.D. 1978. Volunteer fire department was an “employer” within meaning of the Law Against Discrimination and thus subject to provisions thereof relating to employment discrimination and it was not within statutory exclusion as a

“nonprofit social or fraternal club or corporation.” N.J.S.A. 10:5-1 et seq.—Hebard v. Basking Ridge Fire Co. No. 1, 395 A.2d 870, 164 N.J.Super. 77, appeal dismissed 405 A.2d 838, 81 N.J. 294.—Civil R 146.

## **NONPROFIT TRUST FUND**

Bkrcty.S.D.N.Y. 1990. “Nonprofit trust fund” that administered funds contributed by county under collective bargaining agreement with union to pay dental, optical, and legal expenses incurred by union members was not eligible to file petition for reorganizational relief; the trust fund did not qualify as a “person” under statutory definition including individual, partnership, and corporation and was not a “business trust”, as the trust fund was not engaged in any business activities and did not generate any business profits; accordingly, trust fund which filed Chapter 11 petition did not have standing to compel turnover of funds delivered to successor union by county. Bankr.Code, 11 U.S.C.A. §§ 101(8)(A)(v), (35), 109(d), 541.—In re Westchester County Civil Service Employees Ass’n, Inc., Ben. Fund, 111 B.R. 451.—Bankr 2228.

## **NON-PROJECT LANDS**

C.C.A.2 1943. In proceeding to determine original cost of and net investment in a licensed project, licensee had burden of proving what part of profits added to capitalization was derived from purchase of “non-project lands” which were lands not used in licensee’s power development. Federal Power Act, §§ 3(11, 13), 4(b), 16 U.S.C.A. §§ 796(11, 13), 797(b).—Niagara Falls Power Co. v. Federal Power Commission, 137 F.2d 787, certiorari denied 64 S.Ct. 206, 320 U.S. 792, 88 L.Ed. 477, rehearing denied 64 S.Ct. 261, 320 U.S. 815, 88 L.Ed. 492.—Electricity 2.1.

## **NON PROS**

C.A.3 (Pa.) 1990. “Non pros,” or “non prosecutrix,” refers to judgment for defendant entered after showing that plaintiff has failed to prosecute action with due diligence, that there is no compelling reason for delay, and that delay has prejudiced defendant, under Pennsylvania law.—Patterson v. American Bosch Corp., 914 F.2d 384, rehearing denied.—Pretrial Proc 581.

Del.Super. 1938. Where a defendant in a replevin action before a justice of the peace appeals from an adverse judgment, the cause is removed to the Superior Court for trial de novo, and it remains the duty of the respondent to prosecute his complaint with effect to which end he is required to file a declaration or suffer judgment of “non pros,” which is, essentially, a failure to prosecute his complaint and, therefore a breach of the condition of the replevin bond. Code 1935, §§ 4523, 4543 et seq.—Black, for Use of Smulski v. H. Feinberg Furniture Co., 3 A.2d 62, 39 Del. 523, 9 W.W.Harr. 523.—Replev 119.

N.C. 1939. A “non pros” at common law is a judgment entered when plaintiff at any stage of proceedings fails to prosecute his action, or any part of it, in due time, and is entered at the

instance of defendant who obtains costs against the plaintiff, and such type of judgment is now in form of a "judgment of involuntary nonsuit."—Steele v. Beaty, 2 S.E.2d 854, 215 N.C. 680.—Pretrial Proc 691.

Pa.Super. 1997. Judgment of "non pros" is founded upon equitable principle of laches and may properly be entered when party to a proceeding has shown a want of due diligence in failing to proceed with reasonable promptitude, and there is no compelling reason for delay, and delay has caused some prejudice to adverse party.—Deloatch v. Becker, 698 A.2d 94.—Pretrial Proc 581.

Pa.Super. 1997. "Non pros" is judgment entered by trial court which terminates plaintiff's action due to failure to properly and/or promptly prosecute case. Rules Civ.Proc., Rule 218, 42 Pa. C.S.A.—Dombrowski v. Cherkassky, 691 A.2d 976, 456 Pa.Super. 801.—Pretrial Proc 581.

Pa.Super. 1993. "Non pros" is neither acquittal nor conviction, and as a result, neither compulsory joinder statute nor double jeopardy clause apply. 18 Pa.C.S.A. §§ 110, 110(1), (1)(ii); U.S.C.A. Const.Amend. 5.—Com. v. Perillo, 626 A.2d 163, 426 Pa.Super. 1, appeal denied 636 A.2d 633, 535 Pa. 674.—Double J 89, 138.

Pa.Super. 1984. A court properly enters a judgment of "non pros" when a party to the proceedings has shown a want of due diligence by failing to proceed with reasonable promptitude, when there has been no compelling reason for the delay, and when the delay has caused some prejudice to the adverse party.—Cathcart v. Keene Indus. Insulation, 471 A.2d 493, 324 Pa.Super. 123.—Pretrial Proc 582, 594.1, 602.

Pa.Super. 1933. "Non pros." is abbreviation of non prosequitur. Where plaintiff, at any stage of proceedings, fails to prosecute his action, or any part of it, in due time, defendant enters non prosequitur, and signs final judgment, and obtains costs against plaintiff, who is said to be "non pros'd," and name "non pros." is applied to judgment so rendered against plaintiff.—Bucci v. Detroit Fire & Marine Ins. Co., 167 A. 425, 109 Pa.Super. 167.

Pa.Cmwth. 1994. Under doctrine of "non pros" or "non prosequitur," if plaintiff fails to take necessary steps within time prescribed by practice of the court for that purpose, defendant may enter judgment against him.—Rockwood Ins. Co. v. Motor Coils Mfg. Co., 646 A.2d 705, 166 Pa.Cmwth. 495.—Pretrial Proc 581.

Vt. 1898. A "non pros." is in effect like a nonsuit, and is the same as in modern practice is a dismissal of an action for want of prosecution. By the common-law "nonsuit" the plaintiff goes out of court as to all the defendants, the same as he does by a non pros., and therefore, when he desires to go out of court only as to some of the defendants, or as to a part of the declaration, a "nol. pros." is probably the most apt way of doing it, though we are little accustomed to that in civil cases. The nature of a nol. pros. in civil cases was not accurately ascertained and defined until modern times;

some of the older authorities considering it a retraxit, operating to release or discharge the action, and an absolute bar to another action for the same cause, but in later cases, which have been adhered to ever since, a nol. pros. is considered not to be in the nature of a retraxit, but only an agreement not to proceed further as to some of the defendants or as to some of the suit, but he is well at liberty to go on as to the rest.—Davenport v. Newton, 42 A. 1087, 71 Vt. 11.

## NON PROSEQUITUR

C.A.3 (Pa.) 1990. "Non pros," or "non prosequitur," refers to judgment for defendant entered after showing that plaintiff has failed to prosecute action with due diligence, that there is no compelling reason for delay, and that delay has prejudiced defendant, under Pennsylvania law.—Patterson v. American Bosch Corp., 914 F.2d 384, rehearing denied.—Pretrial Proc 581.

Fla. 1933. "Non prosequitur" is form of dismissal judgment entered against plaintiff by reason of failure to continue suit as required.—Hewitt v. International Shoe Co., 148 So. 533, 110 Fla. 37.—Pretrial Proc 691.

Pa.Cmwth. 1994. Under doctrine of "non pros" or "non prosequitur," if plaintiff fails to take necessary steps within time prescribed by practice of the court for that purpose, defendant may enter judgment against him.—Rockwood Ins. Co. v. Motor Coils Mfg. Co., 646 A.2d 705, 166 Pa.Cmwth. 495.—Pretrial Proc 581.

W.Va. 1891. "Non prosequitur," in our practice, is commonly called a "nonsuit," and covers judgment by non prosequitur, nolle prosequi, and technical nonsuits, and also judgments of nonsuit entered under statute at rules. According to the common-law practice, a non prosequitur was entered where plaintiff failed to take any necessary step after defendant had appeared and pleaded.—Buena Vista Freestone Co. v. Parrish, 12 S.E. 817, 34 W.Va. 652.

## NON-PROVISION

N.M.App. 2000. A take-it-or-leave-it offer of medical treatment that in fact is ineffective or harmful to the Medicaid recipient is equivalent to a "denial" or "non-provision" of medically necessary services, for which the recipient has a statutory right to a fair hearing before the Human Services Department. NMSA 1978, § 27-3-3, subd. A.—Hyden v. New Mexico Human Services Dept., 16 P.3d 444, 130 N.M. 19, 2000-NMCA-107.—Health 502.

## NONPUBLIC

S.D.N.Y. 2001. Information remains "nonpublic," and capable of supporting insider trading action under § 10(b) and Rule 10b-5, until it either has been disclosed to achieve broad dissemination to investing public generally and without favoring any special person or group, or is known only by few persons, but their trading on it has caused information to be fully impounded into price of

particular stock. Securities Exchange Act of 1934, § 10(b), as amended, 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.—S.E.C. v. Gonzalez de Castilla, 145 F.Supp.2d 402, modified in part 170 F.Supp.2d 427.—Sec Reg 60.28(2.1).

## NON-PUBLIC FORA

C.A.9 (Cal.) 2002. Military exchanges were not “designated public fora,” but instead were “non-public fora,” for purpose of First Amendment free speech analysis; government historically limited the inventory of speech-related materials in exchanges, access to exchanges was limited to military personnel, their families, and other specifically authorized persons, demonstrating that military did not abandon any right to claim of special interest in regulating expression in military exchanges. U.S.C.A. Const.Amend. 1.—PMG Intern. Div. L.L.C. v. Rumsfeld, 303 F.3d 1163.—Const Law 90.1(4).

C.A.10 (Colo.) 1990. For purposes of determining degree to which government can regulate communicative activity on its property, “nonpublic fora” are places that have not been opened for expressive activity by either tradition or designation. U.S.C.A. Const.Amend. 1.—Brown v. Palmer, 915 F.2d 1435, rehearing granted, adhered to on rehearing 944 F.2d 732.—Const Law 90.1(4).

C.A.2 (N.Y.) 1991. “Nonpublic fora” lack characteristics of traditional public fora and have not been acknowledged by pertinent governmental authority as consistent with expressive activity. U.S.C.A. Const.Amend. 1.—International Soc. for Krishna Consciousness, Inc. v. Lee, 925 F.2d 576, rehearing denied, certiorari granted 112 S.Ct. 855, 502 U.S. 1022, 116 L.Ed.2d 764, affirmed in part 112 S.Ct. 2701, 505 U.S. 672, 120 L.Ed.2d 541, concurring and dissenting opinions 112 S.Ct. 2711, 505 U.S. 672, 120 L.Ed.2d 541, affirmed 112 S.Ct. 2709, 505 U.S. 830, 120 L.Ed.2d 669, concurring and dissenting opinions 112 S.Ct. 2711, 505 U.S. 672, 120 L.Ed.2d 541.—Const Law 90.1(4).

D.Md. 1990. Interior sidewalks constructed on property owned by state and used by state Motor Vehicle Administration were “nonpublic fora,” upon which government could regulate parties’ free speech activities as long as regulations were reasonable in light of purpose of fora and were view neutral; interior sidewalks were constructed solely for purpose of carrying out Motor Vehicle Administration business and were not expressly designated as open for general speech activity by any state official. U.S.C.A. Const.Amend. 1.—International Caucus of Labor Committee v. Maryland Dept. of Transp., Motor Vehicle Admin., 745 F.Supp. 323.—Const Law 90.1(4).

E.D.Pa. 1996. Southeastern Pennsylvania Transportation Authority (SEPTA)-owned subway and rail stations and their advertising space were “non-public fora” for purposes of free speech challenge to SEPTA’s removal of antiabortion group’s posters, which warned that women who chose abortion suffer more and deadlier breast cancer; SEPTA was acting as proprietor and not as lawmaker or regulator, and it retained firm control over types of

advertising that could be placed in its stations. U.S.C.A. Const.Amend. 1; 74 Pa.C.S.A. § 1502 (Repealed).—Christ’s Bride Ministries, Inc. v. Southeastern Pennsylvania Transp. Authority, 937 F.Supp. 425, reversed 148 F.3d 242, certiorari denied 119 S.Ct. 797, 525 U.S. 1068, 142 L.Ed.2d 659.—Const Law 90.1(4), 90.3; Urb R 20.

E.D.Pa. 1991. “Non-public fora” exists when state does not designate public property for indiscriminate expression by the public at large, by certain speakers, or on certain subjects; although nonpublic fora can exist even when public property has been dedicated to use for communicative purposes, the nature of the dedication must be such that the contemplated communication is not indiscriminate on any topic or for any group, or requires some measure of state endorsement or action. U.S.C.A. Const.Amend. 1.—Slotterback By and Through Slotterback v. Interboro School Dist., 766 F.Supp. 280.—Const Law 90.1(4).

D.Utah 2001. “Nonpublic fora” include any government property that is not by tradition or designation a forum for public use. U.S.C.A. Const.Amend. 1.—First Unitarian Church of Salt Lake City v. Salt Lake City Corp., 146 F.Supp.2d 1155, reversed 308 F.3d 1114.—Const Law 90.1(4).

N.D.W.Va. 1996. “Nonpublic fora” consists of government properties that are not by tradition or designation fora for public communication and which the government may preserve for intended uses, and the First Amendment does not guarantee access to such property simply because it is owned or controlled by the government. U.S.C.A. Const. Amend. 1.—Peck v. Upshur County Bd. of Educ., 941 F.Supp. 1465, affirmed in part, reversed in part 155 F.3d 274.—Const Law 90.1(4).

Ohio App. 10 Dist. 1998. There are three categories of fora under free speech law: (1) “traditional public fora,” i.e., places which by long tradition or by government fiat have been devoted to assembly and debate; (2) “limited or designated public fora,” i.e., public property which the State has opened for use by the public as a place for expressive activity; and (3) “nonpublic fora,” i.e., public property which is not by tradition or designation a forum for public communication. U.S.C.A. Const. Amend. 1; Const. Art. 1, §§ 1, 11.—United Auto Workers, Local Union 1112 v. Philomena, 700 N.E.2d 936, 121 Ohio App.3d 760, stay denied 692 N.E.2d 615, 81 Ohio St.3d 1508, dismissed, appeal not allowed 695 N.E.2d 1148, 82 Ohio St.3d 1450.—Const Law 90.1(4).

## NON-PUBLIC FORUM

U.S.Ark. 1998. A televised debate among candidates for political office, sponsored by a public broadcaster, was a “nonpublic forum,” rather than a “designated public forum,” from which the broadcaster could, under the First Amendment, exclude an independent candidate with little popular support in the reasonable, viewpoint-neutral exercise of its journalistic discretion; the debate did not have an open-microphone format, but rather, the broadcaster reserved eligibility for participation to candi-

dates for a particular congressional district seat, then made candidate-by-candidate determinations as to which of the eligible candidates would participate, and the independent candidate was not excluded because of his viewpoint, but for his objective lack of support. U.S.C.A. Const.Amend. 1.—Arkansas Educ. Television Com'n v. Forbes, 118 S.Ct. 1633, 523 U.S. 666, 140 L.Ed.2d 875, on remand Forbes v. Arkansas Educational Television Com'n, 145 F.3d 1017.—Const Law 90.1(9); Tel 435.

C.A.D.C. 2001. Interior of polling place was a “nonpublic forum,” for free speech purposes, as such location was not available for general public discourse of any sort; only expressive activity involved was each voter’s private communication of his own elective choice. U.S.C.A. Const.Amend. 1.—Marlin v. District of Columbia Bd. of Elections and Ethics, 236 F.3d 716, 344 U.S.App.D.C. 349, certiorari denied 121 S.Ct. 2001, 532 U.S. 1039, 149 L.Ed.2d 1004.—Const Law 90.1(4).

C.A.D.C. 1995. For purposes of First Amendment, “public forum,” or even “nonpublic forum” is government property. U.S.C.A. Const.Amend. 1.—Alliance for Community Media v. F.C.C., 56 F.3d 105, 312 U.S.App.D.C. 141, certiorari granted Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C., 116 S.Ct. 471, 516 U.S. 973, 133 L.Ed.2d 401, affirmed in part, reversed in part 116 S.Ct. 2374, 518 U.S. 727, 135 L.Ed.2d 888, conformed to IN THE MATTER OF IMPLEMENTATION OF SECTION 10 OF THE CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992, 1997 WL 225468.—Const Law 90.1(4).

C.A.D.C. 1990. Interview of alien held for “immediate action” is “non-public forum” with specific and important governmental purpose, and government’s exclusion of private citizens from access to alien, so long as it is not selective and based upon content of their views, is not violation of “public forum doctrine.” U.S.C.A. Const.Amend. 1.—Ukrainian-American Bar Ass’n, Inc. v. Baker, 893 F.2d 1374, 282 U.S.App.D.C. 225, rehearing denied.—Const Law 90.1(1).

C.A.8 (Ark.) 1996. A “non-public forum” under First Amendment is public property which is not by tradition or designation a forum for public communication. U.S.C.A. Const.Amend. 1.—Forbes v. Arkansas Educational Television Com'n, 93 F.3d 497, certiorari granted 117 S.Ct. 1243, 520 U.S. 1114, 137 L.Ed.2d 326, reversed Arkansas Educ. Television Com'n v. Forbes, 118 S.Ct. 1633, 523 U.S. 666, 140 L.Ed.2d 875, on remand 145 F.3d 1017, vacated 145 F.3d 1017.—Const Law 90.1(4).

C.A.9 (Cal.) 2002. Public property which has not been traditionally available for public expression, and which is not designated by the government as public is characterized as a “nonpublic forum,” for purpose of First Amendment free speech analysis. U.S.C.A. Const.Amend. 1.—PMG Intern. Div. L.L.C. v. Rumsfeld, 303 F.3d 1163.—Const Law 90.1(4).

C.A.9 (Cal.) 1999. Any public property that is neither a traditional public forum or a designated public forum is a “nonpublic forum,” and the government may limit expressive activity in nonpublic fora if the limitation is reasonable and not based on the speaker’s viewpoint. U.S.C.A. Const.Amend. 1.—DiLoreto v. Downey Unified School Dist. Bd. of Educ., 196 F.3d 958, certiorari denied 120 S.Ct. 1674, 529 U.S. 1067, 146 L.Ed.2d 483.—Const Law 90.1(4).

C.A.9 (Cal.) 1999. High school’s baseball field fence was a “nonpublic forum” open for a limited purpose, and the district could exclude subjects from posting thereon that would be disruptive to the educational purpose of the school; the school sold advertising space on the fence to defray athletic program expenses, but excluded certain subjects from the advertising forum as sensitive or too controversial for the forum’s high school context, and there was no evidence in the record that any political, religious, or controversial public issue advertising was ever permitted on the fence. U.S.C.A. Const.Amend. 1.—DiLoreto v. Downey Unified School Dist. Bd. of Educ., 196 F.3d 958, certiorari denied 120 S.Ct. 1674, 529 U.S. 1067, 146 L.Ed.2d 483.—Const Law 90.1(4); Schools 172.

C.A.10 (Colo.) 1999. “Nonpublic forum,” in which government has much greater latitude to restrict protected speech than in traditional public forum or designated public forum, consists of any government property that is not by tradition or designation a forum for public communication. U.S.C.A. Const.Amend. 1.—Hawkins v. City and County of Denver, 170 F.3d 1281, certiorari denied 120 S.Ct. 172, 528 U.S. 871, 145 L.Ed.2d 145.—Const Law 90.1(4).

C.A.10 (Colo.) 1999. Covered pedestrian walkway in performing arts complex owned by city and county was “nonpublic forum,” in which government had much greater latitude to restrict protected speech than in traditional public forum or designated public forum; although walkway was generally open to public, it was closed to vehicles, its function was simply to permit access to components of complex, and demonstrations and leafletting were not permitted within it without consent. U.S.C.A. Const.Amend. 1.—Hawkins v. City and County of Denver, 170 F.3d 1281, certiorari denied 120 S.Ct. 172, 528 U.S. 871, 145 L.Ed.2d 145.—Const Law 90.1(4).

C.A.2 (Conn.) 1992. Interior postal walkway which was constructed solely for purpose of assisting patrons of post office to get from parking lot to front door of post office was “nonpublic forum,” for First Amendment purposes. U.S.C.A. Const. Amend. 1.—Longo v. U.S. Postal Service, 983 F.2d 9, certiorari denied 113 S.Ct. 2994, 509 U.S. 904, 125 L.Ed.2d 689.—Const Law 90.1(4).

C.A.11 (Fla.) 1994. Public housing complex which was government owned and dedicated for residential use by eligible low income families was a “nonpublic forum”; in practice, access to the property was carefully limited to lawful residents, their invited guests and those conducting official busi-

ness. U.S.C.A. Const.Amend. 1.—*Daniel v. City of Tampa, Fla.*, 38 F.3d 546, rehearing and suggestion for rehearing denied 47 F.3d 433, certiorari denied 115 S.Ct. 2557, 515 U.S. 1132, 132 L.Ed.2d 811.—Const Law 90.1(4).

C.A.11 (Ga.) 1998. “Nonpublic forum” is public property that is not by tradition or designation a forum for public communication. U.S.C.A. Const. Amend. 1.—*U.S. v. Corrigan*, 144 F.3d 763.—Const Law 90.1(4).

C.A.11 (Ga.) 1998. Military base was “nonpublic forum,” so military officials there could impose regulations on speech as long as regulations were reasonable and content-neutral. U.S.C.A. Const. Amend. 1.—*U.S. v. Corrigan*, 144 F.3d 763.—Const Law 90.1(4).

C.A.11 (Ga.) 1993. “Nonpublic forum” is public property which is not by tradition or designation forum for public communication, and limits on access to such forum must meet only reasonable standard. U.S.C.A. Const.Amend. 1.—*Crowder v. Housing Authority of City of Atlanta*, 990 F.2d 586.—Const Law 90.1(4).

C.A.11 (Ga.) 1986. Ingress and egress walkways to post office buildings are a “nonpublic forum,” so that regulation restricting solicitation on such walkways must be reasonable and viewpoint neutral to satisfy First Amendment, where walkways are intended to accommodate traffic to and from post office for conduct of postal business and have not traditionally been sites for expressive conduct, as opposed to public sidewalks surrounding buildings, which remain open for expressive conduct. U.S.C.A. Const.Amend. 1.—*U.S. v. Belsky*, 799 F.2d 1485, rehearing denied 805 F.2d 1043.—Const Law 90.1(4).

C.A.7 (Ind.) 1996. Property can be designated as public forum for purposes of free speech analysis either by tradition or by law; “traditional public forum” includes properties like streets and parks, which have immemorially been held in trust for use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions, while “legally created public forum” is one where government has intentionally—not by inaction or by permitting limited discourse—opened nontraditional forum for public discourse, and any remaining government property is considered “nonpublic forum.” U.S.C.A. Const.Amend. 1.—*Grossbaum v. Indianapolis-Marion County Bldg. Authority*, 100 F.3d 1287, certiorari denied 117 S.Ct. 1822, 520 U.S. 1230, 137 L.Ed.2d 1030.—Const Law 90.1(4).

C.A.7 (Ind.) 1996. “Nonpublic forum,” for purposes of analyzing right to use government property for private expression, is area that government may reserve for its intended purposes, and one to which government may control or limit access. U.S.C.A. Const.Amend. 1.—*Johnson v. City of Fort Wayne, Ind.*, 91 F.3d 922.—Const Law 90.1(4).

C.A.5 (La.) 1989. State bar journal, as the trade publication of the state bar association, was a “non-public forum,” considering that journal was not

established as an open forum for the expressive activities of public, or of all members of the bar; rather, invitation extends to the public to submit articles and advertisements for consideration by the editorial board within framework of editorial discretion necessary to fulfill magazine’s purposes. U.S.C.A. Const.Amend. 1.—*Estiverne v. Louisiana State Bar Ass’n*, 863 F.2d 371.—Const Law 90.1(1).

C.A.8 (Minn.) 1995. For purposes of determining standards by which limitations on speech respecting publicly-owned property or channels of communication must be evaluated for First Amendment purposes, “nonpublic forum” is public property which is not by tradition or designation forum for public communication, and is governed by different standards. U.S.C.A. Const.Amend. 1.—*Van Bergen v. State of Minn.*, 59 F.3d 1541.—Const Law 90.1(4).

C.A.8 (Neb.) 1997. For purpose of First Amendment analysis, “nonpublic forum” is public property which is not by tradition or designation forum for public communication; in addition to time, place, and manner regulations, state may reserve nonpublic forum for its intended purposes, communicative or otherwise, as long as regulation of speech is reasonable and not effort to suppress expression merely because public officials oppose speaker’s view. U.S.C.A. Const.Amend. 1.—*Families Achieving Independence and Respect v. Nebraska Dept. of Social Services*, 111 F.3d 1408.—Const Law 90.1(4).

C.A.3 (N.J.) 2000. Sidewalk outside Post Office was “non-public forum,” and government’s restriction of speech on sidewalk thus was required only to be reasonable, notwithstanding that two newspaper vending machines were located in sidewalk area, where nearest thoroughfare had no adjoining sidewalk, customers entered and departed Post Office via access roads, and sidewalk was designed specifically to facilitate access by customers to Post Office from parking area. U.S.C.A. Const.Amend. 1.—*Paff v. Kaltenbach*, 204 F.3d 425.—Const Law 90.1(4).

C.A.10 (N.M.) 1996. “Nonpublic forum,” for purposes of First Amendment claim challenging government’s restriction of protected speech by private persons on government property, is government property that is not by tradition or designation a forum for public communication. U.S.C.A. Const.Amend. 1.—*Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, certiorari denied 117 S.Ct. 360, 519 U.S. 949, 136 L.Ed.2d 251.—Const Law 90.1(4).

C.A.2 (N.Y.) 1992. “Non-public forum,” for purposes of free speech analysis under First Amendment, includes property that is not open for communicative purposes either by tradition or designation. U.S.C.A. Const.Amend. 1.—*Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 959 F.2d 381, certiorari granted 113 S.Ct. 51, 506 U.S. 813, 121 L.Ed.2d 20, reversed 113 S.Ct. 2141, 508 U.S. 384, 124 L.Ed.2d 352, on remand 17 F.3d 1425.—Const Law 90.1(4).

C.A.2 (N.Y.) 1991. “Nonpublic forum” is property that is not open by tradition to public for communication. U.S.C.A. Const.Amend. 1.—*Travis v. Owego-Apalachin School Dist.*, 927 F.2d 688.—Const Law 90.1(4).

C.A.3 (Pa.) 1990. A “nonpublic forum” exists when publicly owned facilities have been dedicated to use for either communicative or noncommunicative purposes but have never been designated for indiscriminate expressive activity by the general public; content-based regulation of speech in that category is examined under the reasonable nexus standard. U.S.C.A. Const.Amend. 1.—*Gregoire v. Centennial School Dist.*, 907 F.2d 1366, certiorari denied 111 S.Ct. 253, 498 U.S. 899, 112 L.Ed.2d 211.—Const Law 90.1(4).

C.A.6 (Tenn.) 2000. City’s Internet home page, from which city had established hypertext links to other web sites on an individualized basis, first in response to user requests, and then only for web sites of “non-profit” organizations, was a “nonpublic forum,” for purposes of First Amendment’s free speech guarantee. U.S.C.A. Const.Amend. 1.—*Putnam Pit, Inc. v. City of Cookeville, Tenn.*, 221 F.3d 834, 2000 Fed.App. 235P.—Const Law 90.1(4).

C.A.5 (Tex.) 2001. Three different categories of government-owned property are recognized, for purposes of First Amendment’s free speech guarantee: a “traditional public forum” is a place which by long tradition or by government fiat has been devoted to assembly and debate, such as a public street or a parks, while a “designated public forum” is a place or channel of communication assigned by the government for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects, and a “non-public forum” is a place which is not by tradition or designation a forum for public communication. U.S.C.A. Const.Amend. 1.—*Vasquez v. Housing Authority of City of El Paso*, 271 F.3d 198, rehearing en banc granted 289 F.3d 350.—Const Law 90.1(4).

C.A.5 (Tex.) 2001. Housing development owned by city housing authority was a “nonpublic forum,” for purposes of First Amendment challenge to authority’s enforcement of its trespassing regulations to bar political candidates from engaging in door-to-door campaigning at housing development. U.S.C.A. Const.Amend. 1.—*Vasquez v. Housing Authority of City of El Paso*, 271 F.3d 198, rehearing en banc granted 289 F.3d 350.—Const Law 90.1(4).

C.A.5 (Tex.) 2001. “Nonpublic forum,” is not private forum, and because it is government-sponsored medium of communication, it is still subject to First Amendment constraints. U.S.C.A. Const. Amend. 1.—*Chiu v. Plano Independent School Dist.*, 260 F.3d 330.—Const Law 90.1(4).

C.A.5 (Tex.) 2001. School district’s mail delivery system did not rise to level of “designated public forum” but was only a “limited public forum” or “nonpublic forum,” for First Amendment purposes, where district had not opened its mail system up to general public, but had granted only selective access

to non-profit organizations that provided programs or services for students. U.S.C.A. Const.Amend. 1.—*Chiu v. Plano Independent School Dist.*, 260 F.3d 330.—Const Law 90.1(4); Schools 72.

C.A.5 (Tex.) 1999. Fora may be classified, for purposes of determining whether access is guaranteed by the First Amendment, as a “traditional public forum” which by long tradition or by government fiat has been devoted to assembly and debate, as a “designated public forum” created by the government to be a place or channel of communication not traditionally open to assembly and debate for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects, or as a “nonpublic forum” to which access is not guaranteed. U.S.C.A. Const.Amend. 1.—*Doe v. Santa Fe Independent School Dist.*, 168 F.3d 806, suggestion for rehearing denied 171 F.3d 1013, certiorari granted in part *Santa Fe Independent School District v. Doe*, 120 S.Ct. 494, 528 U.S. 1002, 145 L.Ed.2d 381, affirmed 120 S.Ct. 2266, 530 U.S. 290, 147 L.Ed.2d 295.—Const Law 90.1(4), 91.

C.A.10 (Utah) 1997. In First Amendment context, “nonpublic forum” consists of public property which is not by tradition or designation a forum for public communication. U.S.C.A. Const.Amend. 1.—*Summum v. Callaghan*, 130 F.3d 906.—Const Law 90.1(4).

C.A.10 (Utah) 1990. In a “nonpublic forum,” state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation of speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view. U.S.C.A. Const. Amend. 1.—*Barnard v. Chamberlain*, 897 F.2d 1059.—Const Law 90.1(4).

C.A.2 (Vt.) 2001. Vanity license plates were not public forum for purpose of citizen’s claim under First Amendment relating to her selection of letters “SHTHPNS” on those license plates; vanity plates were “nonpublic forum” because State of Vermont’s policy in issuing them was to raise revenue while serving purpose of vehicle identification, state extensively regulated expressive activity in vanity plate regime, general public did not have unimpeded access to vanity plates, and nature of vanity plates was inconsistent with meaningful expressive activity. U.S.C.A. Const.Amend. 1; 23 V.S.A. § 304.—*Perry v. McDonald*, 280 F.3d 159.—Const Law 90.1(4).

C.A.2 (Vt.) 2001. In the context of First Amendment free speech, a “nonpublic forum” is characterized by selective access, which necessarily means that the state can select or limit who may speak and what may be said prior to its expression as long as the restrictions meet the requirements of reasonableness and viewpoint neutrality; accordingly, a restriction on expression which would otherwise be deemed a prior restraint if it had been applied in a public forum is valid in a nonpublic forum as long as it is reasonable and viewpoint neutral. U.S.C.A. Const.Amend. 1.—*Perry v. McDonald*, 280 F.3d 159.—Const Law 90.1(4).

C.A.7 (Wis.) 1996. Public elementary school was “nonpublic forum,” for purpose of First Amendment challenge to school’s policy regarding student distribution of nonschool materials, absent any indication that school had been opened to anyone for “indiscriminate use.” U.S.C.A. Const. Amend. 1.—Muller v. Jefferson Light-house School, 98 F.3d 1530, certiorari denied 117 S.Ct. 1335, 520 U.S. 1156, 137 L.Ed.2d 495.—Const Law 90.1(4).

D.Conn. 1991. Interior post office walkway was a “nonpublic forum” under First Amendment where post office was located on property owned by Postal Service and used exclusively for postal service operations, lot was surrounded by public, municipal sidewalks and streets with building separated from sidewalks and streets by interior postal walkway, parking lot, driving lanes and garage space for postal service vehicles, and interior postal service walkway provided only means by which post office customers could travel from parking lots to post office buildings. U.S.C.A. Const.Amend. 1.—Longo v. U.S. Postal Service, 761 F.Supp. 220, reversed 953 F.2d 790, certiorari granted, vacated 113 S.Ct. 31, 506 U.S. 802, 121 L.Ed.2d 5, on remand 983 F.2d 9, certiorari denied 113 S.Ct. 2994, 509 U.S. 904, 125 L.Ed.2d 689.—Const Law 90.1(4).

D.D.C. 2000. “Nonpublic forum,” for free speech purposes, includes all public property that does not fall within parameters of traditional public forum or designated public forum. U.S.C.A. Const.Amend. 1.—Bynum v. U.S. Capitol Police Bd., 93 F.Supp.2d 50, amended, reconsideration denied 96 F.Supp.2d 4.—Const Law 90.1(4).

D.D.C. 1986. Where government has not only limited access to forum according to articulated purpose, but also has consistently required government permission for access, a “nonpublic forum” is created.—Kurtz v. Baker, 630 F.Supp. 850, vacated 829 F.2d 1133, 265 U.S.App.D.C. 1, certiorari denied 108 S.Ct. 2831, 486 U.S. 1059, 100 L.Ed.2d 931.—Const Law 90.1(4).

S.D.Fla. 1993. “Nonpublic forum,” for purposes of determining constitutionality of restriction on access to government property, is publicly owned facility that has been dedicated to use for either communicative or noncommunicative purposes but has never been designated for indiscriminate expressive activity by general public. U.S.C.A. Const. Amend. 1.—Pritchard v. Carlton, 821 F.Supp. 671.—Const Law 90.1(4).

N.D.Ga. 2002. “Nonpublic forum,” for purpose of First Amendment free speech claim, is public property that is not by tradition forum that has been designated for public communication of ideas. U.S.C.A. Const.Amend. 1.—Jackson v. City of Stone Mountain, 232 F.Supp.2d 1337.—Const Law 90.1(4).

N.D.Ga. 2000. For purposes of First Amendment free speech analysis, government property is generally defined as a traditional public forum, a designated public forum, or a non-public forum; “traditional public forum” is a place which by long

tradition or by government fiat has been devoted to assembly and debate, whereas “designated public forum” arises when the government designates a forum for use by the public at large for purposes of assembly and speech, for use by certain speakers, or for the discussion of certain subjects, and, finally, “non-public forum” is a forum that the government has closed to public discourse and assembly. U.S.C.A. Const.Amend. 1.—National Abortion Federation v. Metropolitan Atlanta Rapid Transit Authority, 112 F.Supp.2d 1320.—Const Law 90.1(4).

N.D.Ga. 1999. Production facilities and equipment for public access television were “nonpublic forum,” rather than designated public forum, and thus operator of facility could bar cable show producer from using facility and equipment for violating its reasonable rules of usage; access to facilities and equipment was limited to producers who met certain qualification requirements and who agree to comply with rules and regulations. U.S.C.A. Const. Amend. 1.—Jersawitz v. People TV, 71 F.Supp.2d 1330.—Tel 456.

N.D.Ga. 1989. Portico adjacent to lobby of federal building was “nonpublic forum” for purposes of First Amendment; portico was bounded by glass wall of lobby on one side and was partially enclosed on other side by large concrete columns; and demonstrators were never permitted on portico. U.S.C.A. Const.Amend. 1.—U.S. v. Gilbert, 720 F.Supp. 1554, affirmed in part, reversed in part 920 F.2d 878.—Const Law 90.1(4).

C.D.Ill. 1989. “Nonpublic forum” for First Amendment purposes is public property not traditionally considered public forum and not open for general use by public. U.S.C.A. Const.Amend. 1.—Nelson v. Moline School Dist. No. 40, 725 F.Supp. 965.—Const Law 90.1(4).

N.D.Ill. 1999. “Nonpublic forum” under free speech law is property not open to general public, even though site may sometimes be used for discussion and other expressive activities. U.S.C.A. Const.Amend. 1.—DeBoer v. Village of Oak Park, 53 F.Supp.2d 982, reconsideration granted 90 F.Supp.2d 922, vacated in part on reconsideration 86 F.Supp.2d 804, affirmed in part, reversed in part 267 F.3d 558.—Const Law 90.1(4).

N.D.Ill. 1998. Three types of forums are recognized for purposes of First Amendment’s free speech clause: first is “traditional public forum,” property that has traditionally been open to public for expressive activity, such as public streets and parks; second is “limited or designated public forum,” which is created by government designation of place or channel of communication for use by public at large for assembly and speech, for use by certain speakers, or for discussion of certain subjects; third is “nonpublic forum,” area that government may reserve for its intended purposes, and to which government may control or limit access. U.S.C.A. Const.Amend. 1.—Sefick v. Gardner, 990 F.Supp. 587, affirmed 164 F.3d 370, certiorari denied 119 S.Ct. 2393, 527 U.S. 1035, 144 L.Ed.2d 794.—Const Law 90.1(4).

N.D.Ill. 1992. “Nonpublic forum” or “closed forum” is one that is not by tradition or designation a forum for public communication and, in addition to time, place and manner regulations, state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose speaker’s view. U.S.C.A. Const.Amend. 1.—*Hedges By and Through Hedges v. Waucousta Community Unit School Dist. No. 118*, 807 F.Supp. 444, vacated 9 F.3d 1295, 136 A.L.R. Fed. 755.—Const Law 90.1(4).

N.D.Ill. 1987. Provisions of the Illinois Voluntary Payroll Deductions Act, which allowed qualified organizations to solicit funds from state employees, created “nonpublic forum” for such solicitation; accordingly, state could impose reasonable restrictions thereon without violating excluded organizations’ First Amendment rights. U.S.C.A. Const.Amend. 1; Ill.S.H.A. ch. 15, ¶¶ 501–505.—*Pilsen Neighbors Community Council v. Burris*, 672 F.Supp. 295.—Const Law 90.1(1).

S.D.Ind. 1995. Government property which has not been traditionally open to the public for all expressive activity or which has not been designated by the government as place for full range of expressive activity is a “nonpublic forum,” and government may exercise control over access to it for expressive activity based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. U.S.C.A. Const. Amend. 1.—*Grossbaum v. Indianapolis-Marion County Bldg. Authority*, 909 F.Supp. 1187, affirmed 100 F.3d 1287, certiorari denied 117 S.Ct. 1822, 520 U.S. 1230, 137 L.Ed.2d 1030.—Const Law 90.1(4).

E.D.La. 2000. “Nonpublic forum,” for purposes of free speech analysis, is any forum which is not by tradition or designation a forum for public communication. U.S.C.A. Const.Amend. 1.—*Henderson v. Stadler*, 112 F.Supp.2d 589, stay denied 2000 WL 1875987, reversed 287 F.3d 374, rehearing and re-hearing denied 46 Fed.Appx. 734, stay denied 123 S.Ct. 404, 154 L.Ed.2d 289, certiorari denied 123 S.Ct. 602, 154 L.Ed.2d 521.—Const Law 90.1(4).

D.Mass. 2001. For purposes of free speech analysis, a “non-public forum” is public property not open by tradition or designation to the public for expressive activities. U.S.C.A. Const.Amend. 1.—*Courtemanche v. General Services Admin.*, 172 F.Supp.2d 251.—Const Law 90.1(4).

E.D.Mo. 1996. Under First Amendment free speech analysis, “nonpublic forum” is public property which is not by tradition or designation a forum for public communication, consisting of property usually incompatible with expressive activity. U.S.C.A. Const.Amend. 1.—*State of Mo. ex rel. Missouri Highway and Transp. Com’n v. Cuffley*, 927 F.Supp. 1248, vacated 112 F.3d 1332, rehearing denied.—Const Law 90.1(4).

D.N.J. 1997. For First Amendment free speech purposes, “nonpublic forum” is publicly-owned fa-

cility that is not by tradition or designation a forum for public communication. U.S.C.A. Const.Amend. 1.—*Marilyn Manson, Inc. v. New Jersey Sports & Exposition Authority*, 971 F.Supp. 875.—Const Law 90.1(4).

D.N.M. 2000. Space reserved on city’s water bill for monthly message from mayor was “non-public forum,” and thus city’s denial of others’ access to same space to reply to mayor’s advocacy of sales tax increase was subject only to reasonableness standard; water bill’s purpose was not dissemination of opinions, bill’s extent of use was not only selective but prohibitive, and city’s intent was to feature messages only from mayor. U.S.C.A. Const. Amends. 1, 14.—*Cook v. Baca*, 95 F.Supp.2d 1215, affirmed 12 Fed.Appx. 640, certiorari denied 122 S.Ct. 462, 534 U.S. 994, 151 L.Ed.2d 379.—Const Law 90.1(1), 90.1(4).

N.D.N.Y. 1998. “Nonpublic forum,” for purposes of First Amendment analysis, is government property that has not been opened for public speech either by tradition or by designation. U.S.C.A. Const.Amend. 1.—*Saratoga Bible Training Institute, Inc. v. Schuyerville Cent. School Dist.*, 18 F.Supp.2d 178.—Const Law 90.1(4).

N.D.N.Y. 1998. “Nonpublic forum” encompasses public property that is not by tradition or designation a forum for communication; such property is subject to time, place and manner restrictions with respect to speech, and may be reserved for its intended purposes so long as reasonable regulations on speech are not based upon public officials’ opposition to the speaker’s viewpoint. U.S.C.A. Const.Amend. 1.—*Liberty Christian Center, Inc. v. Board of Educ. of City School Dist. of City of Watertown*, 8 F.Supp.2d 176.—Const Law 90.1(4).

S.D.N.Y. 1995. State has power, no less than private owner of property, to preserve property under its control for use to which it is lawfully dedicated, and “non-public forum” of public property that is not by tradition or designation forum for public communication may be reserved by State for its intended purposes, communicative or otherwise, as long as regulation on speech is reasonable and not effort to suppress expression merely because public officials oppose speaker’s view. U.S.C.A. Const.Amend. 1.—*Trinity United Methodist Parish v. Board of Educ. of City School Dist. of City of Newburgh*, 907 F.Supp. 707.—Const Law 90.1(4).

N.D.Ohio 2002. Pole on city street, erected for purpose of posting banners by non-profit organizations, was “nonpublic forum” for purposes of First Amendment challenge to denial of bannerizing permission; there was enforced written policy limiting access to banners of nonprofit organizations raising funds for community purposes, pole was by nature capable only of conveying information rather than allowing dialogue, and pole was not traditional means of expression. U.S.C.A. Const.Amend. 1.—*Heartbeat of Ottawa County, Inc. v. City of Port Clinton*, 207 F.Supp.2d 699.—Const Law 90.1(4).

E.D.Pa. 1996. “Nonpublic forum” is not by tradition or designation forum for public communica-

## NON-PUBLIC FORUM

tion; mere fact that government property is used for expressive activity does not qualify it as public forum, but rather, state, no less than private owner of property, has power to preserve property under its control for use to which it is lawfully dedicated. U.S.C.A. Const.Amend. 1.—Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transp. Authority, 937 F.Supp. 425, reversed 148 F.3d 242, certiorari denied 119 S.Ct. 797, 525 U.S. 1068, 142 L.Ed.2d 659.—Const Law 90.1(4).

W.D.Pa. 1996. “Nonpublic forum,” for purposes of determining validity of government restriction of expressive speech, exists when government-owned property has not been dedicated to indiscriminate expressive activity by general public. U.S.C.A. Const.Amend. 1.—Murray v. Pittsburgh Bd. of Public Educ., 919 F.Supp. 838.—Const Law 90.1(4).

W.D.Pa. 1996. Public high school classroom is “nonpublic forum,” for purposes of determining validity of restrictions on expressive speech; as such, school may restrict use of its classrooms to serve school’s intended educational purposes as long as restrictions are reasonable and are not effort to suppress teacher’s expression merely because school opposes teacher’s particular views. U.S.C.A. Const.Amend. 1.—Murray v. Pittsburgh Bd. of Public Educ., 919 F.Supp. 838.—Const Law 90.1(4).

D.R.I. 1994. “Nonpublic forum” consists of government property which has not been designated as forum for general expressive activity either by tradition or by explicit government action, and which is not compatible with such activity, but distinctions between speakers allowed access and those denied access to nonpublic forum must be viewpoint neutral, and regulations must be reasonable in light of the purpose served by the forum. U.S.C.A. Const.Amend. 1.—National Ass’n of Social Workers v. Harwood, 860 F.Supp. 943, opinion modified on reconsideration 874 F.Supp. 530, reversed 69 F.3d 622.—Const Law 90.1(4).

M.D.Tenn. 1998. City did not create “designated public forum” by establishing internet web page and allowing links on selective basis, and thus, web page was “nonpublic forum” to which city could restrict access as long as restrictions were reasonable and were not an effort to suppress expression merely because public officials opposed speaker’s view; city did no more than reserve eligibility for access to forum to particular class of speakers that would promote tourism, economic welfare, and industry in city, and whose members were required, as individuals, to obtain permission to use it. U.S.C.A. Const.Amend. 1.—Putnam Pit, Inc. v. City of Cookeville, 23 F.Supp.2d 822, affirmed in part, reversed in part 221 F.3d 834, 2000 Fed.App. 235P.—Const Law 90.1(4); Mun Corp 718.

E.D.Tex. 2000. Texas Workforce Commission’s (TWC’s) network for providing workforce development services to employers and job seekers in Texas, including bulletin boards at its offices and internet site, constituted “nonpublic forum” for First Amendment purposes; sole purpose of pro-

gram was to facilitate dissemination of job opportunities from employers to employees, and TWC did not allow general access or indiscriminate use of forum by general public. U.S.C.A. Const.Amend. 1; Wagner-Peyser Act, § 1 et seq., 29 U.S.C.A. § 49 et seq.; 20 C.F.R. § 652.3.—Cahill v. Texas Workforce Com’n, 121 F.Supp.2d 1022, affirmed 263 F.3d 163.—Const Law 90.1(4), 90.1(9).

E.D.Va. 1999. Restrictions on speech protected by First Amendment, in “non-public forum” not opened for public use, such as correction institute, military base or mail room of public school, government may impose time, place and manner restrictions, and reserve forum for its intended purpose, communicative or otherwise, as long as regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose speaker’s views. U.S.C.A. Const.Amend. 1.—Lytle v. Brewer, 77 F.Supp.2d 730.—Const Law 90.1(1.3), 90.1(1.4), 90.1(4).

W.D.Va. 1992. University’s student activities fund comprised of mandatory student fees constituted a “non-public forum” and not a “limited public forum” for purposes of determining whether the university’s denial of funding to an unincorporated association officially recognized by the university as a “contracted independent organization” with access to university facilities violated the association’s constitutional rights, where university had limited eligibility for fund monies to organizations deemed “appropriate” as contributing to the educational focus of the university, though university had given funds to certain contracted independent organizations. U.S.C.A. Const.Amend. 1.—Rosenberger v. Rector and Visitors of University of Virginia, 795 F.Supp. 175, affirmed 18 F.3d 269, certiorari granted 115 S.Ct. 417, 513 U.S. 959, 130 L.Ed.2d 333, reversed 115 S.Ct. 2510, 515 U.S. 819, 132 L.Ed.2d 700.—Colleges 9.20(1); Const Law 90.1(1.4).

Ariz.App. Div. 2 1997. Government must show compelling government interest to exclude speakers from “public forum,” meaning place or means for communication that government intentionally has designated for discussion and debate; however, government can impose reasonable time, place, and manner restrictions upon speech in “nonpublic forum,” meaning one to which public does not have access. U.S.C.A. Const.Amend. 1.—Phoenix Elementary School Dist. No. 1 v. Green, 943 P.2d 836, 189 Ariz. 476, review denied.—Const Law 90.1(4).

Cal. 1992. Limitations on expressive activity conducted on “nonpublic forum”—public property that is neither a traditional nor a designated public forum—need only be reasonable, as long as regulation is not an effort to suppress speaker’s activity due to disagreement with speaker’s view. U.S.C.A. Const.Amend. 1.—Clark v. Burleigh, 841 P.2d 975, 14 Cal.Rptr.2d 455, 4 Cal.4th 474, rehearing denied.—Const Law 90.1(4).

Colo.App. 2001. The “nonpublic forum” is public property that is not by tradition or designation a forum for public communication. U.S.C.A. Const.

Amend. 1.—*Holliday v. Regional Transp. Dist.*, 43 P.3d 676, certiorari denied.—Const Law 90.1(4).

D.C. 1991. Restricted corridor five to ten feet from Democratic door of House of Representatives in Capitol was “nonpublic forum” under First Amendment. U.S.C.A. Const.Amend. 1.—*Marcowitz v. U.S.*, 598 A.2d 398, certiorari denied 113 S.Ct. 818, 506 U.S. 1035, 121 L.Ed.2d 689.—Const Law 90.1(4).

Ill.App. 4 Dist. 1992. Public-owned facility which is dedicated to use for either communicative or noncommunicative purposes, but has never been designated for indiscriminate expressive activity by general public is “nonpublic forum” under First Amendment. U.S.C.A. Const.Amend. 1.—*People v. DeRossett*, 178 Ill.Dec. 244, 604 N.E.2d 500, 237 Ill.App.3d 315.—Const Law 90.1(4).

Me. 1986. Town voter registration office was “nonpublic forum,” rather than “public forum,” with overriding governmental interest in maintaining orderly setting for prompt and efficient screening and registration of voters, and, thus, defendant’s arrest and conviction for criminal trespass after defendant expressed displeasure with town and voter registration process was not effort to suppress expression, was reasonable as to time, place, and manner, and, therefore, did not abridge freedom of speech under State and Federal Constitutions. 17-A M.R.S.A. § 402, subd. 1, par. D; U.S.C.A. Const.Amend. 1; M.R.S.A. Const. Art. 1, § 4.—*State v. Chiapetta*, 513 A.2d 831.—Const Law 90.1(4).

N.J. 2000. A “non-public forum” is a publicly owned or operated venue that does not serve as a forum for public communication. U.S.C.A. Const. Amend. 1.—*Green Party of New Jersey v. Hartz Mountain Industries, Inc.*, 752 A.2d 315, 164 N.J. 127.—Const Law 90.1(4).

N.Y.A.D. 2 Dept. 1990. Government armory operated as city shelter for homeless was “nonpublic forum” for First Amendment purposes. U.S.C.A. Const.Amend. 1.—*Gold-Greenberger v. Human Resources Admin. of City of New York*, 552 N.Y.S.2d 328, 154 A.D.2d 124, reversed 571 N.Y.S.2d 897, 77 N.Y.2d 973, 575 N.E.2d 383.—Const Law 90.1(4).

N.Y.City Crim.Ct. 1994. Category of “nonpublic forum” for purposes of First Amendment analysis includes all government property which state may reserve for its intended purpose. U.S.C.A. Const. Amend. 1.—*People v. Schrader*, 617 N.Y.S.2d 429, 162 Misc.2d 789.—Const Law 90.1(4).

Ohio App. 10 Dist. 1998. Government workplace during work hours, like any place of employment, is geared toward accomplishing the government’s business; thus, it is a “nonpublic forum.” U.S.C.A. Const.Amend. 1; Const. Art. 1, §§ 1, 11.—*United Auto Workers, Local Union 1112 v. Philomena*, 700 N.E.2d 936, 121 Ohio App.3d 760, stay denied 692 N.E.2d 615, 81 Ohio St.3d 1508, dismissed, appeal not allowed 695 N.E.2d 1148, 82 Ohio St.3d 1450.—Const Law 90.1(4).

Tex.App.—Fort Worth 1993. For purposes of First Amendment analysis, “public forum” is area which has traditionally been devoted to assembly and public debate, “limited public forum” is one which government has voluntarily opened for use by public for certain speakers, and “nonpublic forum” is one which neither by tradition nor government action has become forum for public communication. U.S.C.A. Const.Amend. 1.—*Otwell v. State*, 850 S.W.2d 815, petition for discretionary review refused.—Const Law 90.1(4).

Tex.App.—Austin 2000. “Nonpublic forum” is one that neither traditionally nor by government action has become a forum for public communication. U.S.C.A. Const.Amend. 1.—*Bader v. State*, 15 S.W.3d 599, petition for discretionary review refused.—Const Law 90.1(4).

Tex.App.—Texarkana 1988. Sidewalk inside school campus constituted “nonpublic forum,” for purposes of right of free expression; place was not in area which by tradition had been devoted to public assembly or debate by general public. U.S.C.A. Const.Amend. 1; Vernon’s Ann.Texas Const. Art. 1, § 8.—*Reed v. State*, 762 S.W.2d 640, petition for discretionary review refused, certiorari denied *Harris v. Texas*, 110 S.Ct. 81, 493 U.S. 822, 107 L.Ed.2d 47.—Const Law 90.1(4).

Tex.App.—Beaumont 2000. Church was “non-public forum,” for purposes of First Amendment free speech challenge to constitutionality of offense of criminal trespass as applied to defendant, who was convicted for refusing to leave seminar which he allegedly disrupted by commenting loudly on speaker’s remarks. U.S.C.A. Const.Amend. 1; V.T.C.A., Penal Code § 30.05.—*Thompson v. State*, 12 S.W.3d 915, petition for discretionary review refused.—Const Law 90.1(4); Tresp 78.

Tex.App.—Beaumont 2000. A “nonpublic forum,” for purposes of the First Amendment’s free speech clause, is one which neither by tradition nor government action has become a forum for public communication. U.S.C.A. Const.Amend. 1.—*Thompson v. State*, 12 S.W.3d 915, petition for discretionary review refused.—Const Law 90.1(4).

## NON-PUBLIC FORUMS

C.A.D.C. 1995. For First Amendment freedom of speech purposes, “nonpublic forums,” in which government has not opened its property to public, are treated less stringently than are public forums. U.S.C.A. Const.Amend. 1.—*Alliance for Community Media v. F.C.C.*, 56 F.3d 105, 312 U.S.App.D.C. 141, certiorari granted *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 116 S.Ct. 471, 516 U.S. 973, 133 L.Ed.2d 401, affirmed in part, reversed in part 116 S.Ct. 2374, 518 U.S. 727, 135 L.Ed.2d 888, conformed to IN THE MATTER OF IMPLEMENTATION OF SECTION 10 OF THE CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992, 1997 WL 225468.—Const Law 90.1(4).

C.A.7 (Ill.) 1998. Meeting rooms in a government-owned renovated naval pier containing recre-

**NON-PUBLIC INFORMATION**

ational and commercial facilities were “nonpublic forums” under free-speech law, where the government rented the rooms to organizations for use by their members and guests rather than by the public at large and sought to maximize positive spillovers and minimize negative ones in deciding whom to rent to and at what price. U.S.C.A. Const.Amend. 1.—Chicago Acorn v. Metropolitan Pier and Exposition Authority, 150 F.3d 695, on remand 1999 WL 199597, on remand 1999 WL 413480.—Const Law 90.1(4).

C.A.7 (Ill.) 1998. “Nonpublic forums” under free-speech law are facilities that are not open to the general public although they are usable and sometimes used for discussion and other expressive activities. U.S.C.A. Const.Amend. 1.—Chicago Acorn v. Metropolitan Pier and Exposition Authority, 150 F.3d 695, on remand 1999 WL 199597, on remand 1999 WL 413480.—Const Law 90.1(4).

E.D.Mo. 1985. City workplace and payroll were “nonpublic forums” in which city could reasonably regulate speech under the First Amendment, and city did not transform workplace or payroll into public forum, where city did not allow any organization claiming to be a charity access to its payroll to receive funds from city employees through payroll deductions, but required charities to meet city’s published requirements, including requirement that charitable organization’s administrative and fund-raising expenses not exceed 25 percent of gross contributions. U.S.C.A. Const.Amend. 1.—United Black Community Fund Inc. v. City of St. Louis, Mo., 613 F.Supp. 739, affirmed 800 F.2d 758.—Const Law 90.1(1).

D.N.J. 2001. Utility poles and borough’s right-of-way were “nonpublic forums,” access to which could be more tightly restricted than access to public forums; such areas were not traditional forums to which public had had open access for discourse in the past, and no evidence showed that borough ever allowed utility poles or right-of-way to be used by public for unfettered discourse or debate. U.S.C.A. Const.Amend. 1.—Tenafly Eruv Ass’n, Inc. v. Borough of Tenafly, 155 F.Supp.2d 142, reversed 309 F.3d 144.—Const Law 90.1(4).

E.D.N.C. 1988. “Nonpublic forums” are forums which have not traditionally been open for public debate or assembly, and government may restrict speech in nonpublic forum as long as such restrictions are reasonable and not content based. U.S.C.A. Const.Amend. 1.—Shopco Distribution Co., Inc. v. Commanding General of Marine Corps Base, Camp Lejeune, N.C., 696 F.Supp. 1063, affirmed 885 F.2d 167, rehearing denied.—Const Law 90(1).

W.D.Tex. 2000. City housing authority’s low-income housing complexes were “non-public forums,” for purposes of free speech analysis. U.S.C.A. Const.Amend. 1.—Vasquez v. Housing Authority of City of El Paso, 103 F.Supp.2d 927, reversed and remanded 271 F.3d 198, rehearing en banc granted 289 F.3d 350.—Const Law 90.1(4).

D.C. 1990. “Nonpublic forums” are properties which are not forums for public communication or

expression by tradition or designation. U.S.C.A. Const.Amend. 1.—Pearson v. U.S., 581 A.2d 347, certiorari denied 112 S.Ct. 51, 502 U.S. 808, 116 L.Ed.2d 28.—Const Law 90.1(4).

Tex.App.—Austin 2000. Television lounge in student union building of state university and university academic center were “nonpublic forums” for First Amendment purposes, where lounge was restricted to students, faculty, and staff, academic center housed library, offices, and computer lab, and there was no evidence that university had opened areas to public for purpose of expressive activities. U.S.C.A. Const.Amend. 1.—Bader v. State, 15 S.W.3d 599, petition for discretionary review refused.—Const Law 90.1(4).

Tex.App.—Texarkana 1988. “Nonpublic forums,” for purposes of right of free expression, are those which neither by tradition nor government action have become forums for public communication. U.S.C.A. Const.Amend. 1; Vernon’s Ann.Texas Const. Art. 1, § 8.—Reed v. State, 762 S.W.2d 640, petition for discretionary review refused, certiorari denied Harris v. Texas, 110 S.Ct. 81, 493 U.S. 822, 107 L.Ed.2d 47.—Const Law 90.1(4).

**NON-PUBLIC INFORMATION**

C.A.2 (N.Y.) 1996. To constitute “nonpublic information”, upon which insider trading claim can be brought under Rule 10b-5, information in question must be specific and more private than general rumor. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.—U.S. v. Mylett, 97 F.3d 663, certiorari denied Cusimano v. U.S., 117 S.Ct. 2509, 521 U.S. 1119, 138 L.Ed.2d 1013.—Sec Reg 60.28(12).

S.D.N.Y. 1998. To constitute “non-public information” under the Securities Exchange Act, information must be specific and more private than general rumor; information becomes public when disclosed to achieve a broad dissemination to the investing public generally and without favoring any special person or group. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.—S.E.C. v. Falbo, 14 F.Supp.2d 508.—Sec Reg 60.28(12).

S.D.N.Y. 1998. In determining whether information is “non-public information” under the Securities Exchange Act, issue is not the number of people who possess it but whether their trading has caused the information to be fully impounded into the price of the particular stock. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.—S.E.C. v. Falbo, 14 F.Supp.2d 508.—Sec Reg 60.28(12).

S.D.N.Y. 1998. Trader’s information about corporation’s planned tender offer for another company was “non-public information,” for purposes of fraud claim under Securities Exchange Act § 10(b) and Rule 10b-5, despite rumors in financial community about possible takeover, in light of specificity of trader’s information, and fact that target company’s stock increased by almost 50% immediately following public announcement of tender of

fer. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.—S.E.C. v. Falbo, 14 F.Supp.2d 508.—Sec Reg 60.28(12).

**NONPUBLIC OFFER**

Idaho 1995. “Nonpublic offer,” within exemption from registration under State Securities Act, exists where securities are offered only to those who possess enough intelligence, information and expertise to make sound business judgment or to those who have access to the type of information that would be contained in registration statement. I.C. § 30-1435(1).—State v. Shama Resources Ltd. Partnership, 899 P.2d 977, 127 Idaho 267.—Sec Reg 269.

Idaho 1995. Offering of securities to persons who are in need of protection of registration statement and who are not able to fend for themselves is not a “nonpublic offer” within meaning of exception to registration requirement. I.C. § 30-1435(1).—State v. Shama Resources Ltd. Partnership, 899 P.2d 977, 127 Idaho 267.—Sec Reg 269.

**NON-PUBLIC OFFICIAL**

Ohio App. 10 Dist. 1992. Environmental Board of Review (EBR) properly concluded that “non-public official” members of board of trustees of regional solid waste authority not otherwise required to file background information required by Ethics Commission were “key employees” subject to disclosure requirements of statute governing application for transfer of license to operate solid waste facility; moreover, action of the EBR in affirming order of director of the Ohio Environmental Protection Agency (EPA) exempting “non-public official” board members from filing of disclosure statements pursuant to solid waste statute and requiring instead for them to furnish same information pursuant to ethics statute as “public official” board members was lawful and reasonable. R.C. §§ 102.02, 3734.02, 3734.41(E).—Franklin Cty. Regional Solid Waste Mgt. Auth. v. Schregardus, 617 N.E.2d 761, 84 Ohio App.3d 591.—Environ Law 378.

**NONPUBLIC SCHOOLS**

N.D. 1977. Where statutes ordinarily use word “school” to mean “public school” and specify “non-public schools” when they are referred to, and use word “pupil” as referring to public school pupils, a statute referring to a payment of public funds for “each pupil who is transported” will be construed as applying only to public school pupils. NDCC 15-34.2-16, 15-40.1-16.—Dickinson Public School Dist. No. 1 v. Scott, 252 N.W.2d 216.—Schools 159.5(2).

**NONPUBLIC SOURCE**

La.App. 1 Cir. 1997. Community action agency was state agency, and not “nonpublic source” or “person,” for purpose of statute prohibiting public servant from receiving payment from nonpublic sources or person or participating in certain transactions, though statutes allowed such agency to be

designated as private, nonprofit organization for other purposes; community action agency was created by legislature, it was under supervision and authority of Department of Labor, and its entire budget was publicly funded. LSA-R.S. 23:62(1), 23:64.1, subd. E, 42:1102(16), 42:1111, subd. C(2)(d), 42:1112, subd. B(3, 5), 42:1115, subd. A(1).—Bankston v. Board of Ethics For Elected Officials, 703 So.2d 703, 1996-1764 (La.App. 1 Cir. 11/7/97), rehearing denied, writ granted 716 So.2d 366, 1998-0189 (La. 3/27/98), reversed 715 So.2d 1181, 1998-0189 (La. 6/22/98), on rehearing, on remand In re Ronald Bankston and Lounges, Inc., 761 So.2d 716, 1996-1764 (La.App. 1 Cir. 5/12/00).—Offic 110.

**NONPUBLIC USE**

Mo. 1949. Even in absence of actual fraud, a taking of property in ostensible behalf of public improvement in excess of what by any possibility could ever serve any public purpose is to that extent a taking for a “nonpublic use.” V.A.M.S. § 227.120; V.A.M.S. Const. 1945, art. 1, § 27; art. 4, § 29.—State ex rel. State Highway Com’n v. Curtis, 222 S.W.2d 64, 359 Mo. 402.—Em Dom 58.

**NONPUBLIC UTILITY OPERATION**

Cal.App. 1 Dist. 1980. Phrase “nonpublic utility operation,” within statute governing jurisdiction of Division of Occupational Safety and Health, was term of special meaning referring to those operations of electric interurban railroads which were not dedicated to unrestricted public use, and thus rapid transit system, which was entirely devoted to public use, was not involved in any “nonpublic utility operation,” and the Division did not have jurisdiction to enter order requiring modification of fire hose outlets in part of the transit system. West’s Ann. Labor Code, § 6800(a-c).—San Francisco Bay Area Rapid Transit Dist. v. Division of Occupational Saf. & Health, 168 Cal.Rptr. 489, 111 Cal.App.3d 362.—Labor 14.

**NONPURCHASE-MONEY LIEN**

Bkrtcy.S.D.Ohio 1993. Refinancing agreement executed by company to which purchase-money loan had been assigned, whereby balance of original purchase-money loan was paid off and additional funds were advanced to debtors, changed nature of assignee’s security interest from “purchase-money lien” to “nonpurchase-money lien,” which debtor could have avoided pursuant to bankruptcy statute. Bankr.Code, 11 U.S.C.A. § 522(f)(2).—In re Keeton, 161 B.R. 410.—Bankr 2787; Sec Tran 146.

**NON-PURCHASE MONEY SECURITY INTEREST**

Bkrtcy.D.Idaho 1993. Under Idaho law, refinancing agreement executed by purchase-money debtor which purported to “create” in creditor a purchase-money security interest in all collateral described in that or earlier agreements, subject to terms of refinancing agreement, was in nature of “novation”; accordingly, to the extent that creditor had previously held a purchase-money security in-

## NON-QUALIFIED DEFERRED

terest in collateral that was subject of earlier agreements, that interest was converted into a “nonpurchase-money security interest,” which debtor could avoid pursuant to bankruptcy lien avoidance provision. Bankr.Code, 11 U.S.C.A. § 522(f)(2).—In re Butler, 160 B.R. 155.—Bankr 2576.5(1); Nova 4.

Bkrcty.C.D.Ill. 1986. Bank had “nonpurchase money security interest” in debtor’s tools of trade, where debtor did not use loan to purchase tools of trade, but rather, had owned collateral before receiving loan.—In re Allman, 58 B.R. 790.—Bankr 2789.

Bkrcty.W.D.Ky. 1980. Taking of a security interest in property which is already owned by debtor results in creation of a “non-purchase money security interest”.—In re Damron, 5 B.R. 357.—Sec Tran 2.

Bkrcty.E.D.Tenn. 1980. Lender’s security interest in new furniture was “nonpurchase money security interest” and thus could be avoided where new furniture secured a debt for more than its purchase money, in that loan for furniture was consolidated with an old loan, and there was no method for determining the extent to which the new furniture secured only its purchase money. Bankr.Code, 11 U.S.C.A. §§ 101(37), 522(f), (f)(2)(A); U.C.C. § 9–101 et seq; T.C.A. §§ 47–9–107(a, b), 47–9–107 comment.—In re Coomer, 8 B.R. 351.—Bankr 2788.

### **NONPURCHASER**

E.D.Pa. 1995. Inmate lacked standing to pursue claims of constitutional violations against state correctional institution and officials based on denial of right to purchase cigarettes from prison commissary where uncontradicted evidence showed that inmate had no funds with which to purchase cigarettes while confined in disciplinary custody so that he was reduced to status of “nonpurchaser” during relevant period.—Austin v. Lehman, 893 F.Supp. 448.—Civil R 201.

### **NON-PURCHASING TENANT**

N.Y.City Civ.Ct. 1998. Definition of a “nonpurchasing tenant” entitled to the occupancy protections of the Martin Act, which governs conversions of buildings from residential rental status to cooperative or condominium ownership in New York City, is not limited to a person who moves into an apartment before conversion, but also includes a person who rents an apartment in a converted building from the sponsor or holder of unsold shares allocated to that apartment. McKinney’s General Business Law § 352–eeee, subd. 1(e).—Paikoff v. Harris, 679 N.Y.S.2d 251, 178 Misc.2d 366, affirmed as modified 713 N.Y.S.2d 109, 185 Misc.2d 372.—Condo 3; Land & Ten 353.

### **NON-PURCHASING TENANTS**

N.Y.Sup.App.Term 1999. Tenants who rented apartment from the sponsors of a cooperative conversion were “non-purchasing tenants” entitled to occupancy protections of the Martin Act, which

governed conversions of buildings from residential rental status to cooperative or condominium ownership in New York City, though tenants were not in possession at time of the conversion. McKinney’s General Business Law § 352–eeee.—Paikoff v. Harris, 713 N.Y.S.2d 109, 185 Misc.2d 372.—Land & Ten 361.

N.Y.City Civ.Ct. 2000. Tenants occupying unsold condominium apartments after non-eviction condominium conversion plan were not “non-purchasing tenants” who were protected from eviction under the Martin Act, where the tenants were not residents when condominium conversion plan was ultimately declared effective by Attorney General’s Office, they instead had leased their apartments from a landlord who was a purchaser of unsold units from condominium sponsor, and their written leases were nothing more than yearly rentals, subject to possible renewal if certain conditions had been met and by the landlord at will. McKinney’s General Business Law § 352–eeee, subd. 1(e).—Parkchester Preservation Co. L.P. v. Hanks, 714 N.Y.S.2d 399, 185 Misc.2d 786.—Condo 3.

### **NONPURPOSE INVESTMENTS**

C.A.9 1997. Guaranteed investment contracts which were purchased with proceeds of county housing authority’s bonds constituted “nonpurpose investments” under Internal Revenue Code, and thus, bonds issued by housing authority were “arbitrage bonds” for which housing authority must pay rebate to government to maintain bonds’ tax free status, where guaranteed investment contracts earned higher return than bonds and were committed to provide funds to repay principal and interest on bonds rather than for governmental purpose of constructing housing, even though housing authority did not directly make, benefit from, or intend to purchase guaranteed investment contracts. 26 U.S.C.A. §§ 103(b)(2), 148(a, f).—Harbor Bancorp & Subsidiaries v. C.I.R., 115 F.3d 722, as amended, certiorari denied 118 S.Ct. 1035, 522 U.S. 1108, 140 L.Ed.2d 102.—Int Rev 3132.10.

### **NON-PURPOSE LOAN**

S.D.Tex. 1969. “Non-purpose loan” is one not made for purpose of purchasing or carrying securities, and is exempt from margin requirements prescribed by Federal Reserve Board. Securities Exchange Act of 1934, §§ 1 et seq., 21(a, e), 15 U.S.C.A. §§ 78a et seq., 78u(a, e).—E. F. Hutton & Co. v. Brown, 305 F.Supp. 371.—Brok 4.

### **NON-QUALIFIED DEFERRED COMPENSATION PLAN**

C.D.Cal. 1999. Employee’s annual severance payments were not “non-qualified deferred compensation plan” subject to special statutory timing provisions, even though those benefits constituted wages under Federal Insurance Contribution Act (FICA); severance plan was not arrangement for deferred salary, but simply provided incentive for voluntary retirement. 26 U.S.C.A. § 3121(v)(2)(C); 26 C.F.R. 31.3121(v)(2)–1.—Cohen v. U.S., 63 F.Supp.2d 1131.—Int Rev 4849.

D.Colo. 1992. Salaries paid to professional corporation's shareholders, who were husband and wife, in alternating years were pursuant to "non-qualified deferred compensation plan" and, therefore, corporation could not avoid its liability as employer for Federal Insurance Contributions Act (FICA) taxes where compensation paid after it had been earned was not paid under any qualified plans listed in Internal Revenue Code. 26 U.S.C.A. § 3121(a)(5), (v)(2)(A, C).—Hoerl & Associates, P.C. v. U.S., 785 F.Supp. 1430, affirmed in part, reversed in part 996 F.2d 226.—Int Rev 4374.

**NONQUALIFIED DEFERRED COMPENSATION PLANS**

C.A.10 (Colo.) 1993. To extent that either of taxpayer's employees received deferred income under their employment agreements, pursuant to which employees were paid biannual salary covering two years' service in one year, both were beneficiaries of "nonqualified deferred compensation plans" and taxpayer was subject to Federal Insurance Contributions Act (FICA) tax liability for deferred compensation paid to both. 26 U.S.C.A. § 3121(v)(2)(A, C).—Hoerl & Associates, P.C. v. U.S., 996 F.2d 226.—Int Rev 4374.

**NON-QUALIFIED STOCK OPTION**

Mo.App. E.D. 2000. Generally, a "non-qualified stock option," or one that is normally taxed by the Internal Revenue Service because it does not qualify for special treatment under the Internal Revenue Code, is a right granted to an employee in exchange for services, and consists of three significant events: (1) the granting of the stock option by the employer, (2) the vesting of the right to exercise the stock option, and (3) the exercising of the stock option by the employee. 26 U.S.C.A. §§ 421-423.—Ralston Purina Co. v. Leggett, 23 S.W.3d 697, rehearing, transfer denied, and transfer denied.—Int Rev 3162.

**NON-QUID PRO QUO SEXUAL HARASSMENT**

N.D.Ill. 1992. "Non-quid pro quo sexual harassment" is conduct that has purpose or effect of unreasonably interfering with employee's work performance or creating intimidating, hostile, or offensive working environment. Civil Rights Act of 1964, § 703(a), as amended, 42 U.S.C.A. § 2000e-2(a).—Saxton v. American Tel. & Tel. Co., 785 F.Supp. 760, affirmed 10 F.3d 526.—Civil R 167.

**NON-QUOTA IMMIGRANT**

C.C.A.9 (Cal.) 1933. Alien Chinese wife of native-born citizen, married prior to May 26, 1924, held "nonquota immigrant," required to have unexpired immigration visa to be entitled to admission. Immigration Act 1924, § 4(a), as amended; § 13(a), and (c) (4), as added by Act June 13, 1930, 8 U.S.C.A. §§ 204 note, 213(a), (c) (4).—Haff v. Tom Tang Shee, 63 F.2d 191.—Aliens 46, 51.5.

S.D.N.Y. 1938. "Temporary visit" as used in statute defining "nonquota immigrant" as an immigrant previously lawfully admitted to the United

States who is returning from a "temporary visit" abroad means visit taken by departing immigrant with intention to return within a period relatively short, fixed by some early event. Immigration Act 1924, § 4(b), 8 U.S.C.A. § 1101(a) (27) (B).—U.S. ex rel. Katnic v. Reimer, 25 F.Supp. 925.—Aliens 51.5.

S.D.N.Y. 1938. Alien who left United States for Spain with intention of enlisting with Spanish forces and thereafter remaining to continue his trade as stonemason was not entitled to re-entry as a "non-quota immigrant" on ground that he was returning from a "temporary visit," but was properly excluded as a "quota immigrant." Immigration Act 1924, §§ 4(b), 13(a) (3), 8 U.S.C.A. §§ 1101(a) (27) (B), 1181(a).—U.S. ex rel. Katnic v. Reimer, 25 F.Supp. 925.—Aliens 51.5.

W.D.Wash. 1924. Under Immigration Act May 26, 1924, § 5, 8 U.S.C.A. § 1101(a) (27) (A-F), providing that "an alien who is not particularly specified in this act as a non-quota immigrant, or a non-immigrant, shall not be admitted as a non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so specified," the alien wife of a Japanese resident, returning after a temporary visit abroad as a non-quota immigrant under section 4(b), the wife not having previously been in the United States, and not being a "non-immigrant," nor a "non-quota immigrant," as defined in sections 3 and 4, is not entitled to admission by reason of the marital relationship.—Ex parte So Hakp Yon, 1 F.2d 814.

**NON-QUOTA IMMIGRANT STEPCHILD**

S.D.N.Y. 1967. Father's illegitimate daughter was classifiable as a "non-quota immigrant stepchild" on petition by natural born citizen who was not child's mother and who married father subsequent to child's birth. 28 U.S.C.A. § 2201; 5 U.S.C.A. § 551 et seq.; Fed.Rules Civ.Proc. rule 56, 28 U.S.C.A.; Immigration and Nationality Act, § 101(b) (1) (B-D) as amended 8 U.S.C.A. § 1101(b) (1) (B-D).—Andrade v. Esperdy, 270 F.Supp. 516.—Aliens 51.5.

**NON-RADIAL SERVICE**

D.N.J. 1966. In "non-radial service" carrier may operate within described territory and without reference to any base point.—Smith & Solomon Trucking Co. v. U. S., 255 F.Supp. 243.—Commerce 85.28(3).

**NONRAILROAD INCOME**

Minn. 1939. Funds returned by the United States government to railroad from "recapture funds" previously taken from railroad's earnings, upon which a gross earnings tax was originally paid to the state, are not "nonrailroad income" and hence may not, under statute amendable only by referendum, provide for gross earnings taxes in lieu of all other taxes upon property owned and operated for railroad purposes, be used in computing franchise tax. M.S.A. §§ 290.02, 295.02; M.S.A. Const art. 4, § 32a; 49 U.S.C.A. §§ 15a(6), 15b.—State v. Duluth, M. & N. Ry. Co., 292 N.W. 401,

**NONRECORD CLAIMANT**

207 Minn. 618, rehearing denied 292 N.W. 411, 207 Minn. 637, certiorari denied Minnesota v. Duluth & I R R Co, 61 S.Ct. 439, 311 U.S. 719, 85 L.Ed. 468, certiorari denied 61 S.Ct. 439, 311 U.S. 719, 85 L.Ed. 468, certiorari denied 61 S.Ct. 439, 311 U.S. 719, 85 L.Ed. 468, certiorari denied 61 S.Ct. 439, 311 U.S. 719, 85 L.Ed. 468, certiorari denied 61 S.Ct. 439, 311 U.S. 719, 85 L.Ed. 468, certiorari denied 61 S.Ct. 439, 311 U.S. 719, 85 L.Ed. 468, certiorari denied 61 S.Ct. 439, 311 U.S. 719, 85 L.Ed. 468, certiorari denied 61 S.Ct. 439, 311 U.S. 719, 85 L.Ed. 468, certiorari denied 61 S.Ct. 439, 311 U.S. 719, 85 L.Ed. 468, c

**NON-RATED POLICY**

N.D. 1982. “Non-rated policy” is a policy in which premiums reflect that applicant or insured has no health problems which would cause insurance company to seek a higher premium than normal.—American Mut. Life Ins. Co. v. Jordan, 315 N.W.2d 290.—Insurance 2005.

**NON-REBATE ERRONEOUS REFUND**

M.D.Fla. 1995. Refund which was automatically issued to taxpayers as a second refund because of a computer error was a “non-rebate erroneous refund,” for purposes of determining correct collection procedure. 26 U.S.C.A. § 6211(b)(2).—Bilzerian v. U.S., 887 F.Supp. 1509, reversed 86 F.3d 1067, on remand Steffen v. U.S., 952 F.Supp. 779, recommendation regarding acquiescence 1998 WL 1665333.—Int Rev 4974.

W.D.Ky. 1991. “Non-rebate erroneous refund” made with respect to tax previously assessed by taxpayer on his federal income tax return is not a “rebate” within meaning of the Internal Revenue Code, and therefore the deficiency procedure, and subsequent reassessment and collection procedures are not applicable; nonrebate erroneous refund simply gives back the taxpayer a part of taxpayer’s assessed tax and assessed balance due may be collected by ordinary collection procedures. 26 U.S.C.A. §§ 6211(b)(2), 6501(a), 6502.—Davenport v. U.S., 136 B.R. 125.—Int Rev 4974.

**NON-REBATE REFUND**

M.D.Fla. 1995. “Rebate refund” occurs when Internal Revenue Service (IRS) makes redetermination of liability which reduces amount of original assessment, whereas “non-rebate refund” occurs when IRS, through computer or clerical error, automatically returns to taxpayer an amount assessed for a reason not based on a redetermination of liability. 26 U.S.C.A. § 6211(b)(2).—Bilzerian v. U.S., 887 F.Supp. 1509, reversed 86 F.3d 1067, on remand Steffen v. U.S., 952 F.Supp. 779, recommendation regarding acquiescence 1998 WL 1665333.—Int Rev 4540, 4957.

E.D.N.Y. 1998. Tax Code contemplates two different categories of refund; if the refund is pursuant to a recalculation of liability, it is a “rebate refund,” and if refund results merely from clerical error or other mistake, it is a “non-rebate refund.” 26 U.S.C.A. § 6211(b)(2).—Mildred Cotler Trust v. U.S., 2 F.Supp.2d 264, reversed 184 F.3d 168.—Int Rev 4540, 4957.

E.D.N.Y. 1998. Tax rebate that resulted from computer error was a “non-rebate refund.”—Mil-

dred Cotler Trust v. U.S., 2 F.Supp.2d 264, reversed 184 F.3d 168.—Int Rev 4957.

**NONREBATE REFUNDS**

C.A.7 (Ill.) 1995. “Rebate refunds” which are issued on basis of some substantive recalculation of tax owed can be included in deficiency calculations, while “nonrebate refunds” which are sent to taxpayer not because Internal Revenue Service (IRS) determines that tax paid is not owing, but because of mistakes, cannot be included in deficiency. 26 U.S.C.A. § 6211.—O’Bryant v. U.S., 49 F.3d 340.—Int Rev 4540, 4957.

**NONRECOGNITION**

M.D.Pa. 1964. As used in subdivision of mitigation of limitations provisions of Revenue Code making erroneous “nonrecognition” of loss which affects amount of basis determined a prerequisite to income tax adjustment where amount of adjustment would be credited or refunded in same manner as overpayment, quoted word may be construed as meaning nonallowance. 26 U.S.C.A. (I.R.C. 1954) §§ 312(f), 1311–1315, 1312(7) (C).—Joyce v. U.S., 237 F.Supp. 163, reversed 361 F.2d 602.—Int Rev 5049.

**NONRECOGNITIONAL ACTIVITY**

C.A.8 1981. Area standards picketing for sole purpose of encouraging compliance with prevailing area wage and benefit standards is “nonrecognition activity” that is not proscribed by National Labor Relations Act. National Labor Relations Act, § 8(b)(7)(C) as amended 29 U.S.C.A. § 158(b)(7)(C).—N.L.R.B. v. Sheet Metal Workers Union Local No. 3, 662 F.2d 513.—Labor 331.

**NONRECORD**

Fla.App. 1 Dist. 1974. “Nonrecord” activity, which moves case toward ultimate resolution, is sufficient “prosecution” to preclude dismissal of case for failure to prosecute; prosecution may be accomplished by means other than filing of pleadings or orders of the court. 30 West’s F.S.A. Rules of Civil Procedure, rule 1.420(e).—Eddings v. Davidson, 302 So.2d 155.—Pretrial Proc 590.1.

**NONRECORD ACTIVITY**

Fla.App. 2 Dist. 1990. Taking of depositions is “nonrecord activity,” for purposes of rule providing for dismissal for failure to prosecute when it appears on face of record that no activity has occurred for one year. West’s F.S.A. RCP Rule 1.420(e).—Smith v. DeLoach, 556 So.2d 786, review denied 564 So.2d 1087.—Pretrial Proc 590.1.

**NONRECORD CLAIMANT**

Ill.App. 1 Dist. 1995. Tenant in possession was not “nonrecord claimant,” under Mortgage Foreclosure Act. S.H.A. 735 ILCS 5/15–1210.—Applegate Apartments Ltd. Partnership v. Commercial Coin Laundry Systems, 212 Ill.Dec. 827, 657 N.E.2d 1172, 276 Ill.App.3d 433, appeal denied 216 Ill.Dec. 1, 664 N.E.2d 638, 166 Ill.2d 535.—Mtg 426.

**NON-RECOURSE**

C.A.7 (Ill.) 1995. Under Illinois law, note that mortgage secured was “nonrecourse” where borrower would not be liable for deficiency judgment if sale of property yielded, after payment of all expenses, sum less than unpaid balance of loan.—Fidelity Mut. Life Ins. Co. v. Harris Trust and Sav. Bank, 71 F.3d 1306, on remand Fidelity Mut. Ins. Co. v. Harris Trust and Savings Bank, 1996 WL 681277.—Mtg 556.

N.D.Cal. 1949. A shipper was not relieved from demurrage charges on empty cars stored on its tracks because of the so-called “non-recourse” clause in bills of lading by which the consignee assumed the “freight” and “all other lawful charges” on the ground that demurrage before shipment was embraced within meaning of the quoted language, since the quoted phrase under *eiusdem generis*, referred to charges connected with transportation.—Western Pac. R. Co. v. Pacific Portland Cement Co., 84 F.Supp. 15, reversed 184 F.2d 34, certiorari denied 71 S.Ct. 282, 340 U.S. 906, 95 L.Ed. 655.—Carr 100(1).

D.Me. 1993. For purposes of interpreting non-recourse provision of loan participation agreement under Maine law, “nonrecourse” is implicitly limited in its formal legal definition to disallowing recourse on underlying instrument.—People’s Heritage Sav. Bank v. Recoll Management, Inc., 814 F.Supp. 159.—Contracts 194.

Bkrcty.N.D.Tex. 1982. “Nonrecourse” simply means that a lienor may look only to property subject to lien to satisfy debt and cannot look to debtor personally for payment.—In re Dan Hixson Chevrolet Co., 20 B.R. 108.—Sec Tran 240.

**NONRECOURSE CLAUSE**

Ct.Cl. 1955. “Nonrecourse clause” in bill of lading, which clause provided that carrier should not make delivery of shipment without payment of freight and all other lawful charges, merely meant that if carrier waived its lien for freight charges by surrendering goods without collecting charges shipper would no longer be liable for such charges, and such clause was inapplicable to exonerate shipper from liability for freight charges when railroad did not surrender goods.—Reading Co. v. U. S., 128 F.Supp. 745, 131 Ct.Cl. 44.—Carr 194.

**NONRECOURSE CREDITOR**

9th Cir.BAP (Cal.) 1998. “Nonrecourse creditor” is one who can look only to its collateral for satisfaction of its debt and does not have any right to seek payment of any deficiency from debtor’s other assets.—In re Weinstein, 227 B.R. 284.—Bankr 2851.

Bkrcty.S.D.N.Y. 1993. “Nonrecourse creditor” is creditor who has agreed to look only to its collateral for satisfaction of its debt and does not have any right to seek payment of any deficiency from debtor’s other assets, while “recourse creditor” has right to seek payment of deficiency in value of its collateral from debtor’s other assets.—In re 680 Fifth Ave. Associates, 156 B.R. 726,

affirmed 169 B.R. 22, affirmed 29 F.3d 95, 142 A.L.R. Fed. 789.—Bankr 3550.

**NONRECOURSE LOAN**

Bkrcty.E.D.N.Y. 1997. “Nonrecourse loan” is one in which lender has no recourse against person of debtor; instead, lender’s recourse is limited to collateral, property of debtor securing repayment of loan.—In re Bucherer, 216 B.R. 332.—Banks 178.

**NONRECURRING CHARGES**

D.Or. 1998. Oregon Public Utility Commission (PUC) had authority, under interconnection provisions of Telecommunications Act of 1996, to impose wholesale discounts on “nonrecurring charges”, those being one-time fees for establishing particular service, even though charges were not “telecommunications services” within meaning of Act. Telecommunications Act of 1996, 47 U.S.C.A. §§ 251(b)(4), 252(c).—US West Communications, Inc. v. TCG Oregon, 35 F.Supp.2d 1237.—Tel 321.1.

**NON-RECURRING EXPENSES**

Ill.App. 1 Dist. 1992. Legal fees and engineering and roofing costs should be characterized as “non-recurring expenses” and require separate assessment, under provision of Condominium Property Act stating that any nonrecurring common expense, any common expense not set forth in budget as adopted, and any increase in assessment over amount adopted shall be separately assessed against all unit owners. S.H.A. ch. 30, ¶ 309(d).—Azar v. Old Willow Falls Condominium Ass’n, 170 Ill.Dec. 694, 593 N.E.2d 583, 228 Ill.App.3d 753, appeal denied 176 Ill.Dec. 792, 602 N.E.2d 446, 146 Ill.2d 621.—Condo 12.

**NONRECURRING INCOME**

Ohio App. 5 Dist. 1996. Money received by father following exercise of his stock option qualified as “nonrecurring income” for purposes of determining whether to modify his child support obligation; father had apparently only exercised his stock option on two occasions, and fact that he accumulated options over period of time in excess of three years did not require option to be treated as income, particularly as he earned no income on options until market value of stock exceeded option price, such that he received no value for accumulated shares of stock until he exercised his stock option. R.C. § 3113.215(A)(11).—Yost v. Unanue, 671 N.E.2d 1374, 109 Ohio App.3d 294.—Child S 258.

**NON-RECURRING ISSUES**

Fla.App. 1 Dist. 2000. Issues of the amount of social security offset employer was entitled to take against workers’ compensation benefits and whether claimant was entitled to a refund of offsets previously taken over an 11-year period were “non-recurring issues,” and thus were barred by doctrine of res judicata from being raised at subsequent merits hearing, where there were no changes to the entitlement classification or to the number of de-

pendsents receiving benefits, and claimant himself had equal access to the social security information from which the offset was calculated.—Boynont Landscape v. Dickinson, 752 So.2d 1236.—Work Comp 1791.

#### **NONRECURRING LUMP-SUM PAYMENTS**

C.A.9 (Cal.) 1992. California's emergency housing payments to homeless families are "nonrecurring lump-sum payments" excludable from income in determining federal food stamp eligibility, though they were capable of recurring. Food Stamp Act of 1977, § 5(d)(8), 7 U.S.C.A. § 2014(d)(8); West's Ann.Cal.Welf. & Inst.Code § 11450(f)(2), (f)(2)(A-C, E).—Hamilton v. Madigan, 961 F.2d 838.—Agric 2.6(2).

#### **NONRECURRING OR UNSUSTAINABLE SOURCE OF INCOME OR CASH FLOW ITEM**

Ohio App. 12 Dist. 1999. Imputed income from husband's unexercised executive employee stock options was not a "nonrecurring or unsustainable source of income or cash flow item," within meaning of child support statute's exclusion from gross income, where the options were an integral part of husband's compensation and he could expect to receive annual stock options so long as he continued to work in his position with employer. R.C. § 3113.215(A)(2)(e), (11).—Murray v. Murray, 716 N.E.2d 288, 128 Ohio App.3d 662, appeal not allowed 710 N.E.2d 718, 85 Ohio St.3d 1499.—Child S 260.

#### **NONRECURRING PAYMENT**

N.Y.Fam.Ct. 1993. Father's personal injury award did not qualify as "nonrecurring payment" within meaning of statute permitting court to allocate a portion of nonrecurring payment from extraordinary sources that otherwise would not be considered as income for support of child; all of father's present income, out of which child support was paid, was derived from income generated by investment of personal injury award. McKinney's Family Court Act § 413, subd. 1(e).—Erie County Dept. of Social Services on Behalf of Trunfio v. LaBarge, 606 N.Y.S.2d 520, 159 Misc.2d 806.—Child S 85.

#### **NONREFUNDABLE DEPOSIT**

Bkrcty.D.Vt. 1990. Under Vermont Uniform Commercial Code (UCC), "nonrefundable deposit" that bankruptcy trustee retained after would-be purchaser of creditor's collateral failed to proceed with purchase was not "proceeds" of creditor's collateral, such as would be subject to creditor's security interest; collateral was not "sold, exchanged, collected or otherwise disposed of". 9A V.S.A. § 9-306(1); Bankr.Code, 11 U.S.C.A. § 552.—In re Vermont Knitting Co., Inc., 111 B.R. 464.—Sec Tran 168.

#### **NONREFUNDABLE FEE**

N.Y.A.D. 2 Dept. 1993. Use of "nonrefundable fee" retainer is unethical, as violative of attorney's obligation to refund unearned fees upon his or her

discharge; such a retainer is distinguishable from "minimum fee agreement," which is forecast of minimum amount client can expect to pay, and under which attorney is paid in quantum meruit if discharged before completion. Code of Prof.Resp., EC 2-32; DR 2-106, subd. B, pars. 1-8, DR 2-110, subd. A, par. 3, McKinney's Judiciary Law App.; McKinney's Judiciary Law § 90.—Matter of Cooperman, 591 N.Y.S.2d 855, 187 A.D.2d 56, appeal granted, stay granted 602 N.Y.S.2d 798, 82 N.Y.2d 745, 622 N.E.2d 299, affirmed 611 N.Y.S.2d 465, 83 N.Y.2d 465, 633 N.E.2d 1069.—Atty & C 44(1).

#### **NON-REFUNDABLE FEE AGREEMENT**

Ariz. 2002. A "non-refundable fee agreement" is one under which the attorney may be entitled to the fee regardless of whether he or she actually performs the services, or some portion of the services, called for in the agreement.—In re Connally, 55 P.3d 756, 203 Ariz. 413.—Atty & C 144.

#### **NONREFUNDABLE FIXED FEE CONTRACT**

Ind.App. 1 Dist. 1991. Fee for legal services paid in advance in "nonrefundable fixed fee contract" is not truly nonrefundable under Model Rules of Professional Conduct when client dies before attorney earns entire fee under contract; attorney is limited to reasonable value of services rendered before client's death under theory of quantum meruit. Rules of Prof.Conduct, Rule 1.16(d).—Jennings v. Backmeyer, 569 N.E.2d 689.—Atty & C 137.

#### **NON-REFUNDABLE FLAT FEE**

Ariz. 2002. A "non-refundable flat fee" is a lump-sum fee constituting complete payment for the lawyer's services. Restatement Third, The Law Governing Lawyers § 38 comment.—In re Connally, 55 P.3d 756, 203 Ariz. 413.—Atty & C 144.

#### **NON-REFUNDABLE RETAINER**

E.D.N.Y. 1994. "Nonrefundable retainer" is specific type of special retainer which allows attorney to keep advance payment regardless of whether specified services are rendered.—Wong v. Michael Kennedy, P.C., 853 F.Supp. 73.—Atty & C 137.

Bkrcty.N.D.Ohio 1994. "Nonrefundable retainer" belongs to attorney and is not subject to refund whether or not lawyer actually has to perform legal services contemplated; it is intended to compensate lawyer for being available but not for specific services and part is intended as present payment for legal services to be performed in future.—In re National Magazine Pub. Co., 172 B.R. 237.—Atty & C 137.

Ariz. 2002. A "non-refundable retainer" is a fee paid, apart from any other compensation, to ensure that a lawyer will be available for the client if required.—In re Connally, 55 P.3d 756, 203 Ariz. 413.—Atty & C 137.

#### **NONRELIANCE**

Utah 1952. In action for breach of warranty as to fitness for plaintiff's purpose of defendant's pou-

try feed concentrate which was sold to plaintiff allegedly as result of statements of defendant's salesman to plaintiff that in tests of concentrate no less than 65 per cent egg production was achieved, and that a minimum egg yield of 65 per cent could be expected from concentrate and defendant's self-feed plan, fact that plaintiff requested written guarantee was insufficient to take from jury question of plaintiff's "inducement" to buy or his "reliance" or "nonreliance" on such alleged oral representations. U.C.A.1943, 81-1-12.—*Park v. Moorman Mfg. Co.*, 241 P.2d 914, 121 Utah 339, 40 A.L.R.2d 273.—Sales 445(2).

#### NON-REMOVABLE

D.Nev. 1987. Claim by plaintiff against Washington corporation was not "non-removable" within meaning of removal provision where diversity existed between parties, and thus joinder of defendant Washington corporation was required for removal of case to federal court. 28 U.S.C.A. § 1441(c).—*Jetstar Inc. v. Monarch Sales & Service Co.*, 652 F.Supp. 310.—Rem of C 82.

D.S.C. 1974. Action by apparel manufacturer, which was sued for personal injuries occurring when garment ignited while worn by minor, for declaratory judgment as to manufacturer's rights to be represented and indemnified under general liability policy and under excess blanket catastrophe liability policy was not removable to federal court on petition of only issuer of general liability policy, both in that cause of action against issuer of other policy was not "non-removable" claim and in that causes of action against the insurers were not "separate and independent claims or causes of action." 28 U.S.C.A. §§ 1332, 1441, 1441(a-c).—*Her Majesty Industries, Inc. v. Liberty Mut. Ins. Co.*, 379 F.Supp. 658.—Rem of C 49.1(4).

#### NON-RENEWAL

C.A.6 (Ohio) 1989. "Assignment" of service station franchises was valid under Ohio law of contracts and sales and, therefore, was neither "termination" nor "nonrenewal" within meaning of Petroleum Marketing Practices Act; the franchise agreements did not state specific price for sale of fuel and did not mention assignor's "discount for cash program"; franchisees presented no laboratory tests that fuel did not meet trademark specifications and failed to show material disruptions of gasoline supplies; dealer support services were not part of franchises; and transitional problems such as building and maintenance delays and changes in auto accessories and warehouse locations did not constitute materially increased burden or impairment of return performance. Petroleum Marketing Practices Act, §§ 102(a), 105(a-c), 106(b), 15 U.S.C.A. §§ 2802(a), 2805(a-c), 2806(b); Ohio R.C. § 1302.13(A, B).—*May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, 869 F.2d 917.—Trade Reg 873.5.

W.D.Ark. 1996. Under Arkansas law, "non-renewal" of policy was not synonymous with "cancellation," and, thus, conditions on cancellation stated in endorsement to professional malpractice insur-

ance policy were inapplicable to insurer's decision not to renew policy, even though endorsement deleted policy provisions on cancellation or nonrenewal; endorsement placed no limits on nonrenewal.—*Bakker v. Continental Cas. Ins. Co.*, 941 F.Supp. 828.—Insurance 1898.

D.N.J. 1997. Under general rule, petroleum franchisor's assignment of franchise will not rise to level of "termination" or "nonrenewal" of franchise under Petroleum Marketing Practices Act (PMPA) so long as essential characteristics of franchise remain intact. Petroleum Marketing Practices Act, §§ 101-106, 15 U.S.C.A. §§ 2801-2806.—*Sawhney v. Mobil Oil Corp.*, 970 F.Supp. 366, reversed 173 F.3d 421.—Trade Reg 873.5.

D.N.J. 1997. Gasoline station franchisor's assignment of franchise to assignee-franchisor, which was assignor-franchisor's distributor, was valid under New Jersey law and, thus, assignment did not, in and of itself, constitute "termination" or "nonrenewal" of franchise under Petroleum Marketing Practices Act (PMPA), where franchise agreement expressly, but not exclusively, permitted assignment to affiliates. Petroleum Marketing Practices Act, §§ 101(1), 106(b)(1), 15 U.S.C.A. §§ 2801(1), 2806(b)(1); N.J.S.A. 12A:2-210.—*Sawhney v. Mobil Oil Corp.*, 970 F.Supp. 366, reversed 173 F.3d 421.—Trade Reg 873.5.

E.D.Tenn. 1996. Assignment of dealer lease and supply agreement by petroleum service station franchisor, a petroleum refiner, to petroleum distributor was not "termination" or "nonrenewal" of franchisee's franchise so as to violate Petroleum Marketing Practices Act (PMPA) and, thus, franchisor was not liable to franchisee under PMPA due to assignment, and distributor was not liable to franchisee under Tennessee law for tortious interference with contractual relationship or contractual rights; distributor was meeting essential obligations of agreement, assignment did not violate Tennessee law, including not being prohibited by Tennessee Petroleum Trade Practices Act, so as to be invalid under PMPA, and franchisee did not show that assignment deprived franchisee of rights guaranteed by PMPA. Petroleum Marketing Practices Act, §§ 102(b)(1), (b)(3)(D)(iii), 105(c), 15 U.S.C.A. §§ 2802(b)(1), (b)(3)(D)(iii), 2805(c); West's Tenn.Code, §§ 47-2-210(2), 47-25-601 to 47-25-626, 47-50-102; Restatement (Second) of Contracts § 317(2).—*Clark v. BP Oil Co.*, 930 F.Supp. 1196, affirmed 137 F.3d 386, 1998 Fed. App. 63P.—Trade Reg 873.5.

E.D.Tenn. 1996. Assignment of petroleum service station franchise by petroleum refiner to petroleum distributor does not, standing alone, constitute "termination" or "nonrenewal" of franchise under Petroleum Marketing Practices Act (PMPA). Petroleum Marketing Practices Act, § 105(c), 15 U.S.C.A. § 2805(c).—*Clark v. BP Oil Co.*, 930 F.Supp. 1196, affirmed 137 F.3d 386, 1998 Fed. App. 63P.—Trade Reg 873.5.

W.D.Wis. 1983. In context of Wisconsin Fair Dealership Law, terms "termination," "cancellation" and "nonrenewal" mean the act of the grant-

or which ends the relationship between the parties. W.S.A. 135.01, 135.02(6), 135.03, 135.04 et seq.—Meyer v. Kero-Sun, Inc., 570 F.Supp. 402.—Trade Reg 871(3).

Ark.App. 2002. Termination of automobile policy when the insured failed to pay the renewal premium was a “nonrenewal” by the insured, not a “cancellation” by the insurer, and, therefore, did not require the insurer to notify the lienholder; the policy was in effect for slightly less than one year and could expire on its own terms without cancellation by the insurer. A.C.A. §§ 23-89-301(6), 23-89-304, 23-89-305(a).—Stanley Wood Chevrolet-Pontiac, Inc. v. Progressive Cas. Ins. Co., 83 S.W.3d 445, 79 Ark.App. 37.—Insurance 1900, 204(2).

Cal.App. 1 Dist. 1974. Term “nonrenewal,” within meaning of statutes governing grounds for cancellation of automobile policies and form and timeliness of notice that such statutes do not apply to a nonrenewal, is to be construed as a negative form of the term “renewal”; as used in such statutes the term “renewal” is an act to be performed by the insurer, “nonrenewal” is the insurer’s omission to perform such act and the insured’s failure to renew does not fall within the term’s definition. West’s Ann. Insurance Code, §§ 660(e), 661, 662.—State Farm Mut. Auto Ins. Co. v. Brown, 115 Cal.Rptr. 213, 40 Cal.App.3d 385.—Insurance 1900.

Cal.App. 2 Dist. 1990. “Nonrenewal” within context of Proposition 103 connotes insurer’s refusal to issue new policy at expiration of existing policy, rather than means by which refusal is accomplished; “nonrenewal” is incomplete until existing coverage expires. West’s Ann. Cal. Ins. Code § 1861.03.—AIU Ins. Co. v. Gillespie, 272 Cal. Rptr. 334, 222 Cal.App.3d 1155, review denied.—Insurance 1898.

Fla.App. 5 Dist. 1998. Policy change by endorsement excluding liability coverage for personal injury was “nonrenewal” within meaning of statute requiring at least 45 days advance written notice of nonrenewal. West’s F.S.A. § 627.4133(1).—U.S. Fire Ins. Co. v. Southern Sec. Life Ins. Co., 710 So.2d 130.—Insurance 1900.

Fla.App. 5 Dist. 1998. “Nonrenewal” within meaning of statute requiring at least 45 days advance written notice of nonrenewal includes policy with material changes in terms and conditions from prior policy. West’s F.S.A. § 627.4133(1).—U.S. Fire Ins. Co. v. Southern Sec. Life Ins. Co., 710 So.2d 130.—Insurance 1900.

Ill. 1975. Term “cancellation” as used in statute relating to cancellation of insurance policies refers to unilateral termination by insurer before end of policy period while “nonrenewal” as used in same statutes refers to automatic expiration of policy at end of policy period. S.H.A. ch. 73, §§ 755.2(b), 755.3–755.5.—Shiaras v. Chupp, 334 N.E.2d 129, 61 Ill.2d 164.—Insurance 1894, 1912.

Ill.App. 1 Dist. 1992. Termination of automobile liability coverage due to failure to pay renewal premium for the umbrella policy was “nonrenewal,”

rather than “cancellation,” and, therefore, was not subject to cancellation provisions of policy and insurance code, even though insured disputed receipt of premium renewal notice, and even though notice of cancellation was allegedly mailed. S.H.A. ch. 73, ¶¶ 613 et seq., 755.11, 755.13(g), 755.14, 755.17.—Librizzi v. State Farm Fire and Cas. Co., 177 Ill.Dec. 751, 603 N.E.2d 821, 236 Ill.App.3d 582.—Insurance 2042.

Ill.App. 4 Dist. 1988. “Nonrenewal” involves expiration of policy at end of its term, whereas “cancellation” is unilateral termination by insurer before end of policy.—First Nat. Bank of Pittsfield v. Country Mut. Ins. Co., 125 Ill.Dec. 363, 530 N.E.2d 521, 175 Ill.App.3d 860.—Insurance 1894.

Ill.App. 5 Dist. 1990. “Nonrenewal,” within meaning of insurance policy, refers to automatic expiration of policy at end of policy period.—Olympic Federal v. American Interinsurance Exchange, 148 Ill.Dec. 920, 561 N.E.2d 226, 203 Ill.App.3d 942.—Insurance 1899.

Kan.App. 1996. Reduction of teacher’s extended duty days, with consequent reduction in salary, did not constitute “nonrenewal” of his contract so as to invoke statutory notice and due process procedures. K.S.A. 72-5437, 72-5438.—Baldwin v. Board of Educ., Unified School Dist. No. 418, 930 P.2d 18, 23 Kan.App.2d 280, review denied.—Schools 147.2(1).

Kan.App. 1996. Distinction between “termination” and “nonrenewal” of teacher’s contract within statute specifying required notice of such event is that the former applies where teacher’s employment is ended prior to completion of the contract term during the school year, and the latter applies where teacher’s employment is ended at the conclusion of the school year when the contract expires, and in either case, the terms contemplate severance of the employment relation. K.S.A. 72-5437.—Baldwin v. Board of Educ., Unified School Dist. No. 418, 930 P.2d 18, 23 Kan.App.2d 280, review denied.—Schools 147.2(1), 147.34(2).

La.App. 1 Cir. 1996. Lapse of automobile insurance policy due to insured’s failure to make timely payment for renewal was “nonrenewal,” rather than “cancellation,” and, therefore, was not subject to statutory procedures for cancellation; when policy expires from running of its term, it is not being disrupted and is thus not being cancelled, but is dying natural death. LSA-R.S. 22:636.1, subds. B, E.—Adamson v. State Farm Mut. Auto. Ins. Co., 676 So.2d 227, 1995-2450 (La.App. 1 Cir. 6/28/96).—Insurance 2042.

La.App. 1 Cir. 1987. “Cancellation” of “insurance coverage” occurs when, during the policy period or term, coverage is terminated; “non-renewal” of insurance coverage occurs when, at the end of a policy period or term, coverage expires.—Carson v. Dickerson, 512 So.2d 1188.—Insurance 1894.

Mich. 1996. “Nonrenewal,” as such term was employed in statute providing procedural protections with respect to employment of nontenured educational administrators, meant termination of

either administrative position, through reassignment to nonadministrative position, or legal relationship between employer and administrator; definition excluding reassignment would have permitted constructive nonrenewal, arbitrary reassignment of administrators to nonadministrative positions, reassignment as subterfuge for nonrenewal, or reassignment for purpose of removing individual from protection of statute, and statutory reference to contract termination date was for notice purposes only. M.C.L.A. § 380.132(2) (1995).—*Sanders v. Delton Kellogg Schools*, 556 N.W.2d 467, 453 Mich. 483.—Schools 63(1), 147.28.

Mo. 1995. “Nonrenewal” is decision by insurer not to issue new policy upon expiration of existing policy. V.A.M.S. §§ 375.001(3), 379.882(5).—*Hecker v. Missouri Property Ins. Placement Facility*, 891 S.W.2d 813.—Insurance 1894.

N.C.App. 1996. There was no prohibited “nonrenewal” of petroleum service station franchise agreement within meaning of Petroleum Marketing Practices Act (PMPA) when, after expiration of original term of agreement and as condition for franchisee’s renewal of agreement with franchisor’s assignee, minimum gasoline sales requirements and monthly rent amount were increased, absent evidence that assignee breached his duty to use good faith when changing terms of agreement upon renewal. Petroleum Marketing Practices Act, § 102(a)(2), (b)(3), (b)(3)(A)(i), as amended, 15 U.S.C.A. § 2802(a)(2), (b)(3), (b)(3)(A)(i).—*Richardson v. BP Oil Co.*, 477 S.E.2d 686, 124 N.C.App. 509, review denied 486 S.E.2d 208, 346 N.C. 180.—Trade Reg 873.5.

N.D. 2002. Termination of commercial insurance policy after the insured failed to pay the renewal premium upon expiration of the policy term was not a “cancellation” or “non-renewal,” and, thus, the policy did not require the insurer to give notice; the policy lapsed or expired by its own terms.—*Wahl v. Country Mut. Ins. Co.*, 640 N.W.2d 689, 2002 ND 42.—Insurance 1900, 2044(1).

S.C. 1998. Insurer’s renewal notice attempted “renewal” of policy, not “nonrenewal,” and, therefore, was governed by statutory requirement to furnish renewal notice at least 30 days prior to expiration of policy; notice stated premiums for the vehicles and noted no differences in coverage. Code 1976, §§ 38-75-720(1, 5), 38-75-740, 38-75-750.—*Walton v. Canal Ins. Co.*, 503 S.E.2d 727, 331 S.C. 636.—Insurance 1900.

Wash. 1993. Inclusion of new terms in subsequent franchise offer comports with Franchise Investment Protection Act (FIPA) and does not constitute “nonrenewal” or “termination” of original franchise. West’s RCWA 19.100.010 et seq.—*Corp v. Atlantic Richfield Co.*, 860 P.2d 1015, 122 Wash.2d 574.—Trade Reg 873.5.

#### NON-REPLACEABLE ELECTROLYTE

D.Mass. 1943. As used in claims for patent for heat producing composition and method of chemically generating heat, the term “electrolyte” means

a substance which when dissolved in water is capable of conducting an electric current, “electromotive” or “displacement series” is the chemical arrangement of metals or salts in the order in which they will displace one another, “replaceable electrolyte” is one which comprises a salt of a metal which is lower in electromotive series than the base metal with which it is associated in mixture and therefore displaceable or replaceable by base metal, and “non-replaceable electrolyte” is one with which such a reaction does not take place.—*Lee v. Congress Beauty Equipment Co.*, 48 F.Supp. 827.—Pat 165(3).

#### NONRESIDENCE

Miss. 1918. “Nonresidence” means actual cessation to dwell within a state for an uncertain period without definite intention as to a time for returning, although a general intention to return may exist.—*Bank of Hattiesburg v. Mollere*, 79 So. 87, 118 Miss. 154.

Neb. 1902. “Absence” and “nonresidence” are two entirely different things. Thus a man may reside on a homestead in one county, and yet be long absent therefrom in another county.—*Webster v. Citizens’ Bank*, 96 N.W. 118, 2 Neb. (Unof.) 353.

N.J.Cir.Ct. 1940. Mere “presence” in New Jersey is not “residence” within statute authorizing issuance of attachment against property of debtor who is not a resident in New Jersey, and mere “absence” is not proof of “nonresidence”. N.J.S.A. 2:42-5.—*Augustus Co., for Use of Bourgeois v. Manzella*, 17 A.2d 68, 19 N.J.Misc. 29.—Attach 25.

N.Y.Co.Ct. 1914. Plaintiff, who, after the institution of an action in the county of his residence, closed his house for the winter and took up his abode temporarily in hotels in cities in which his theatrical business led him, did not become a non-resident for that reason, but retained his original residence, and could not be required to give bond for costs on the ground of “nonresidence.”—*Ball v. Randall*, 149 N.Y.S. 595, 87 Misc. 194.

N.C. 1890. “Nonresidence,” within the meaning of the attachment laws, means the “actual cessation to dwell within a state for an uncertain period, without definite intention as to a time for returning, although a general intention to return may exist.”—*Carden v. Carden*, 12 S.E. 197, 107 N.C. 214, 22 Am.St.Rep. 876.

#### NON-RESIDENT

U.S.Oklahoma. 1939. Action on life policies instituted in Oklahoma state court against an Oklahoma insurer was not removable by the insurer to federal court since insurer was not a “nonresident” of Oklahoma within meaning of statute providing for removal of causes. Jud.Code § 28, 28 U.S.C.A. §§ 1441, 1445, 1447.—*Atlas Life Ins. Co. v. W. I. Southern, Inc.*, 59 S.Ct. 657, 306 U.S. 563, 83 L.Ed. 987.—Rem of C 45.

C.A.D.C. 1965. Assuming that defendant when served in India under Nonresident Motorist’s Act of District of Columbia was no longer entitled to

diplomatic immunity, he was not "nonresident" to whom Act was applicable where, at time of collision out of which suit arose, he enjoyed diplomatic immunity. D.C.Code 1961, § 40-423.—Shaffer v. Singh, 343 F.2d 324, 120 U.S.App.D.C. 42.—Autos 235(3).

C.A.D.C. 1952. Under the District of Columbia Financial Responsibility Act authorizing substituted service on "nonresident" motorist, quoted word did not include one who had lived in the District for more than 15 months before accident and continued to live there for more than eight months after it occurred, although he was driving a vehicle using New York license plates and may have been domiciled in New York on date of accident. D.C.Code 1940, § 40-403.—Johnson v. Jacoby, 195 F.2d 563, 90 U.S.App.D.C. 280.—Autos 235(3).

App.D.C. 1936. Under statute providing that if a person having interest in property in District of Columbia and having wife dependent on him for support has disappeared or absconded, without making sufficient provision for such support, and has been "without the District of Columbia continuously" for two years or longer, such wife may file petition for appointment of receiver for property, quoted words mean uninterruptedly and physically beyond the confines of the District, and are not synonymous with "nonresident." Act April 8, 1935, 49 Stat. 111.—De Ruiz v. De Ruiz, 88 F.2d 752, 66 App.D.C. 370.—Hus & W 294.

C.C.A.4 1946. Where citizen of the United States, who was the manager of a Mexican mining company, spent two-thirds of year in the United States for pleasure and profit, he was not a "nonresident" of the United States within meaning of statute providing that earned income from sources outside United States of a bona fide nonresident of the United States for more than six months during taxable year shall be exempt from taxation.—C.I.R. v. Swent, 155 F.2d 513, certiorari denied Swent v. Commissioner of Internal Revenue, 67 S.Ct. 491, 329 U.S. 801, 91 L.Ed. 685.

C.C.A.8 (Mo.) 1940. Where bankrupt, after arriving in St. Louis from California, registered at a hotel in St. Louis with an intent to stay there only until he could purchase a store and get located, until the bankrupt acquired a permanent or definite abode in some political subdivision of the state of Missouri, the bankrupt remained a "nonresident" within meaning of Missouri statute concerning validity of mortgages on personalty where mortgagor is a nonresident of the state. V.A.M.S. § 443.460.—Katcher v. Wood, 109 F.2d 751.—Chat Mtg 150(2).

C.C.A.2 (N.Y.) 1948. One who was arrested on a warrant of deportation for having entered the United States illegally, and was thereafter released on bail pending determination of the deportation proceedings, did not thereby become a "nonresident", but, even if he were a nonresident under immigration laws, he was still "residing in the United States" within provision of Selective Service Act rendering him liable to military service. Selective Training and Service Act of 1940, § 3(a), as amend-

ed, 50 U.S.C.A.Appendix, § 303(a).—U.S. v. Rubinstein, 166 F.2d 249, certiorari denied 68 S.Ct. 791, 333 U.S. 868, 92 L.Ed. 1146, certiorari denied Foster v. U.S., 68 S.Ct. 791, 333 U.S. 868, 92 L.Ed. 1146.—Armed S 20.4(2).

D.Conn. 1947. Where defendant was a citizen of Michigan where he was domiciled and maintained permanent home but he owned and staffed a farm in Connecticut where he spent an average of 50 days yearly and also an estate in England, defendant was a "non-resident" of Connecticut within removal act and was entitled to remove diversity of citizenship action from state to federal court.—Hunt v. Dodge, 72 F.Supp. 624.

N.D.Iowa 1947. Where foreign motor truck corporation engaged in operating motor trucks between Denver and Chicago had secured a permit to transact business in Iowa and had designated a resident agent for service of process and at all times after accident had a regular place of business within the state and was continuously operating its business in the state, such corporation was not a "nonresident" of Iowa within statute tolling statute of limitations, and action for death not brought within two years after accident happened on Iowa highway was barred by limitation. Code Iowa 1946, §§ 321.498, 321.499, 614.1, subd. 3, 614.6, 617.3, 617.6.—Denver-Chicago Trucking Co. v. Lindeman, 73 F.Supp. 925.—Death 39.

D.Me. 1936. Maine corporation, which did large part of its manufacturing business in New Hampshire but had its principal place of business in Maine, was "nonresident" of New Hampshire, within New Hampshire statute prescribing town in which conditional sales contracts shall be recorded where one or both parties to contract do not reside in state. Pub.Laws N.H.1926, c. 216, §§ 27-30.—In re Brown Co., 14 F.Supp. 251, affirmed Babcock & Wilcox Co. v. Spaulding, 86 F.2d 256.—Sales 465.

D.Md. 1937. Within Maryland statute authorizing special form of constructive service on nonresident, in action growing out of automobile accident, wife of naval officer, temporarily assigned to duty at Annapolis and living there for several years and for over a year after an accident, was not a "nonresident" though she and her husband may have retained their citizenship in some other state and may not have acquired citizenship in Maryland. Code Pub.Gen.Laws Supp.Md.1935, art. 56, §§ 190, 190A.—Suit v. Shailer, 18 F.Supp. 568.—Autos 235(3).

E.D.Pa. 1954. Under Pennsylvania law Pennsylvania resident who left Pennsylvania on his official duties as member of United States military service could not be reached by ordinary Pennsylvania legal process and hence was "nonresident" within Pennsylvania tolling statute, notwithstanding that resident was domiciled in Pennsylvania during entire period of military service and might have been subject to service of process by service at his place of abode or by issuance of writ of summons in Pennsylvania court during his absence and reissue and service after his return. 12 P.S. §§ 34, 40; Pa.R.C.P. Nos. 1009, 1010, 12 P.S.Appendix.—Rich

v. Jefferson Medical College of Philadelphia, 125 F.Supp. 357.—Lim of Act 87(4).

E.D.Pa. 1949. Citizen and resident of Dominion of Canada was a "nonresident" subject to substituted service under the Pennsylvania statute providing for substituted service on nonresident motorists in civil suits arising out of accident or collision within the commonwealth. 75 P.S. § 2001 et seq.—Lulevitch v. Hill, 82 F.Supp. 612.—Autos 235(3).

D.R.I. 1976. "Nonresident" within purview of Rhode Island long-arm statute means nonresident at time of service under such statute. Gen.Laws R.I.1956, § 9-5-33.—Del Guidice v. Robbins, 410 F.Supp. 303.—Fed Cts 76.

Bkrcty.S.D.Ohio 1982. Under Kentucky statute setting forth proper location at which to record security interest in order to perfect it, debtor, which, as foreign corporation, had filed application for "certificate of authority" to transact business in Kentucky listing address in county in which creditor filed its financing statement as address of debtor's proposed registered office in Kentucky, was not "nonresident" of Kentucky for purpose of filing under statute and filing was not required to have been made in office of Kentucky Secretary of State on ground that debtor's principal place of business was outside Kentucky. KRS 271A.540, 355.9-401(1)(c).—Matter of Midwestern Food Stores, Inc., 21 B.R. 944.—Sec Tran 90.

Ala. 1924. As to giving his wife and minor children a homestead in his land, a husband is a "non-resident" when he ceases to dwell within the state for an uncertain period without a definite intention of returning, although he has a general intention to return at some future time; it being his intention that controls, not the absence of the wife from state.—Lucky v. Roberts, 100 So. 878, 211 Ala. 578.—Home 142(1).

Ark. 1964. Defendant may be "nonresident" within statute allowing plaintiff in civil action to have attachment against property of defendant who is nonresident regardless of whether defendant is a domiciliary of state. Ark. Stats. § 31-101.—Stephens v. AAA Lumber Co., 384 S.W.2d 943, 238 Ark. 842.—Attach 25.

Ark. 1947. An Arkansas congressman whose legal domicile was in Arkansas did not maintain a "place of abode" outside the state and hence was not an "non-resident" for income tax purposes, though he spent more than six months in each taxable year in Washington, D.C. Pope's Dig. § 14025, subds. 9, 10; U.S.C.A.Const art. 1, § 2.—Cravens v. Cook, 204 S.W.2d 909, 212 Ark. 71.—Tax 1013.

Ark. 1935. One who testified that her home was in the state, although she had lived in another state for three years, held not a "nonresident" of whom bond for costs might be required.—North River Ins. Co. of New York v. Thompson, 81 S.W.2d 19, 190 Ark. 843.—Costs 110(2).

Cal.App. 1 Dist. 1947. "Nonresident" within statute authorizing service of process on director of motor vehicles when a nonresident is sued for

damages arising out of an automobile accident within the state refers to an out-of-state person who comes to California for a temporary sojourn, whether it be a transient who is merely journeying through the state or one who has come for temporary purposes, which might or might not, later, result in the determination to remain for a considerable period, if not permanently. West's Ann.Vehicle Code, §§ 17450-17458.—Briggs v. Superior Court of Alameda County, 183 P.2d 758, 81 Cal. App.2d 240.—Autos 235(3).

Cal.App. 3 Dist. 1947. Where member of armed forces from Missouri was stationed in California for more than three years prior to date of automobile collision, and he stated that he became a resident of California several months before collision and continued to be such until after collision, and there was no evidence that he was a nonresident, he was not a "nonresident" within meaning of Vehicle Code section authorizing service on a nonresident motorist by leaving copy of summons and complaint with director of motor vehicles. West's Ann.Vehicle Code, §§ 17450-17458; West's Ann.Gov.Code, §§ 243, 244.—Berger v. Superior Court in and for Yuba County, 179 P.2d 600, 79 Cal.App.2d 425.—Autos 235(3); Domicile 4(1).

Cal.App. 4 Dist. 1948. The statute authorizing service of process on director of motor vehicles when a "nonresident" is sued for damages arising out of an automobile accident within the state uses quoted word as meaning a person who was not a resident of state at time accident occurred.—De Pier v. Maddox, 197 P.2d 87, 87 Cal.App.2d 460.

Colo. 1999. A company was a "nonresident" of city, for purposes of municipal code's exemption of certain purchases by nonresidents from a sales and use tax, if company had an lack of significant contacts and consistent operation in city; term did not automatically include companies incorporated out-of-state or automatically exclude those incorporated in-state.—General Motors Corp. v. City and County of Denver, 990 P.2d 59.—Tax 1270.

Colo. 1999. Automobile manufacturer that was incorporated in Delaware and was headquartered in Michigan did not qualify as "nonresident" of Colorado municipality, for purposes of municipal code's exemption of certain purchases by nonresidents from sales and use tax, where manufacturer maintained lab in municipality and tested over one thousand vehicles per year in and around the city.—General Motors Corp. v. City and County of Denver, 990 P.2d 59.—Tax 1270.

Colo. 1947. In statute governing process in automobile cases, "nonresident" must be construed consistently with the act's purpose of obviating the difficulty of effecting service in ordinary way on nonresident involved in automobile accident while temporarily within the state. '35 C.S.A.Supp. c. 16, § 48(1).—Carlson v. District Court of City and County of Denver, 180 P.2d 525, 116 Colo. 330.—Autos 235(3).

Colo. 1947. A Lutheran pastor living in Colorado, though temporarily, was not a "nonresident" upon whom process in automobile case could be

served upon secretary of state, merely because his automobile bore an Illinois license. '35 C.S.A.Supp. c. 16, § 48(1).—Carlson v. District Court of City and County of Denver, 180 P.2d 525, 116 Colo. 330.—Autos 235(3).

Conn. 1936. Under statute providing that tax on transfer from nonresident should be imposed only on real property situated in state or tangible personality with actual situs in state, "nonresident" refers to one who is such at date of death, as to whom right of state to tax would be limited to tangible property within its jurisdiction. Gen.St. 1930, § 1360(b) (Rev.1949, § 2020); Pub.Acts 1929, c. 299, § 42, repealing Gen.St.1918, § 1265, as amended.—Hackett v. Bankers Trust Co., 187 A. 653, 122 Conn. 107.—Tax 867(1).

Del.Ch. 1933. Word "noninhabitant" and "nonresident" are synonymous.—Perrine v. Pennroad Corp., 168 A. 196, 19 Del.Ch. 368.

Del.Super. 1979. Under long-arm statute, providing for personal jurisdiction to be obtained over nonresidents whose acts cause injury within state, term "nonresident" refers to status of person at time service is sought to be obtained and, thus, permits jurisdiction over nonresidents who meet one of the jurisdictional tests, regardless of whether such persons resided in state at time cause of action arose. 10 Del.C. § 3104.—Harmon v. Eudaily, 407 A.2d 232, affirmed 420 A.2d 1175.—Courts 12(2.1).

D.C.Mun.App. 1953. Fact that defendant operated taxicab in District of Columbia and lived "within metropolitan area" in nearby Maryland did not preclude his recovery of attorney's fee under bond executed in his favor by plaintiff who instituted in the District of Columbia an automobile negligence action against defendant as a "nonresident." D.C.Code 1951, § 40-403.—Dew v. Simon, 95 A.2d 482.—Autos 251.

D.C.Mun.App. 1949. Where defendant had moved his family to new accommodations in Maryland, defendant was a "non-resident" of District of Columbia within attachment statute, notwithstanding his place of business remained in District of Columbia, and he planned to move back as soon as he could find accommodations.—Fink v. Katz, 68 A.2d 813.

D.C.Mun.App. 1943. "Nonresident", as used in attachment statute, must be taken in its ordinary and usual signification. D.C.Code 1940, § 16-301.—D'Elia & Marks Co. v. Lyon, 31 A.2d 647.—Attach 25.

D.C.Mun.App. 1943. That defendant had an established office in the District of Columbia and presumably was available for personal service was not material in determining whether he was a "nonresident" within attachment statute. D.C.Code 1940, § 16-301.—D'Elia & Marks Co. v. Lyon, 31 A.2d 647.—Attach 25.

D.C.Mun.App. 1943. Evidence that physician with office in District of Columbia boarded up his Maryland home and, with his family, moved to expensive apartment in the District of Columbia under one-year lease, intending to move back to

Maryland when he could afford it, authorized quashing of attachment of physician's property on ground that physician was not a "nonresident" of the District of Columbia. D.C.Code 1940, § 16-301.—D'Elia & Marks Co. v. Lyon, 31 A.2d 647.—Attach 47(4).

Fla. 1933. Motor vehicle operator employed within state five months every year was during such period "resident" and not "nonresident" of state, within law exempting from license provisions of motor vehicle regulation statute, motor vehicle owned by nonresident. F.S.A. § 320.37.—Robinson v. Fix, 151 So. 512, 113 Fla. 151.

Ga. 1980. Foreign corporation which was not authorized to transact business in Georgia and which did not have a registered agent for service of process was a "nonresident" for venue purposes. Code, § 24-117.—Bergen v. Martindale-Hubbell, Inc., 267 S.E.2d 10, 245 Ga. 742.—Corp 666.

Ga. 1970. Where evidence established as matter of law that third-party defendant was a resident of Georgia at time of automobile collision, such defendant could not be served under the "long-arm" statute which provides that Georgia court may exercise personal jurisdiction over any nonresident as to cause of action arising out of tort since the ordinary signification of term "nonresident" is mutually exclusive with the ordinary signification of the word "resident". Code, §§ 24-113.1, 102-102, subd. 1.—Thompson v. Abbott, 174 S.E.2d 904, 226 Ga. 353.—Autos 235(3).

Ga. 1902. "Residence" and "domicile" are not synonymous terms as used in attachment laws, though the distinction is not always accurately drawn. It is the actual and not the legal residence which is meant in attachment statutes. "Domicile" includes residence with an intention to remain, while no length of residence without intention of remaining constitutes domicile. In Keller v. Carr, 42 N.W. 292, 40 Minn. 428, it was ruled that a debtor may remain or reside out of the state so long and under such circumstances as to be a "nonresident" within the meaning of the statute relating to attachments, although, by reason of his intention to remain, his political domicile continues to be in the state; but a mere casual or temporary absence of a debtor from a state on business or pleasure will not render him a nonresident, even though he may not have a house of usual abode here at which a summons might be served against him. "Residence" was defined as an act, "domicile" as an act coupled with an intent. It was said that a man may have residence in one state or county and his domicile in another, and he may be a nonresident of the state of his domicile in the sense that his place of actual residence is not there.—Stickney v. Chapman, 42 S.E. 68, 115 Ga. 759.

Ga.App. 2000. Foreign corporation registered to do business in state was not subject to service of process under the long arm statute, as corporation, which was authorized to do business in state, was not a "nonresident" to which statute applied. O.C.G.A. § 9-10-90 et seq.—Cherokee Warehouses, Inc. v. Babb Lumber Co., Inc., 535 S.E.2d 254,

244 Ga.App. 197, certiorari denied.—Corp 668(2), 668(14).

Ga.App. 1999. Evidence in personal injury and loss of consortium action arising from auto accident did not show that alleged tortfeasor was “nonresident” at time of service, and thus, service on him under Nonresident Motorist Act was invalid; in his summary judgment affidavit, he averred that before accident he maintained his permanent residence in Georgia even while temporarily living in Pennsylvania, that he returned to Georgia shortly before accident with intention of permanently residing there, that his health deteriorated while visiting in Pennsylvania one year after accident, and that he was unable to return home, and even if evidence showed that he had more than one residence at time of collision, it did not show that he was nonresident when he was served in Pennsylvania. O.C.G.A. § 40-12-1 et seq.—Whitten v. Richards, 523 S.E.2d 906, 240 Ga.App. 719, reconsideration denied, and reconsideration denied, and certiorari denied.—Autos 235(3).

Ga.App. 1999. When an individual has more than one residence, and one residence is in Georgia, he is not a “nonresident” for purposes of the Nonresident Motorist Act. O.C.G.A. § 40-12-1 et seq.—Whitten v. Richards, 523 S.E.2d 906, 240 Ga.App. 719, reconsideration denied, and reconsideration denied, and certiorari denied.—Autos 235(3).

Ga.App. 1999. A former Georgia resident who moves out of state after an auto accident is not a “nonresident” under the Nonresident Motorist Act. O.C.G.A. § 40-12-1 et seq.—Whitten v. Richards, 523 S.E.2d 906, 240 Ga.App. 719, reconsideration denied, and reconsideration denied, and certiorari denied.—Autos 235(3).

Ga.App. 1998. Long arm statute does not require that a person both intend to and actually establish a residence outside of Georgia to become a “nonresident”, only that he actually reside elsewhere. O.C.G.A. § 9-10-90 et seq.—Cooper v. Edwards, 508 S.E.2d 708, 235 Ga.App. 48.—Courts 12(1).

Ga.App. 1993. Defendant who has residence both within and outside state is not “nonresident,” so as to permit service of process upon him in accordance with provisions of Nonresident Motorist Act. O.C.G.A. § 40-12-1 et seq.—Carroll v. Americal Corp., 428 S.E.2d 811, 207 Ga.App. 651.—Proc 62.

Ga.App. 1989. Term “nonresident” includes an individual who, at the time a claim or cause of action arises was residing in Georgia and subsequently became a resident outside of Georgia as of the date of perfection of service of process. O.C.G.A. § 9-10-90.—Calhoun v. Somogyi, 379 S.E.2d 595, 190 Ga.App. 502.—Domicile 1.

Ga.App. 1975. Where manufacturer of riding lawnmower engine was a registered foreign corporation authorized to do or transact business in Georgia at the time the cause of action under the “Long-Arm” statute arose, it was statutorily exclud-

ed from the status of “nonresident” and thus personal jurisdiction over the manufacturer could not be acquired under provision of “long-arm” statute authorizing personal jurisdiction over a nonresident who commits a tortious injury in Georgia caused by an act or omission outside the state. Code, §§ 24-113.1(c), 24-117.—Tecumseh Products Co. v. Sears, Roebuck & Co., 213 S.E.2d 522, 134 Ga. App. 102.—Corp 665(3).

Ga.App. 1942. Where foreign corporation has office and place of business in county within the state, in charge of agent upon whom service against the corporation can be legally made, such corporation is not a “non-resident” within meaning of Nonresident Motorist Act, so as to authorize suit against it in a county where it has no office, place of business or agent. Laws 1937, pp. 732-734.—Hirsch v. Shepherd Lumber Corp., 21 S.E.2d 110, 67 Ga.App. 474.—Autos 232.

Ga.App. 1928. A person who voluntarily removes from state for purpose of living and carrying on business elsewhere for unlimited period, is for purposes of attachment a “nonresident” though he may occasionally visit the state and may intend to return at some indefinite future time.—Biggers v. Bank of Ringgold, 144 S.E. 397, 38 Ga.App. 521.

Ga.App. 1912. A mere casual or temporary absence of a debtor from the state on business or pleasure will not render him a “nonresident,” within the meaning of the statute relating to attachments.—Flemister Grocery Co. v. Wright Mercantile & Lumber Co., 73 S.E. 1077, 10 Ga.App. 702.

Ill. 1942. A transient pauper is a “nonresident”, and aid given a transient person in county, not chargeable to a township, properly comes within class of nonresidents, within section of Pauper Act imposing on county expense of illness or death of indigent nonresident becoming ill or dying in county. S.H.A. ch. 107, § 25.—People ex rel. Hempen v. Baltimore & O. R. Co., 42 N.E.2d 69, 379 Ill. 543.—Social S 3.

Ill. 1939. Under statute providing use and operation of a motor vehicle on highways by a nonresident should be deemed an appointment of Secretary of State to receive service of process in actions growing out of such use or resulting in damage to person or property, term “nonresident” is not limited to nonresident natural persons, but includes every nonresident, individual, member of partnership or corporate, owner or nonowner, using and operating a motor vehicle over Illinois highways. S.H.A. ch. 95½, § 23.—Jones v. Pebler, 20 N.E.2d 592, 371 Ill. 309, 125 A.L.R. 451.—Autos 235(3).

Ill. 1939. Under statute providing use and operation of a motor vehicle on highways of state by a nonresident should be deemed an appointment of Secretary of State to receive service of process in actions growing out of such use or resulting in damage to person or property, “nonresident” includes nonresidents driving a motor vehicle on highway of state either by themselves or through their agents, servants, or employees at time when use or operation caused damage to person or property of a resident. S.H.A. ch. 95½, § 23.—Jones v.

Pebler, 20 N.E.2d 592, 371 Ill. 309, 125 A.L.R. 451.—Autos 235(3).

Ill. 1916. Practice Act § 13, Laws 1907, p. 443, S.H.A. ch. 110 Appendix § 13, now S.H.A. ch. 110, § 140, providing that any nonresident person having a place or places of business in any county in which suit may be instituted may be sued by the usual and ordinary name which such person has assumed, and under which he is doing business, and service of process may be had in such county upon such person by serving the same upon any agent of such person within the state, must be construed in favor of its constitutionality so that the word "nonresident" applies only to nonresidents of the county who are residents of the state.—*Joel v. Bennett*, 115 N.E. 5, 276 Ill. 537.

Ill. 1910. A "nonresident" is one who is not a resident of a particular place, and the term may be used indiscriminately to describe one who does not reside in a particular country, or state, or county, or any of the smaller subdivisions of territory made for governmental purposes, and the word may as well refer to one not residing in a county as to one residing outside of the state.—*Watson v. Coon*, 93 N.E. 289, 247 Ill. 414.

Ill.App. 3 Dist. 1952. Defendant in automobile collision case who was overseas in military service was a "nonresident" within statute designating Secretary of State as attorney in fact for non-resident for service of process. S.H.A. ch. 95½, § 23.—*Rutherford v. Bentz*, 104 N.E.2d 343, 345 Ill.App. 532.—Autos 235(3).

Iowa 1894. In Code, § 2533, I.C.A. § 614.6, relating to limitation of actions, and declaring that the time during which a defendant is a nonresident of the state shall not be included in computing any of the periods of limitation above described, the word "nonresident" contemplates one who has acquired a residence in another state, and not one who is merely sojourning in another state still holding his residence in Iowa.—*Fowler v. Des Moines & K.C.R. Co.*, 60 N.W. 116, 91 Iowa 533.

Ky. 1955. Where water for refinery, though taken from mains at a point inside corporate limits of city adjacent to property owned by refinery operator, was carried through line installed at city's expense to refinery just outside corporate limits of city and was there metered, refinery operator was a "nonresident" consumer of water within city ordinance fixing different rates for resident and nonresident consumers.—*City of Covington v. Sohio Petroleum Co.*, 279 S.W.2d 746.—Waters 203(5).

Ky. 1932. To constitute person "nonresident" within provisions respecting jurisdiction, fixed, though not permanent, abode outside state is required, but *animus revertendi* need not be abandoned. Civ.Code Prac. §§ 39, 57, 194; Ky.St. § 2524.—*Appleton v. Southern Trust Co.*, 51 S.W.2d 447, 244 Ky. 453.—Courts 12(1).

Ky. 1932. Person may be "nonresident" of state, though he is citizen thereof.—*Appleton v. Southern Trust Co.*, 51 S.W.2d 447, 244 Ky. 453.—Domicile 2.

Ky. 1932. Temporary residence out of state, even for indefinite period, will not constitute person "nonresident," if, at departure and during absence, he had intention to return to state.—*Appleton v. Southern Trust Co.*, 51 S.W.2d 447, 244 Ky. 453.—Domicile 4(2).

Ky. 1910. Ky.St. § 3014, Russell's St. § 963, provides that the agent or agents of nonresident proprietors shall be civilly responsible for the license tax and criminally responsible for carrying on business in like manner as if they were proprietors. *Held*, that the word "nonresident," as used in a city ordinance reproducing such section and requiring every person, etc., engaged in posting bills as a business to pay a license fee, means one living without the corporate limits of the city, though within the state.—*Loges v. City of Louisville*, 132 S.W. 565, 141 Ky. 367.—Licens 11(1).

Ky. 1907. Civ.Code Prac. § 616, requires a "nonresident," before commencing an action, to give a bond for costs. Section 617 provides that, if the bond is not given, the action shall be dismissed. Plaintiff, whose home had previously been in this state, went to another state to secure employment; his intention being to return as soon as he could procure work in the state. He owned no property in the state, and his family accompanied him. He remained out of the state about three months, during all of which time his purpose was to return as soon as he could get employment. *Held*, that plaintiff was not a "nonresident," within the meaning of Civ.Code Prac. § 616.—*Erwin v. Allen*, 99 S.W. 322, 124 Ky. 458, 30 Ky.L.Rptr. 607.—Costs 110(2).

Ky.App. 1993. "Nonresident" as used in statutory prohibition against granting operator's license to nonresident lacking valid driver's license in state of residence refers to status of driver at time of revocation, and, thus, driver who moves to state cannot successfully avoid the prohibition by simple expedient of changing residence. KRS 186.440(4).—*Vaughn v. Com., Transp. Cabinet, Div. of Driver's Licensing*, 870 S.W.2d 231.—Autos 138.

Ky.App. 1993. "Nonresident" as used in statutory prohibition against granting operator's license to nonresident lacking operator's license in state of residence refers to status of driver at time of revocation, and, thus, driver who moves to state cannot successfully avoid provisions of the statute by simple expedient of changing residence. KRS 186.440(4).—*Com., Transp. Cabinet v. Hobson*, 870 S.W.2d 228.—Autos 138.

La.App. 1 Cir. 1994. Defendant was "nonresident" of state, within meaning of Louisiana statute authorizing issuance of prejudgment writ of attachment based on defendant's nonresidence, based on evidence that, at time plaintiff's petition for writ of attachment was filed, defendant had North Carolina bank account, driver's license and vehicle registration and had moved virtually all of her possessions from the Louisiana home which she had listed for sale to her North Carolina apartment. LSA-C.C.P. arts. 3541, 5251(11).—*Alessi v. Belan-*

ger, 644 So.2d 778, 1993-2047 (La.App. 1 Cir. 10/7/94).—Attach 25, 47(4).

La.App. 2 Cir. 1985. Mississippi contractor constituted a “nonresident” contractor within purview of statute [LSA-R.S. 38:2225 subd. A] providing that preference shall be given to resident contractors over nonresident contractors in award of public contracts. LSA-R.S. 38:2211 subd. A(7)(a).—American Waste and Pollution Control Co. v. Madison Parish Police Jury, 480 So.2d 761, writ granted, stay granted 481 So.2d 1324, writ granted, stay granted 481 So.2d 1324, reversed 488 So.2d 940, rehearing denied.—Pub Contr 11.

La.App. 4 Cir. 1997. Foreign corporation was not “nonresident” within meaning of venue provision of long-arm statute, as foreign corporations was duly registered with Secretary of State to do business in Louisiana. LSA-R.S. 13:3202.—Broussard v. Campbell Wells Corp., 702 So.2d 361, 1997-1847 (La.App. 4 Cir. 11/5/97), on rehearing in part, writ denied 717 So.2d 1144, 1998-0124 (La. 4/9/98).—Corp 666.

Md. 1972. A “contingent remainderman”, who may either be a person not in being or not ascertained, and who may not be a natural person at all, is neither a “resident” nor a “nonresident” within statute exempting or excluding fiduciary from income tax liability for undistributed income being held for benefit of a nonresident, since both terms import identifiable individuals. Code 1957, art. 81, §§ 279(e, i), 313(b).—Maryland Nat. Bank v. Comptroller of Treasury, 287 A.2d 291, 264 Md. 536.—Tax 1022.

Md. 1922. Where one was granted a six months’ vacation by his employer for the benefit of his health and, acting on such leave went to Florida and from thence to Southern California, he was not a “nonresident” within the attachment law.—Winkler v. Hazard, 116 A. 850, 140 Md. 102, 26 A.L.R. 177.—Attach 25.

Md. 1908. If petitioner has been out of the state for a year and a half with no intention of returning or with the intention of returning at some indefinite future time, he is a “nonresident” within Code Pub.Gen. Laws 1904, art. 16, § 123, providing that, where it is unknown whether a nonresident is living or dead, a bill may be filed against him as if living, etc., and he may be proceeded against as such, though he may not intend to abandon his domicile in the state.—Hollander v. Central Metal & Supply Co. of City of Baltimore, 71 A. 442, 109 Md. 131, 23 L.R.A.N.S. 1135.

Mass. 1951. Where majority of stock of electric company was held by a Boston national bank as trustee, the bank was a “resident” and not a “nonresident” for purposes of statute providing that corporate franchise taxes paid by electric light companies are retained by the commonwealth in proportion to the amount of stock owned by nonresidents and the remainder is distributed to the municipalities where the businesses are carried on. M.G.L.A. c. 58 § 24, as amended by St.1933, c. 254, § 23.—Commissioner of Corporations & Tax-

ation v. City of Malden, 98 N.E.2d 277, 327 Mass. 271.—Tax 909.

Mass. 1943. Under statute, a person whose legal residence is not in commonwealth may be “nonresident”, entitled to operate his automobile, registered elsewhere in Massachusetts without registration therein, though he has acquired and maintained indefinitely a “regular place of abode”, that is regular “residence,” in commonwealth, if he has not become domiciled therein. G.L., Ter.Ed., c. 90, § 1; § 3, as revised by St.1939, c. 325.—Rummel v. Peters, 51 N.E.2d 57, 314 Mass. 504.—Autos 36.

Mass. 1943. “Legal residence”, within statutory definition of “nonresident”, entitled to operate automobile in commonwealth without registration therein, as any person whose legal residence is not within commonwealth, is something more than ordinary “residence”, which is word of varied meanings, ranging from “domicile” down to personal presence with some slight degree of permanence, and means, in general, personal presence at some place of abode, with no present intention of definite and early removal therefrom and with purpose to remain for undetermined period, not infrequently, but not necessarily, combined with design to stay permanently. G.L., Ter.Ed., c. 90, § 1; § 3, as revised by St.1939, c. 325.—Rummel v. Peters, 51 N.E.2d 57, 314 Mass. 504.—Autos 36.

Mass. 1943. The statute defining “nonresident”, permitted to operate in commonwealth an automobile not registered therein, as any person whose legal residence is not within commonwealth, contemplates that a man may be nonresident, though he has regular place of abode or residence in commonwealth, and uses expression “legal residence” in sense of “domicile”. G.L., Ter.Ed., c. 90, § 1; § 3, as revised by St.1939, c. 325.—Rummel v. Peters, 51 N.E.2d 57, 314 Mass. 504.—Autos 36.

Mass. 1943. In action for damage to plaintiff’s automobile, not registered in Massachusetts, evidence that plaintiff lived in Pennsylvania all his life, that automobile was registered therein in his name at time of accident, that he returned to Pennsylvania for summer and Christmas vacations during years in which he studied at universities and taught school in Massachusetts, and that he owned property, paid poll taxes, and voted in Pennsylvania, justified trial judge’s finding that plaintiff was “nonresident”, entitled to operate automobile in Massachusetts without registration therein, even if he had no residence in Pennsylvania. G.L., Ter.Ed., c. 90, § 1; § 3, as revised by St.1939, c. 325.—Rummel v. Peters, 51 N.E.2d 57, 314 Mass. 504.—Autos 36, 56.

Mass. 1934. Student owner of automobile domiciled in New York, who had been living in a Massachusetts college dormitory for eight months prior to accident, held not a “nonresident” of Massachusetts so as to be authorized to operate his automobile in Massachusetts by virtue of New York registration, but registration in Massachusetts was required. G.L. c. 90, §§ 1, 10.—Brennan v. Schuster, 192 N.E. 835, 288 Mass. 311.—Autos 36.

Mass. 1931. "Nonresident," as used in automobile laws, does not comprehend residents (G. L. c. 90, s 1, as amended).—Jenkins v. North Shore Dye House, 178 N.E. 644, 277 Mass. 440.—Autos 36.

Mass. 1931. G. L. c. 90, s 1, as amended by St. 1923, c. 464, s 1, and St. 1924, c. 189, provides that "nonresident" as used in automobile laws shall mean "any resident of any state or country who has no regular place of abode or business in commonwealth for a period of more than 30 days in the year; provided, that any such resident who owns a commercial motor vehicle which is operated in commonwealth for more than 30 days in year shall not, as to such vehicle, be deemed a nonresident."—Jenkins v. North Shore Dye House, 178 N.E. 644, 277 Mass. 440.—Autos 36.

Mich. 1910. In the absence of a statute making a foreign corporation, for purposes of litigation, a resident of every county in which it does business, a foreign corporation is a "nonresident," within Comp.Laws, § 719, requiring the service of a short summons, in an action in justice's court against a nonresident and the service of a long summons does not give the court jurisdiction.—Wells v. U. S. Fidelity & Guaranty Co. of Baltimore, Md., 125 N.W. 57, 160 Mich. 213.—J P 80.1(1).

Minn. 1951. In light of purpose of Safety Responsibility Act, a person must be deemed a "nonresident", within provision of the act governing service of process upon nonresidents in automobile cases, when he has no actual residence, as distinguished from concepts of legal domicile and temporary abode, within the state. M.S.A. §§ 170.55, 645.21, 645.31.—Hughes v. Lucker, 46 N.W.2d 497, 233 Minn. 207.—Autos 235(3).

Minn. 1951. A person is deemed a "nonresident" within meaning of the statute providing that the operation by a nonresident of a motor vehicle upon the state highways shall be deemed an appointment of the Commissioner of Highways as an attorney upon whom process may be served, when he has no actual residence, as distinguished from the concept of legal domicile and temporary abode, within the state. M.S.A. § 170.05.—Chapman v. Davis, 45 N.W.2d 822, 233 Minn. 62.—Autos 235(3).

Miss. 1958. Evidence including showing that judgment debtor who was an airplane cotton duster had come to Mississippi in 1950, that in off season he "loafs and hunts", that he had been in and out of Mississippi since 1951, that he had an equity in a home which was listed for sale, that he and his wife and six children had moved to Colorado and that he had told a number of persons that he intended to move to Colorado and to go into business there justified finding that judgment debtor was either a "non-resident" of Mississippi or was "about to remove himself or his property out of the State" warranting issuance of attachment. Code 1942, § 2679.—Dickson v. Lindsay, 107 So.2d 732, 234 Miss. 684.—Attach 47(4).

Miss. 1942. One who resides in state becomes a "non-resident" thereof, within statute authorizing attachment against nonresidents, when he removes

therefrom intending to remain out permanently or for a definite period of time, although he frequently visits the state for short intervals of time. Code 1930, § 174.—Bonds v. Ross, 7 So.2d 554, 192 Miss. 610.

Miss. 1942. One who resides in state becomes a "nonresident" thereof, within statute authorizing attachment against nonresidents, when he removes therefrom intending to remain out permanently or for a definite period of time, although he frequently visits the state for short intervals of time. Code 1930, § 174.—Bonds v. Ross, 7 So.2d 554, 192 Miss. 610.—Attach 25.

Miss. 1942. Where brakeman's run was from Jackson, Tenn., to Louisville, Miss., passing through New Albany, Miss., once each day six days weekly train remaining there about an hour daily for switching purposes, and brakeman rented his house in New Albany where he had been living and rented house in Jackson with purpose of remaining there for an indefinite period brakeman was a "nonresident" of Mississippi within statute authorizing attachment against nonresidents. Code 1930, § 174.—Bonds v. Ross, 7 So.2d 554, 192 Miss. 610.—Attach 25.

Miss. 1937. A foreign corporation domesticated in Mississippi under statute remains a resident of state of original incorporation for all jurisdictional purposes, state and federal, and is subject to attachment in Mississippi courts as a "nonresident," since, for purpose of removing to federal court an action brought in state of domestication, a domesticated foreign corporation is a nonresident. Code 1930, §§ 4160-4162.—Southern Motor Express Co. v. Magee Truck Lines, 177 So. 653, 181 Miss. 223, 114 A.L.R. 1377.—Corp 670(2).

Miss. 1930. Foreign railroad corporation with line of railroad within state and property subject to execution and liable to personal judgment held, nevertheless, "nonresident" within attachment statute (Hemingway's Code 1927, §§ 307, 4506).—Clark v. Louisville & N.R. Co., 130 So. 302, 158 Miss. 287.—Corp 670(1).

Miss. 1921. The word "nonresident," as used in Code 1906, § 536 (Hemingway's Code, § 293), authorizing attachment in chancery against nonresidents, includes insurance companies domiciled in other states which have not become domesticated under the laws of the state, although under the laws of this state process may be served upon the commissioner, and when so served has the effect of authorizing personal judgments against the insurance company.—Aetna Ins. Co. v. Robertson, 88 So. 883, 126 Miss. 387.—Judgm 17(11).

Mo. 1903. Rev.St.1899, §§ 9303, 575, V.A.M.S. §§ 140.240, 506.160, provide that, if the plaintiff or other person for him shall depose that part of the defendants are nonresidents or have absconded or absented themselves from their usual abode service may be had by publication. An affidavit in a tax suit stated that defendant had "absconded from his usual place of abode in this state." Held, that an order authorizing service by publication, on the ground that defendant was a "nonresident," was

not a compliance with the statute, and gave the court no jurisdiction.—*Parker v. Burton*, 72 S.W. 663, 172 Mo. 85.—Proc 96(4).

Neb. 1926. “Nonresident,” as used in statute relating to appropriating land for highways, means one not domiciled within state. Comp.St.1922, § 1021.—*Sheridan County v. Hand*, 210 N.W. 273, 114 Neb. 813.—Em Dom 180.

Neb. 1893. Comp.St. c. 16, § 100, provides that if, upon the location of a certain railroad, it shall be found to run through the lands of any “nonresident” owner, the railroad may give a certain notice to such proprietor, if known, and, if not known, by publication in some newspaper published in the county where such lands may lie, and, if such owner shall not thereafter apply within a certain time to have the damages assessed in the prescribed mode, the company may proceed to have damages assessed, subject to the same right of appeal as in the case of resident owners. Held, that the word “nonresident,” as so used, means a nonresident of the state, and not of the land affected, or of the county where it is situated. The word “nonresident” is ordinarily used in connection with certain rights of creditors and property owners. Thus a person who does not reside in the school district in which he has property is a nonresident of such district; so, if he owns property in any village, city, or county in which he does not reside, he is a nonresident of such county, city, or village. In the broad sense it is applicable to every one who does not reside at a particular place named. The word, however, when applied to the bringing of an action, is used in a more limited sense. If personal service cannot be had within the boundaries of the state, constructive service by publication is permitted. If personal service can be had upon a defendant within the state, then service by publication cannot be made. In the general acceptance of the term as used in such connection, it means one who resided out of the state.—*Pacific R. Co. v. Perkins*, 54 N.W. 845, 36 Neb. 456.

Neb. 1891. As used in Code, § 926, providing that when the ground of attachment is that the defendant is a foreign corporation, or a “nonresident of the state,” the order of attachment may be issued without an undertaking, “nonresident” is synonymous with “not a resident of the state,” as used in an affidavit for the attachment reciting that the defendant is not a resident of the state.—*Nagel v. Loomis*, 50 N.W. 441, 33 Neb. 499.

N.H. 1939. As applied to corporations, the adjectives “foreign” and “nonresident” are usually regarded as synonymous.—*Blanchette v. New England Tel. & Tel. Co.*, 6 A.2d 161, 90 N.H. 207.—Corp 632.

N.J. 1954. A corporation whose domicile and residence in the state of its creation are inseparable incidents of the charter which gives it being does not become a “nonresident” by transacting business in another sovereignty, although it may have a residence there for the purposes ordained by the foreign jurisdiction.—*In re Roche's Estate*, 109 A.2d 655, 16 N.J. 579.—Corp 52.

N.J.Err. & App. 1942. Husband’s affirmative statement in application for discharge of writ of ne exeat that he lost his position in New Jersey and moved to Pennsylvania to secure employment in response to which wife relied upon statement in affidavit that husband voluntarily quit employment in New Jersey and left the state to evade contempt proceedings for failure to comply with separate maintenance decree without producing proof thereof of which was available to the wife through husband’s former employer, warranted finding that husband was a “nonresident” immune from service of writ of ne exeat while voluntarily within jurisdiction as defendant in a criminal cause.—*Cook v. Cook*, 28 A.2d 178, 132 N.J.Eq. 352.—Proc 119.

N.J.Sup. 1907. A corporation is “resident,” irrespective of its domicile, when it does business in a state and its officers reside there, upon whom process may be served at their homes. Conversely, a corporation, no matter where incorporated, which does not do business in the state and does not have officers residing there upon whom process may be served, is “nonresident.”—*Brand v. Auto Service Co.*, 67 A. 19, 75 N.J.L. 230, 46 Vroom 230.

N.J.Ch. 1939. A foreign corporation doing business in the state, pursuant to license issued to it, and having a place of business within state and an officer residing in state on whom process might be served, was not a “nonresident,” so as to be required to give security for costs. Rev.St.1937, 2:29-25.—*M.J. Merkin Paint Co. v. Riccardi*, 3 A.2d 890, 124 N.J.Eq. 597.

N.J.Cir.Ct. 1940. Mere inconvenience in service of summons or other process furnishes no reason for issuance of attachment against one as a “nonresident” debtor. N.J.S.A. 2:42-5.—*Augustus Co., for Use of Bourgeois v. Manzella*, 17 A.2d 68, 19 N.J.Misc. 29.—Attach 21.

N.J.Cir.Ct. 1940. A debtor not having a place of abode at which summons could be served is “nonresident” and his property can be proceeded against by writ of attachment. N.J.S.A. 2:42-5.—*Augustus Co., for Use of Bourgeois v. Manzella*, 17 A.2d 68, 19 N.J.Misc. 29.—Attach 25.

N.J.Cir.Ct. 1940. A physician and surgeon who maintained in New Jersey a farm upon which was situated a furnished dwelling house in which his family had resided continuously for 10 years and to which he occasionally went when the opportunity afforded, and who owned New York residence property in which he permanently lived and practiced his profession, had his “usual place of abode” in New York, and was a “nonresident” of New Jersey, and hence was subject to writ of attachment. N.J.S.A. 2:42-5.—*Augustus Co., for Use of Bourgeois v. Manzella*, 17 A.2d 68, 19 N.J.Misc. 29.—Attach 25.

N.M.App. 2002. Foreign insurer was a “nonresident” for purposes of the venue statute and, therefore, was subject to suit in any county in state; its place of incorporation determined residency. NMSA 1978, § 38-3-1.—*Toscano v. Lovato*, 40 P.3d 1042, 131 N.M. 598, 2002-NMCA-022.—Insurance 3559.

N.Y. 1938. In action against foreign corporation which was engaged in business in State of New York and maintained an office therein for regular transaction of business, for purpose of statute of limitations, such corporation was not a "nonresident." Civil Practice Act, § 19.—McConnell v. Caribbean Petroleum Co., 15 N.E.2d 573, 278 N.Y. 189.—Lim of Act 88.

N.Y.A.D. 2 Dept. 1905. A person domiciled within the state, who temporarily leaves it for medical treatment for injuries, intending to return, is not a "non-resident."—Taylor v. Norris, 93 N.Y.S. 356, 104 A.D. 21.

N.Y.A.D. 3 Dept. 1992. Property was not purchased while taxpayer was "nonresident" of state, within meaning of nonresidency exemption from New York's compensating use tax, to the extent that taxpayer at least maintained New York apartment during relevant time period; it was taxpayer's rental of apartment, and not his use thereof, that determined his residency for compensating use tax purposes. McKinney's Tax Law §§ 1101, 1118(2).—Morris v. New York State Dept. of Taxation and Finance, 588 N.Y.S.2d 927, 183 A.D.2d 5, leave to appeal granted 595 N.Y.S.2d 399, 81 N.Y.2d 705, 611 N.E.2d 300, reversed 603 N.Y.S.2d 807, 82 N.Y.2d 135, 623 N.E.2d 1157.—Tax 1270.

N.Y.Sup. 1965. Term "nonresident" as used in statute providing for issuance of income execution to sheriff of county where nonresident is employed means nonresident of the state. CPLR § 5321(b).—Schleimer v. Gross, 261 N.Y.S.2d 670, 46 Misc.2d 931.—Execution 4205(3).

N.Y.Sup.App.Term 1910. Municipal Court Act (Laws 1902, c. 580) § 25, subd. 3, provides that no person having a place in the city for the regular transaction of business is deemed a "nonresident" under the provisions of the act, and section 32 permits the order for service of summons upon a defendant residing within the city after an alias summons has been issued, upon satisfactory proof that diligent effort has been made to serve the summons and that the place of his sojourn cannot be found, or, if he is within the city, that he evades service, so that personal service cannot be made. Defendant had an office in the city at a certain address, and plaintiff's attorney made affidavit that defendant called upon him at his office before the action was begun. Five alias summonses were secured, and numerous efforts were made to serve defendant, and plaintiff wrote him several letters at his New Jersey residence, stating that suit would be brought, and plaintiff was informed by attorneys, who appeared specially, but did not accept service, that they were attorneys for defendant, though plaintiff had requested defendant's attorney to enter an appearance and defendant's son stated to the process server that his father came to the office sometimes once a week, and sometimes not so often. Held, that an order for substituted service was properly issued under the circumstances; the facts justifying the belief that defendant was seeking to evade personal service.—Tricoli v. McKenzie, 123 N.Y.S. 211.—Courts 189(4).

N.Y.City Ct. 1940. A defendant who had a domicile in New York but attended a university in Philadelphia, lived there almost the entire year, registered his automobile there, and gave Philadelphia as his address, was a "nonresident" within statute providing for service of summons on nonresidents involved in automobile accidents within New York, and service on defendant by mailing a copy of summons and complaint to the Secretary of State and service of copy on defendant by registered mail at his Philadelphia address were valid. Vehicle and Traffic Law, § 52.—Uslan v. Woronoff, 18 N.Y.S.2d 222, 173 Misc. 693, affirmed 21 N.Y.S.2d 613, 259 A.D. 1093, reargument denied 22 N.Y.S.2d 464, 259 A.D. 1117.—Autos 235(3).

N.C. 1951. A resident of Canada, operating an automobile involved in an accident on a public highway in the state of North Carolina, was a "non-resident" within the purview of statute authorizing substituted service on non-resident motorist in civil suits arising out of accident or collision within the state. G.S. § 1-105.—Ewing v. Thompson, 65 S.E.2d 17, 233 N.C. 564.—Autos 235(3).

N.C. 1931. Under evidence that defendant came to state for temporary sojourn during summer and returned to home in sister state immediately thereafter, and that defendant's automobile involved in accident was operated under license of sister state, defendant held "nonresident" within statute authorizing service of summons on commissioner of revenue. Pub.Laws 1929, c. 75.—Bigham v. Foor, 158 S.E. 548, 201 N.C. 14.—Autos 235(3).

N.C. 1927. Where a defendant in an attachment proceeding had been absent from the state for over a year, and was so ill that the time of his return to the state, even if he were ever able to return, was uncertain, held, that he was a "nonresident" of the state within the meaning of C.S. § 484, subsec. 3, relative to service by publication on nonresident defendants, and within section 799, subsec. 2, relative to attachment of property of nonresidents.—Brann v. Hanes, 140 S.E. 292, 194 N.C. 571.

N.D. 1957. Every nonresident, whether a corporation or an individual, is a "nonresident" within statute authorizing service on State Highway Commissioner as attorney for nonresident motorists. NDRC 1953 Supp. 28-0611.—Austinson v. Kilpatrick, 82 N.W.2d 388.—Autos 235(3).

Ohio 1954. Generally, in the absence of the expression of a contrary legislative intention, a corporation incorporated under the laws of another State is within contemplation of the term "nonresident" as used in a statute, including statute respecting the taxation of the personal property of a nonresident corporation.—B.F. Goodrich Co. v. Peck, 118 N.E.2d 525, 161 Ohio St. 202, 53 O.O. 91.

Ohio 1954. Generally, in the absence of the expression of a contrary legislative intention, a corporation incorporated under the laws of another State is within contemplation of the term "nonresident" as used in a statute, including statute respecting the taxation of the personal property of a nonresident corporation. Gen.Code, §§ 5325-1, 5328, 5611-2.—B.F. Goodrich Co. v. Peck, 118

N.E.2d 525, 161 Ohio St. 202, 53 O.O. 91.—Tax 166.

Ohio Com.Pl. 1958. Corporations are included in the term "nonresident" as used within statute providing for service of process upon nonresident owners or operators of motor vehicles. R.C. § 2703.20.—American States Ins. Co. v. OK Trucking Co., 147 N.E.2d 526, 7 O.O.2d 292, 79 Ohio Law Abs. 467.—Autos 235(3).

Ohio Prob. 1948. "Non-resident" within Ohio statute authorizing probate court to set off year's allowance to widow and children of non-resident decedent leaving property in Ohio includes all those persons not domiciled within state, and statute applies to persons having their abode in Ohio but domiciled in another state. Gen.Code, § 10509-78.—In re McCombs' Estate, 80 N.E.2d 573, 52 Ohio Law Abs. 353.—Ex & Ad 173.

Okla. 1921. The term "foreign corporation," as used in Rev.Laws 1910, § 4812, 12 Okl.St.Ann. § 1151, providing that the plaintiff may have an attachment against the property of the defendant when the defendant is a foreign corporation or a nonresident of this state, was not used in the same sense as the term "nonresident" so as to mean merely a corporation which might be without the jurisdiction of the court in the sense that a nonresident of the state was out of the jurisdiction, but means a corporation created and existing by the laws of some other state or country.—Magna Oil & Refining Co. v. Uncle Sam Oil Co., 196 P. 142, 81 Okla. 8, 1921 OK 79.—Corp 632.

Or. 1917. A foreign corporation is a "nonresident" although doing business within this state within L.O.L. § 26, ORS 12.260, providing for application of foreign statute of limitations in actions between "nonresidents."—Hamilton v. North Pac. S.S. Co., 164 P. 579, 84 Or. 71.—Lim of Act 2(2).

Pa.Cmwlth. 1984. "Non-resident," for purposes of Home Rule Law forbidding municipalities from limiting or enlarging the powers granted by acts of the General Assembly which involve the fixing of rates of nonproperty or personal taxes levied upon nonresidents, means a person, partner, association or other entity that has its principal place of business outside the taxing district. 53 P.S. § 1-302(a)(7).—Municipality of Monroeville v. Bertolo, 480 A.2d 1290, 84 Pa.Cmwlth. 403, reversed in part, appeal dismissed in part Cox's v. Municipality of Monroeville, 484 A.2d 737, 506 Pa. 167.—Mun Corp 958.

R.I. 1977. Corporation which was incorporated in New Jersey but which maintained office within state and had been qualified to do business within state for years was not a "non-resident" for purpose of use tax exemption. Gen.Laws 1956, § 44-18-36, subd. B.—Great Lakes Dredge & Dock Co. v. Norberg, 369 A.2d 1101, 117 R.I. 600, 2 A.L.R.4th 847.—Tax 1270.

S.D. 1914. Where a person broke up housekeeping in this state, rented his residence for one year, stored his household goods, and removed to another state, where he purchased a business which

he thereafter conducted, he was a "nonresident" within the attachment laws, notwithstanding his intention to return to the state later; since it is the actual and not the legal residence that governs, and the fact that a party has no dwelling place, nor place of abode in the family of another within the state where process can be left, as provided in Code Civ.Proc. § 110, may properly be taken into consideration.—Culhane Adjustment Co. v. Farrand, 147 N.W. 271, 34 S.D. 87.

Tex.Civ.App.—San Antonio 1941. An unmarried soldier, originally domiciled in Texas, who was pursuant to military orders transferred to a military reservation within territorial boundaries of Maryland and who had no place of abode except the barracks on reservation was a "nonresident" of Maryland within meaning of Maryland statute providing for service of summons on nonresidents involved in automobile collision within the state by service upon the secretary of state. Code Pub.Gen. Laws Supp.1935, Md. art. 56, § 190A.—United Services Automobile Ass'n v. Harman, 151 S.W.2d 609, writ dismissed, correct, certiorari denied 62 S.Ct. 640, 315 U.S. 807, 86 L.Ed. 1206.—Autos 235(3).

Tex.Civ.App.—Dallas 1946. A Texas corporation, having had a place of business in Texas for more than 30 consecutive days in registration period, could not, in view of contrary provision in reciprocity agreement, be considered a "nonresident" of Texas as to trucks, based, domiciled and registered in Louisiana so as to be entitled under reciprocity agreement to use such trucks on Texas highways without registration in Texas. Vernon's Ann.Civ.St. art. 6675a-16.—Hilburn v. Herrin Transp. Co., 197 S.W.2d 149.—Autos 78.

Tex.Civ.App.—El Paso 1959. Corporation that was bona fide resident of state of Texas and state of Mississippi was a "nonresident" of neither state within statute authorizing State Highway Department to enter into agreement with other states exempting residents of such other states using highways of Texas from payment of motor vehicle registration fees. Vernon's Ann.Civ.St. art. 6675a-16.—D. C. Hall Co. v. State Highway Commission, 330 S.W.2d 904, ref. n.r.e., certiorari denied 81 S.Ct. 233, 364 U.S. 901, 5 L.Ed.2d 194.—Autos 36.

W.Va. 1942. A resident of state may become a "nonresident", within the meaning of attachment statute, by leaving state with intention of changing his residence from within the state to residence elsewhere, but mere absence from the state is not sufficient to establish such nonresidence. Code 1931, 38-7-2.—LeFevre v. LeFevre, 19 S.E.2d 444, 124 W.Va. 105.—Attach 25.

W.Va. 1892. "Nonresident," as used in Code, c. 138, § 2, requiring a nonresident plaintiff to give security for costs, means one who resides out of the state. One who has actually ceased to dwell within the state for eight months, without any definite intention as to a time or occasion for returning, is a nonresident. Nonresidence began as soon as she left the state with no then present intention of

returning.—*Dean v. Cannon*, 16 S.E. 444, 37 W.Va. 123.

#### **NON-RESIDENT ALIEN**

App.D.C. 1935. Native of Mexico who established residence and purchased home in United States, was admitted to citizenship, and never revealed intention of returning to native country or abandoning residence, *held* not exempt from tax on income for services performed outside United States as "nonresident alien," though he spent major portion of his time in Europe and maintained business headquarters there. Revenue Act 1926, §§ 213(c), 217(c) (3), 44 Stat. 23, 30; 8 U.S.C.A. § 1427.—*Stallforth v. Helvering*, 77 F.2d 548, 64 App.D.C. 290, certiorari denied 56 S.Ct. 123, 296 U.S. 606, 80 L.Ed. 430.—Int Rev 4083.

C.A.4 1950. A citizen of Egypt, who entered United States on a visitor's visa in August, 1939 and was allowed to remain continuously in the country until August, 1945 because of difficulties in returning to Europe, and who during such period in the country traded in stocks and commodities on the United States exchanges, was not exempt from taxation on capital gains realized by the transactions as a "non-resident alien", within meaning of statutory exemption.—*C.I.R. v. Nubar*, 185 F.2d 584, certiorari denied 71 S.Ct. 796, 341 U.S. 925, 95 L.Ed. 1357.

Cal. 1886. "Nonresident alien," within West's Ann. Civ.Code, § 672, providing that, if a nonresident alien takes by succession, he must appear and claim the property within five years, means those who are neither citizens of the United States nor residents of the state.—*State v. Smith*, 12 P. 121, 70 Cal. 153.

Iowa 1912. A "nonresident alien," within Code, § 3368, providing that, as against a purchaser from a nonresident alien, the survivor shall not be entitled to a distributive share in the estate of deceased, if at the time of the purchase the survivor was also a nonresident alien, is a nonresident of the state, though a resident of a sister state.—*In re Kennedy's Estate*, 135 N.W. 53, 154 Iowa 460.—Aliens 9; Dower & C 44.

Iowa 1890. As used in Code, § 2442, I.C.A. § 636.8, which provides that the widow of a nonresident alien shall be entitled to the same rights in the property of her husband as a resident, except as against a purchaser from decedent, "nonresident alien" means an alien not residing in the state.—*In re Gill's Estate*, 44 N.W. 553, 79 Iowa 296, 9 L.R.A. 126.

Neb. 1925. A child born to a citizen of the United States during his residence abroad, and residing there in her minority, is not a "nonresident alien" and may inherit the lands of her father in Nebraska.—*Nelson v. Nielsen*, 203 N.W. 640, 113 Neb. 453.

#### **NONRESIDENT ALIEN BENEFICIARIES**

W.Va. 1941. Naturalization of a husband or parent does not of itself make an alien wife or alien

minor child, residing outside of the United States, a citizen of the United States, and hence widow and minor child of an American citizen, who were aliens when he was naturalized after September 22, 1922, and who never resided in the United States, were "nonresident alien beneficiaries" within the meaning of state statute denying workmen's compensation to "nonresident alien beneficiaries," and could not recover compensation for his death, unless they were protected by treaty provision. Acts 1939, c. 137, art. 4, § 15-a; 8 U.S.C.A. §§ 8, 368(a, b).—*Micaz v. Compensation Com'r*, 13 S.E.2d 161, 123 W.Va. 14.—Citiz 7.

#### **NONRESIDENT ALIEN ENEMY**

S.D.N.Y. 1943. A Belgian corporation which has removed its domicile and registered office to New York in accordance with Belgian decree law is not a "nonresident alien enemy", but "resident alien", entitled to sue in American courts, even if considered a resident alien enemy, as lawful residence implies protection and capacity to sue and be sued.—*Chemacid, S.A., v. Ferrotar Corporation*, 51 F.Supp. 756.—War 10(2).

#### **NONRESIDENT ALIENS**

C.A.9 (Guam) 1987. Northern Mariana Islands corporation had no "nonresident aliens" among its shareholders who included residents of the continental United States, Guam and the Commonwealth of Northern Mariana Islands, so as to preclude taxpayers who were shareholders from deducting losses incurred by corporation from their gross income in determining their Guam territorial income tax. 26 U.S.C.A. §§ 932(a), 1374(a).—*Holmes v. Director of Revenue and Taxation, Government of Guam*, 827 F.2d 1243, appeal after remand 937 F.2d 481.—Tax 1015.

#### **NON-RESIDENT ATTORNEY**

Tex.App.—Corpus Christi 1994. Term "non-resident attorney" in rule requiring mailing of notice to nonresident attorney who has requested it is not a limiting or defining term so much as it is merely descriptive term for those attorneys who may be expected to request mailed notice; rule does not qualify notice requirements for setting case for trial but, rather, expands the requirements of notice to include nonresident attorneys who would not otherwise be entitled to direct notice as the attorney in charge. Vernon's Ann.Texas Rules Civ.Proc., Rule 246.—*Bruneio v. Bruneio*, 890 S.W.2d 150.—Trial 6(1).

#### **NONRESIDENT CITIZEN**

E.D.Pa. 1936. Where taxpayer, who was an American citizen for many years prior to 1928, conducted a business in England and resided therein, except for yearly trips to United States, taxpayer was a bona fide "nonresident citizen" for purpose of exemption of income from sources without United States for income tax purposes for year 1928, notwithstanding that taxpayer was physically present in United States during first seven weeks of 1928. Revenue Act 1928, Sec. 116(a), 26 U.S.C.A.Int.Rev.

Acts, page 386.—*Carstairs v. U.S.*, 75 F.Supp. 683.—Int Rev 4110.

**NONRESIDENT DEFENDANT**

Cal.App. 2 Dist. 1950. A foreign corporation doing business within state was a “nonresident defendant” within attachment statute.—*Warner Mfg. Co. v. Standard Interstate Mfg. Co.*, 218 P.2d 131, 97 Cal.App.2d 494.

Mo.App. 1909. The words “nonresident defendant,” as used in V.A.M.S. § 521.240, providing that no property or wages declared by statute to be exempt shall be attached except in the case of a “nonresident defendant” or a defendant who is about to move out of the state with intent to change his domicile, has reference to one whose domicile is out of the state, and classed nonresident defendants with defendants about to move out of the state with intent to change their domiciles.—*McDowell v. Friedman Bros. Shoe Co.*, 115 S.W. 1028, 135 Mo.App. 276.

**NON-RESIDENT ENEMY ALIEN**

E.D.N.Y. 1942. Where injured seaman, a citizen of Hungary, overstayed his shore leave of 60 days, abandoned his calling, and did not obtain a visa as an immigrant or pay a head tax and thus lived in the United States illegally, seaman was a “non-resident enemy alien” who should be stayed from proceeding with libel for injuries sustained on a foreign ship while in a United States port for the duration of the war. *Trading With the Enemy Act §§ 2(c), 7(b), 50 U.S.C.A.Appendix §§ 2(c), 7(b).*—*The Leontios Teryazos*, 45 F.Supp. 618.—War 10(2).

**NON-RESIDENTIAL**

Bkrcty.N.D.Ga. 1989. Lease of property that debtor operated as hotel was “nonresidential” lease, which debtor had to assume or reject within 60 days of bankruptcy filing, notwithstanding that three of debtor’s employees may have lived on premises. Bankr.Code, 11 U.S.C.A. § 365(d)(4).—*Matter of Emory Properties, Ltd.*, 106 B.R. 318.—Bankr 3107.

Bkrcty.N.D.Tex. 1989. If people reside on real property, it is not “nonresidential,” within meaning of statute requiring that leases for “nonresidential” real property must be assumed by trustee within 60 days after order for relief to preclude leases from being deemed rejected even if property is also used for nonresidential purposes. Bankr.Code, 11 U.S.C.A. § 365(d)(4).—*In re Care Givers, Inc.*, 113 B.R. 263.—Bankr 3103.1.

Kan. 1958. Auditor was not justified in refusing to register urban renewal bonds on the ground that commercial properties were included in proposed urban renewal area and that the Urban Renewal Law does not authorize inclusion of commercial properties in such areas, since buildings which are “nonresidential” are commercial or business buildings and improvements as set out in the statutory definition of “slum area” and the words “blighted area” refer to slum deteriorated or deteriorating

structures. G.S.1957 Supp. 17-4760, 17-4748(c).—*City of Kansas City v. Robb*, 332 P.2d 520, 183 Kan. 834.—Mun Corp 936.

N.Y.Sup. 1970. Fact that multiple story building, three upper stories of which once housed separate apartments and which were remodeled to create six modern apartments, with one street level store was not being put to residential use immediately prior to renovation, the upper three floors being vacant, did not deprive it of basic character for which it was constructed; thus it was not “nonresidential” structure for purpose of tax abatement based on reasonable costs of improvements and alterations. Administrative Code, § J51-2.5, subd. a, par. 2, subd. b, subd. i(2).—*Martell’s Restaurant Corp. v. Housing and Development Administration*, 316 N.Y.S.2d 340, 64 Misc.2d 991, affirmed 323 N.Y.S.2d 389, 37 A.D.2d 691.—Tax 220.

**NONRESIDENTIAL PROPERTY**

Me. 1998. Property used by nonprofit corporation in furtherance of its business of providing housing and services for the elderly was “nonresidential property,” even though people resided there; accordingly, nonprofit corporation was entitled to appeal tax assessment directly to the Board of Property Tax Review. 36 M.R.S.A. § 843, subd. 1-A.—*Ellen M. Leach Memorial Home v. City of Brewer*, 711 A.2d 149, 1998 ME 118.—Tax 480.

**NONRESIDENTIAL REAL PROPERTY**

Bkrcty.S.D.Cal. 1993. Ground lease of real property on which Chapter 11 debtor later constructed apartment buildings, which lease had 50-year term, was not lease of “nonresidential real property,” and thus was not subject to restrictions on assuming or rejecting leases of nonresidential real property under Bankruptcy Code, despite commercial purpose of building; rather, debtor had until confirmation of its reorganization plan, or such earlier time as ordered by court, to assume or reject lease. Bankr.Code, 11 U.S.C.A. § 365(d)(4).—*In re Bonita Glen II*, 152 B.R. 751.—Bankr 3103(1).

Bkrcty.D.Kan. 1987. “Facility leases” into which debtor entered in order to obtain construction financing pursuant to Kansas industrial revenue bond statutes were leases of “personalty” and not of “nonresidential real property”, for purpose of “assumption/rejection requirements” of Bankruptcy Code. Bankr.Code, 11 U.S.C.A. § 365; K.S.A. 12-1740 et seq.—*In re Petroleum Products, Inc.*, 72 B.R. 739.—Bankr 3107.

Bkrcty.D.Neb. 1988. Agricultural lease is lease of “nonresidential real property” within provision of Bankruptcy Code providing for 60 days for assumption or rejection of lease. Bankr.Code, 11 U.S.C.A. § 365.—*Matter of Hejco, Inc.*, 87 B.R. 80.—Bankr 3103(2).

Bkrcty.N.D.Ohio 1986. Even if parcels of land subject to debtors’ oil and gas leases had people residing on them, leases were of “nonresidential real property” so as to be subject to requirement that debtor assume or reject leases within 60 days

**NONRESIDENT PARTNERSHIP**

of order of relief or leases would be deemed rejected, where each lease contained requirement that no well be drilled closer than 200 feet to a residence. Bankr.Code, 11 U.S.C.A. § 365(d)(4).—*In re Gassoil, Inc.*, 59 B.R. 804.—Bankr 3107.

Bkrcty.E.D.Tex. 2000. Chapter 11 debtors' nursing home leases were not leases of "nonresidential real property," within meaning of statute requiring that such leases must be assumed within 60 days of order for relief or be deemed rejected; while debtors themselves did not reside on property and had only financial interest therein, bankruptcy court, in deciding whether leases could be deemed rejected, could not ignore interests of patients and of nursing home residents living on property. Bankr.Code, 11 U.S.C.A. § 365(d)(4).—*In re Texas Health Enterprises, Inc.*, 255 B.R. 181, stay denied 255 B.R. 185.—Bankr 3103.2.

Bkrcty.N.D.Tex. 1989. Nursing home leases were not leases for "nonresidential real property," within meaning of statute requiring that leases for "nonresidential real property" must be assumed by trustee within 60 days after order for relief to preclude leases from being deemed rejected. Bankr.Code, 11 U.S.C.A. § 365(d)(4).—*In re Care Givers, Inc.*, 113 B.R. 263.—Bankr 3103.1.

**NONRESIDENT INDIVIDUAL**

Va. 1990. Defendant, who resided in Commonwealth and had left for only one week at a time, was not "nonresident individual" within meaning of statute permitting order of publication after leaving process with Commissioner of Department of Motor Vehicles (DMV), if party to be served is nonresident individual. Code 1950, §§ 8.01–307, subd. 2, 8.01–308, 8.01–316, subd. 1, par. a.—*Dennis v. Jones*, 393 S.E.2d 390, 240 Va. 12.—Proc 87.

**NONRESIDENT LAND**

Me. 1930. As regards railroad's right to abatement of taxes without having filed list of taxable property with assessors, land of railroad is subject to laws governing taxation of "nonresident land." Rev.St.1916, c. 10, § 4.—*Portland Terminal Co. v. City of Portland*, 151 A. 460, 129 Me. 264.—Tax 462.

**NON-RESIDENT MOTORIST**

C.A.3 (Pa.) 1956. Serviceman who was stationed in California under service orders and who, although he and his family at times considered remaining in California, did not intend, at time he was involved in automobile accident, to remain in California longer than was required by service commitment, was a "non-resident motorist" within California Non-resident Motorist Act. Vehicle Code Cal. § 404.—*Mangene v. Diamond*, 229 F.2d 554.—Autos 235(3).

N.Y.City Civ.Ct. 1995. Motorist who did not reside in state at time of accident was "nonresident motorist" who could be served under statute governing service of nonresident motorists, even though motorist had moved to state following accident and was resident of state at time service was

sought. McKinney's Vehicle and Traffic Law § 253, subd. 1.—*Executive Ins. Co. v. Yeshiva Mikdash Melech, Inc.*, 626 N.Y.S.2d 420, 164 Misc.2d 764.—Autos 235(3).

**NONRESIDENT OPERATOR**

Ark. 1948. A "nonresident operator" of automobile is not "nonresident owner" upon whom service can be made under nonresident motorist service statute, notwithstanding that nonresident operator is in charge of automobile. 3 Ark. Stats. §§ 27-341, 27-342.—*Kerr v. Greenstein*, 212 S.W.2d 1, 213 Ark. 447.—Autos 235(3).

R.I. 1931. Where motor vehicle involved in accident was owned and driven by resident licensed operator, nonresident employer of driver held not "nonresident operator" on whom substituted service of process could be made. Gen.Laws 1923, c. 98, § 14, as amended by Pub.Laws 1927, c. 1050.—*Clesas v. Hurley Mach. Co.*, 157 A. 426, 52 R.I. 69.—Autos 235(3).

**NONRESIDENT OWNER**

Ark. 1948. The nonresident motorist service statute does not make service on Secretary of State sufficient service on any one except "nonresident owner", and does not provide for service on nonresident operator of vehicle owned by or registered in name of citizen of Arkansas. 3 Ark. Stats. §§ 27-341, 27-342.—*Kerr v. Greenstein*, 212 S.W.2d 1, 213 Ark. 447.—Autos 235(3).

Ark. 1948. The words "nonresident owner, chauffeur, operator, driver" in first part of first sentence of nonresident motorist service statute and use of word "such" before "nonresident owner" in later parts of statute, do not authorize service on nonresident automobile operator who is not a nonresident owner. 3 Ark. Stats. §§ 27-341, 27-342.—*Kerr v. Greenstein*, 212 S.W.2d 1, 213 Ark. 447.—Autos 235(3).

Ark. 1948. A "nonresident operator" of automobile is not "nonresident owner" upon whom service can be made under nonresident motorist service statute, notwithstanding that nonresident operator is in charge of automobile. 3 Ark. Stats. §§ 27-341, 27-342.—*Kerr v. Greenstein*, 212 S.W.2d 1, 213 Ark. 447.—Autos 235(3).

**NONRESIDENT OWNERS OF MOTOR VEHICLES**

Or. 1942. The statute relating to appointment by "nonresident owners of motor vehicles" of Secretary of State as attorney in fact for service of process does not include nonresident drivers of motor vehicles on state highways, unless they are owners of such vehicles. O.C.L.A. §§ 115–128 to 115–131, and § 115–129 (repealed 47:464 and 43:145); ORS 15.190, 15.200, 481.095.—State ex rel. *Pardee v. Latourette*, 125 P.2d 750, 168 Or. 584.—Autos 235(3).

**NONRESIDENT PARTNERSHIP**

Ga. 1999. General partnership was not "nonresident partnership" in products liability action arising

ing from auto accident allegedly caused by faulty tire manufactured by partnership, and thus, venue was proper in Fulton County, even though partnership was organized under laws of New York state; partnership acknowledged that at time of suit, and at all relevant times to litigation, at least one of its general partners was resident of Fulton County. O.C.G.A. § 9-10-90.—*Ford v. Uniroyal Goodrich Tire Co.*, 514 S.E.2d 201, 270 Ga. 730, on remand 521 S.E.2d 198, 238 Ga.App. 533.—Partners 195.

**NONRESIDENT PERSON**

Iowa 1965. The words "nonresident person" within statute providing that a nonresident person committing a tort in Iowa against a resident of Iowa shall be deemed to be doing business in Iowa for purpose of service of process does not include a person who is a resident of Iowa at time tort is committed, but who has removed therefrom before the action is commenced. I.C.A. § 617.3.—*Fagan v. Fletcher*, 133 N.W.2d 116, 257 Iowa 449.—Proc 72.

**NON-RESIDENTS**

C.A.3 (Virgin Islands) 1960. In statute providing that nonresidents of Virgin Islands are not qualified to act as executors or administrators, the term "nonresidents" means persons not domiciled in the Islands. 15 V.I.C. § 235(a).—*In re Vose's Estate*, 276 F.2d 424.—Ex & Ad 15, 18.

Kan. 1934. Words "non-residents" and "taxpayers resident within the territory," as used in drainage district statutes, mean nonresidents of and taxpayers residing within territory included in proposed district, and not nonresidents of and taxpayers within county in which proposed district is located. Rev.St.1923, 24-458; Rev.St.Supp.1930, 24-101.—*State ex rel. Boynton v. Niotaze Drainage Dist.* No. 1, 34 P.2d 124, 140 Kan. 1.—Drains 14(2).

Minn. 1952. Where owner of automobile and son had resided in Minnesota for 20 years prior to accident and continued such residence for some time thereafter, they were not "nonresidents" subject to constructive service of process by service upon commissioner of highways in action for damages resulting from accident, though prior to accident they had formed intention of permanently leaving the state at some future time and did so before jurisdiction was acquired. M.S.A. § 170.55.—*Hinton v. Peter*, 55 N.W.2d 442, 238 Minn. 48.—Autos 235(3).

Mo.App. 1948. Fact that certain residents of first school district had petitioned for and obtained an election on question whether the land on which they lived should be released to second school district, did not render them "nonresidents" of the first district and prevent them from petitioning for meeting for vote on annexation of first district to second district, where the land on which they lived and which was sought to be released to second school district, had not been actually accepted by and taken into the second school district. V.A.M.S. § 165.300.—*State ex rel. Heppe v. Zilafro*, 210 S.W.2d 719.—Schools 38.

N.Y.A.D. 4 Dept. 1951. Nonresident alien defendants are "nonresidents" within and are subject to the substituted service provisions of the Vehicle and Traffic Law. Vehicle and Traffic Law, § 52.—*Gianetto v. LaDelpha*, 104 N.Y.S.2d 362, 278 A.D. 179, appeal denied 105 N.Y.S.2d 1015, 278 A.D. 1022.—Autos 235(3).

N.Y.Sup. 1968. Where nothing to contrary was submitted by defendant automobile owner and defendant driver, there were presumptions that their Texas addresses in police accident report were also their residences, that addresses were given to police, and that therefore defendants were "non-residents" within Vehicle and Traffic Law dealing with service of summons on a "non-resident" by service on Secretary of State, and effective services were made on defendants, though letters were returned with notations "moved Left no address" and "unclaimed". Vehicle and Traffic Law § 253.—*Ingber v. Morrison*, 293 N.Y.S.2d 390, 57 Misc.2d 669.—Autos 235(3).

N.C. 1944. In action for specific performance of contract to convey realty, where defendants were engaged in business out of state for an indefinite time and were not residing in state at time action was instituted, defendants were "nonresidents" within attachment statute, and plaintiff was entitled to serve the defendants by publication, notwithstanding defendants had a voting residence in state. G.S. § 1-449.—*Voehringer v. Pollock*, 30 S.E.2d 374, 224 N.C. 409.—Attach 25.

Tex.Civ.App.—El Paso 1938. In action for conversion or in the alternative for the purchase price of the property involved, evidence that the presence of defendants in the state was purely casual and temporary, in connection with a cannery business operated by them in the state, authorized judgment overruling their joint plea of privilege, on ground that they were "nonresidents" within meaning of venue statute, notwithstanding defendants' testimony that on date suit was filed and at time plea of privilege was filed they were residing in state. Vernon's Ann.Civ.St. art. 1995.—*Snidow v. Gage*, 118 S.W.2d 910.—Plead 111.42(4.1).

**NONRESIDENT'S LICENSE**

Ohio App. 6 Dist. 1983. For purposes of statute providing that, upon nonresident's conviction for operating motor vehicle while under influence of alcohol, trial judge shall suspend the nonresident's license for not less than 30 days nor more than three years or revoke that nonresident's license, a "nonresident's license" is defined as a nonresident's privilege to operate motor vehicle in the state, and that trial judge may not order nonresident to surrender physical possession of the nonresident's driver's license upon conviction of driving motor vehicle while intoxicated; overruling *State v. Mendez*, 3 O.O.3d 352. R.C. §§ 4507.16, 4509.01(C)(3), 4511.19.—*State v. Kivell*, 463 N.E.2d 52, 11 Ohio App.3d 12, 11 O.B.R. 24.—Autos 144.2(8).

**NONRESIDENTS OF STATE**

N.C. 1955. Students who attend state institutions of higher learning from out of state remain

## NONRETURNABLE CONTAINER

“nonresidents of state”, insofar as right to charge tuition fees is concerned. G.S. §§ 116–143, 116–144.—*Barker v. Iowa Mut. Ins. Co.*, 85 S.E.2d 305, 241 N.C. 397.—Colleges 9.20(2).

### **NONRESIDENTS OF THE COUNTY**

N.Y.City Ct. 1889. Code Civ.Proc. §§ 3268, 3269, requiring nonresident plaintiffs to give security for costs, use the phrase “nonresidents of the state” with reference to courts of record generally and “nonresidents of the county” with reference to the city court of New York. Section 3160 provides that a plaintiff in the latter court, “Who has an office for the regular transaction of business in person, within the city of New York, is a resident of that city within sections 3268, 3269.” *Held*, that a plaintiff in the city court, who is a nonresident of the state, but has an office for the transaction of business in person in the city of New York, cannot be required to file security for costs, and it is immaterial that under another section of the Code such a nonresident is liable to attachment.—*Beebe v. Parker*, 22 Abb. N. Cas. 445, 24 N.Y.St.Rep. 120, 4 N.Y.S. 97, 16 Civ.Proc.Rep. 320.—Costs 110(1).

### **NONRESIDENTS OF THE STATE**

N.Y.City Ct. 1889. Code Civ.Proc. §§ 3268, 3269, requiring nonresident plaintiffs to give security for costs, use the phrase “nonresidents of the state” with reference to courts of record generally and “nonresidents of the county” with reference to the city court of New York. Section 3160 provides that a plaintiff in the latter court, “Who has an office for the regular transaction of business in person, within the city of New York, is a resident of that city within sections 3268, 3269.” *Held*, that a plaintiff in the city court, who is a nonresident of the state, but has an office for the transaction of business in person in the city of New York, cannot be required to file security for costs, and it is immaterial that under another section of the Code such a nonresident is liable to attachment.—*Beebe v. Parker*, 22 Abb. N. Cas. 445, 24 N.Y.St.Rep. 120, 4 N.Y.S. 97, 16 Civ.Proc.Rep. 320.—Costs 110(1).

### **NONRESIDENT WITNESS**

Ill. 1897. Smith-Hurd Stats. c. 51, § 28, provides that, when a party desires to take the evidence of a “nonresident witness,” he, or, where notice is given that a commission to take the testimony of a “nonresident witness” will be applied for, the opposite party, on giving the other three days’ notice in writing, may have a commission directed as provided in section 26, to take such evidence on oral interrogatories. Section 26 authorizes a deposition to be orally taken if the witness resides out of the county. *Held*, that section 28 is not limited to a witness not residing in the state.—*Gardner v. Meeker*, 48 N.E. 307, 169 Ill. 40.—Depositions 42.

### **NONRESIDENT WITNESS IMMUNITY RULE**

Fla.App. 2 Dist. 1991. “Nonresident witness immunity rule” permits nonresidents to enter state and voluntarily testify in judicial proceedings with immunity from service of process for reasonable

time before and after testifying.—*Lee v. Stevens of Florida, Inc.*, 578 So.2d 867.—Proc 120.

### **NON RES JUDICATA**

C.A.D.C. 1951. The doctrine of “non res judicata” does not mean that judgment is invalid or incomplete, but simply means, in respect to a stranger to a case, that in a subsequent contest, the prior judgment is not decisive on the stranger’s claims, but the judgment is nevertheless “stare decisis”.—*Land v. Dollar*, 190 F.2d 623, 89 U.S.App. D.C. 38, stay granted *Sawyer v. Dollar*, 1951 WL 44185, certiorari granted 72 S.Ct. 165, 342 U.S. 875, 96 L.Ed. 658, certiorari granted *Matter of Killion*, 72 S.Ct. 165, 342 U.S. 875, 96 L.Ed. 658, vacated 73 S.Ct. 7, 344 U.S. 806, 97 L.Ed. 628, vacated 73 S.Ct. 8, 344 U.S. 806, 97 L.Ed. 628.—Courts 89; Judgm 707.

### **NONRESPONSIVE**

N.J.Super.L. 1992. Failure of bidder on township public works project to complete page four of bid form, on which there was provision that bidder forfeits bid bond as liquidated damages in event successful bidder fails to execute contract, was a “material” deviation from bid solicitation, rendering bid “nonresponsive”; with no effective signature on page four, bidder was not bound to its bid and therefore could walk away from obligation to perform work on project, although bidder made belated attempt to cure defect. N.J.S.A. 40A:11-1 et seq.—*Ace-Manzo, Inc. v. Township of Neptune*, 609 A.2d 112, 258 N.J.Super. 129.—Mun Corp 333.

### **NONRETALIATORY REASON**

Minn. 1976. A “nonretaliatory reason” for eviction of tenants who have made good-faith efforts to enforce contractual or statutory provisions designed for their benefit is a reason wholly unrelated to and unmotivated by any good-faith activity on part of tenant protected by statute, e. g., nonpayment of rent, other material breach of covenant, continuing damage to premises by tenants, or removal of housing unit from market for a sound business reason. M.S.A. §§ 504.18, 566.03, subd. 2(1, 2).—*Parkin v. Fitzgerald*, 240 N.W.2d 828, 307 Minn. 423.—Land & Ten 275.

### **NONRETROGRESSION PRINCIPLE**

U.S.N.C. 1993. Under “nonretrogression principle,” proposed voting change cannot be precleared under Voting Rights Act that will lead to retrogression in position of racial minorities with respect to their effective exercise of electoral franchise. Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.—*Shaw v. Reno*, 113 S.Ct. 2816, 509 U.S. 630, 125 L.Ed.2d 511, on remand 861 F.Supp. 408, probable jurisdiction noted 115 S.Ct. 2639, 515 U.S. 1172, 132 L.Ed.2d 878, reversed 116 S.Ct. 1894, 517 U.S. 899, 135 L.Ed.2d 207.—Elections 12(8).

### **NONRETURNABLE CONTAINER**

Cal.App. 2 Dist. 1957. Dry ice, passed on to a taxpayer’s customers as an incident of its ice cream

products sales activities to preserve such product, was not within meaning of “nonreturnable container” as such term is used in statute exempting nonreturnable containers from retail sales tax. West’s Ann.Rev. & Tax.Code, §§ 6051, 6364.—Good Humor Co. of Cal. v. State Bd. of Equalization, 313 P.2d 640, 152 Cal.App.2d 873.—Tax 1243.

**NON-RIPARIAN USE**

Cal. 1943. The use of waters of a stream by riparian owner upon nonriparian lands is a “non-riparian use”.—Moore v. California Oregon Power Co., 140 P.2d 798, 22 Cal.2d 725.

**NON-ROUTINE**

C.A.7 1990. Environmental Protection Agency’s (EPA’s) characterization of power company’s replacement program for electric power plant as “non-routine,” for purposes of exception in EPA’s regulations to “new source performance standards” under Clean Air Act for “routine” modifications, was not inconsistent with EPA’s prior ruling that other utilities’ replacement of 40 air heaters was “routine.” Clean Air Act, § 111(a)(2, 4), as amended, 42 U.S.C.A. § 7411(a)(2, 4).—Wisconsin Elec. Power Co. v. Reilly, 893 F.2d 901, rehearing denied.—Environ Law 274.

E.D.Pa. 1990. For purposes of determining reasonableness of secret search of traveler’s luggage which had been checked at airport for transport to foreign nation, search was “nonroutine,” and thus, “border exception” was inapplicable; no other passenger’s luggage on that flight was searched, and search was initiated by inchoate hunch, conducted partially in secret without notice and consent for sole purpose of obtaining evidence of criminal conduct. 31 U.S.C.A. § 5317(b).—U.S. v. Ezeiruaku, 754 F.Supp. 420, reversed 936 F.2d 136, rehearing denied.—Cust Dut 126(7).

Fed.Cl. 2000. With respect to requirement that a claim under the Contract Disputes Act (CDA) be a non-routine request for payment, a request for payment is “non-routine” when it is a demand for compensation for unforeseen or unintended circumstances. Contract Disputes Act of 1978, § 6(a), as amended, 41 U.S.C.A. § 605(a); 48 C.F.R. § 33.206.—Vanalco, Inc. v. U.S., 48 Fed.Cl. 68.—U.S. 73(9).

N.Y.A.D. 3 Dept. 1992. Particular procedure may be “nonroutine,” for purposes of Freedom of Information Law (FOIL) government agency non-routine criminal investigative technique or procedure disclosure exemption, even though procedure may be “time-tested.” McKinney’s Public Officers Law § 87, subd. 2(e)iv.—Spencer v. New York State Police, 591 N.Y.S.2d 207, 187 A.D.2d 919.—Records 60.

**NON-ROUTINE BORDER SEARCHES**

C.A.5 (Tex.) 2002. “Non-routine border searches” requiring particularized reasonable suspicion include body cavity searches, strip searches, and x-rays. U.S.C.A. Const.Amend. 4.—U.S. v.

Kelly, 302 F.3d 291, certiorari denied 123 S.Ct. 707, 154 L.Ed.2d 643.—Cust Dut 126(10).

**NONROUTINE PROCEDURES**

N.Y.A.D. 3 Dept. 1992. Portions of investigatory file compiled by State Police, which led to file requester’s arrest and murder conviction, describing State Police’s surveillance of places which requester was known to frequent and its establishment of roadblocks did not describe “nonroutine procedures” within meaning of Freedom of Information Law (FOIL) government agency nonroutine criminal investigative technique or procedure disclosure exemption. McKinney’s Public Officers Law § 87, subd. 2(e)iv.—Spencer v. New York State Police, 591 N.Y.S.2d 207, 187 A.D.2d 919.—Records 60.

**NONROUTINE SEARCH**

S.D.Tex. 2000. Courts consistently treat two categories of border searches as “nonroutine searches:” strip-searches and body-cavity searches. U.S.C.A. Const.Amend. 4.—U.S. v. Roberts, 86 F.Supp.2d 678, affirmed 274 F.3d 1007.—Cust Dut 126(10).

**NONSALARIED**

C.A.8 (Mo.) 1995. Employee is considered “nonsalaried,” and thereby entitled to overtime compensation under Fair Labor Standards Act (FLSA), if his or her compensation is subject to reduction for violation of any rules other than safety rules of major significance. Fair Labor Standards Act of 1938, § 7, 29 U.S.C.A. § 207; 29 C.F.R. § 541.118(a)(5).—Auer v. Robbins, 65 F.3d 702, certiorari granted 116 S.Ct. 2545, 518 U.S. 1016, 135 L.Ed.2d 1066, motion granted 117 S.Ct. 289, 519 U.S. 924, 136 L.Ed.2d 209, and 117 S.Ct. 355, 519 U.S. 946, 136 L.Ed.2d 248, affirmed 117 S.Ct. 905, 519 U.S. 452, 137 L.Ed.2d 79.—Labor 1197.

**NONSALARIED PERSON**

Colo. 1966. Deceased deputy sheriff who was paid only when services were to be performed and thus had no fixed salary although statutes allegedly provided that deputy sheriffs should be paid a monthly salary was “nonsalaried person” at death within statute providing that rate of compensation for dependents of every nonsalaried person killed shall be the maximum. C.R.S. ’63, 81-2-7(1) (b).—State Compensation Ins. Fund v. Keane, 417 P.2d 8, 160 Colo. 292.—Work Comp 912.

**NONSAN**

Cal. 1903. “Insane” means, according to its etymology, “nonsane,” or “unsound,” and is equivalent, as is said by Lord Hardwicke, to “non compos,” which, according to Coke, includes all kinds of mental unsoundness recognized by the law, and therefore includes the extreme case of an entire want of understanding.—Jacks v. Estee, 73 P. 247, 139 Cal. 507.

### **NONSCHEDULED AIRCRAFT**

Cal.App. 3 Dist. 1982. Generally, “nonscheduled aircraft” for purposes of tax assessment are aircraft individually chartered or aircraft which do not fly on regularly scheduled basis. West’s Ann. Rev. & T.Code § 1153.—County of Alameda v. State Bd. of Equalization, 182 Cal.Rptr. 450, 131 Cal.App.3d 374.—Tax 67.

### **NON-SCHEDULED TRAMP OPERATOR**

C.A.5 (Tex.) 1952. A “non-scheduled tramp operator” in the steamship trade means a vessel owner who puts his ship into port when and where he is able to obtain a cargo, generally a full cargo, without any expectation, advertisement, or holding out to the trade, of another or subsequent sailing from any indicated port.—Pacific Emp. Ins. Co. v. Parry Nav. Co., 195 F.2d 372.

### **NONSCHEDULED VEHICLE**

Minn.App. 1989. Individual occupying a non-scheduled vehicle is not insured for coverage under commercial automobile policy issued to business entity; “nonscheduled vehicle” is one not listed in the insurance policy and not owned by the policy-holder.—Mikulay v. Home Indem. Co., 449 N.W.2d 464, review denied.—Insurance 2654.

### **NONSCITUR A SOCII**

Ark. 1997. Under doctrine of statutory construction of “nonscitur a sociis”, or “it is known from its associates,” a word can be defined by accompanying words.—Boston v. State, 952 S.W.2d 671, 330 Ark. 99.—Statut 193.

### **NONSEAMEN**

C.A.5 (La.) 1989. Oil well service company employees, who were “seamen” under Jones Act, were not “seamen” within meaning of exemption from Fair Labor Standards Act, in that they spent at least half of their time maintaining and servicing wells, which was “nonseamen” duty. Fair Labor Standards Act of 1938, § 13(b)(6), as amended, 29 U.S.C.A. § 213(b)(6); Jones Act, 46 U.S.C.A.App. § 688.—Dole v. Petroleum Treaters, Inc., 876 F.2d 518, 29 Wage & Hour Cas. (BNA) 582, rehearing denied.—Labor 1221.

### **NONSECTARIAN**

Wash. 1969. Bible camp of church at which a particular set of religious beliefs are taught is “sectarian” and not “nonsectarian” under statute exempting from taxation property of “nonsectarian” religious organization. RCWA 84.36.030; RCWA Const. art. 1, § 11.—Pacific Northwest Conference of Free Methodist Church of North America v. Barlow, 463 P.2d 626, 77 Wash.2d 487.—Tax 244.

Wash. 1935. Property of corporation organized as nonsectarian and nonprofit corporation to foster religious activities of students on State University campus without regard to their denominational affiliation under auspices of religious denomination by which it was largely supported held exempt from taxation under statute exempting property of “non-

sectarian” organization or association used for “religious purposes”; “sectarian” approximating in meaning “denominational”. Rem.Rev.Stat. § 11111, as amended by Laws 1933, Ex.Sess., p. 58, § 1.—Wesley Foundation at Seattle v. King County, 52 P.2d 1247, 185 Wash. 12.—Tax 244.

### **NONSECURE CUSTODY**

C.A.4 (W.Va.) 1994. Defendant who had escaped from federal correction center having a four-foot high perimeter fence had not escaped from “nonsecure custody,” as required in order to receive a four-level decrease in base offense level. U.S.S.G. § 2P1.1(b)(3), 18 U.S.C.A.App.—U.S. v. Sarno, 24 F.3d 618.—Sent & Pun 687.

M.D.Pa. 1993. Defendant was in “nonsecure custody” when he escaped from minimum security, federal prison camp, for purposes of four-point reduction in base offense level for escape from nonsecure custody of community corrections center or similar facility, where inmates in federal prison camp were housed in dormitory-style housing which was not locked down. U.S.S.G. § 2P1.1(b)(3), 18 U.S.C.A.App.—U.S. v. Hillstrom, 837 F.Supp. 1324, affirmed 37 F.3d 1490, certiorari denied 115 S.Ct. 1382, 514 U.S. 1028, 131 L.Ed.2d 236.—Sent & Pun 687.

### **NON-SECURE CUSTODY FACILITY**

N.D.Fla. 1991. Federal prison camp, which did not have wall, fence or other barrier around its perimeter, was “non-secure custody facility” within meaning of sentencing guideline provision calling for decrease in base offense level if defendant escapes from nonsecure custody facility. U.S.S.G. §§ 2P1.1, 2P1.1(b)(3), 2P1.1, comment. (n.1), 18 U.S.C.A.App.—U.S. v. Agudelo, 768 F.Supp. 339.—Sent & Pun 687.

### **NONSECURITIES**

D.Neb. 1992. Enumerated categories of instrument which are definitively “nonsecurities” are: note delivered in consumer financing, note secured by mortgage on home, short-term note secured by lien on small business or some of its assets, note evidencing character loan to bank customer, short-term note secured by assignment of accounts receivable, or note which simply formalizes open account debt incurred in ordinary course of business. Securities Exchange Act of 1934, § 3(a)(10), 15 U.S.C.A. § 78c(a)(10); Neb.Rev.St. § 8-1122.—Prochaska & Associates, Inc. v. Merrill Lynch Pierce Fenner & Smith, Inc., 798 F.Supp. 1427.—Sec Reg 5.13.

### **NONSECURITY**

D.Neb. 1992. Four factors to be considered in determining whether instrument is sufficiently kindred to enumerated categories of instruments which are definitively nonsecurities so as to be considered “nonsecurity” are: motivations for transaction; plan of distribution, e.g., common trading for speculation or investment; reasonable expectations of investing public; and existence of regulatory scheme that would make securities acts superfluous.

Securities Exchange Act of 1934, §§ 2, 3(a)(10), 15 U.S.C.A. §§ 78b, 78c(a)(10); Securities Act of 1933, § 12(2), 15 U.S.C.A. § 77l(2); Neb.Rev.St. §§ 8-1102, 8-1118(2), 8-1122.—Prochaska & Associates, Inc. v. Merrill Lynch Pierce Fenner & Smith, Inc., 798 F.Supp. 1427.—Sec Reg 5.10.

### **NONSEPARABLE CONTROVERSY**

S.D.Ga. 1943. Acts of negligence of several defendants alleged in combination to have produced an injury, will be taken as presenting a "nonseparable controversy".—May v. George A. Rheman Co., 51 F.Supp. 426.

### **NON-SERVANT AGENT**

La.App. 1 Cir. 1993. "Non-servant agent," for whom master or employer may not incur vicarious tort liability, is one that is not such part of master's business that his physical acts and time to be devoted to business are subject to control, even though non-servant agent is contributor to business of master. LSA-C.C. art. 2320.—Whetstone v. Dixon, 616 So.2d 764, corrected, writ denied 623 So.2d 1333, writ denied 623 So.2d 1333.—Mast & S 301(1).

### **NONSERVICE**

Kan. 1985. Bartenders whose functions were performed away from customers were "nonservice" bartenders who did not customarily and regularly receive tips within meaning of Fair Labor Standards Act [29 U.S.C.A. § 203(m)], and, thus, payment of 40 percent of tip pool to them violated Act and invalidated tip pool as to percent paid them. Fair Labor Standards Act of 1938, § 3(m), 29 U.S.C.A. § 203(m).—Elkins v. Showcase, Inc., 704 P.2d 977, 237 Kan. 720, 27 Wage & Hour Cas. (BNA) 455.—Labor 1334.

### **NON-SEVERE**

C.A.9 (Wash.) 1988. Claimant's impairment is "non-severe," so as not to warrant award of social security disability benefits, only if impairment consists of slight neurosis, slight impairment of sight or hearing, or other slight abnormality or combination of abnormalities; Secretary of Health and Human Services should not have applied more restrictive standard in deciding whether claimant could recover benefits for dysfunction of inner ear which affected her ability to read and to stand upright. Social Security Administration Regulations, § 404.1520(a, c), 42 U.S.C.A.App.—Yuckert v. Bowen, 841 F.2d 303.—Social S 140.21.

### **NON-SHAREHOLDER CONTRIBUTIONS TO CAPITAL**

C.A.3 (Virgin Islands) 1974. Nontaxable subsidies granted Virgin Islands corporation for purpose of aiding economic development of the Islands, with subsidy being equal to 75% of the amount of Virgin Islands income taxes paid, did not constitute "non-shareholder contributions to capital" and, thus, when the Virgin Islands corporation was liquidated and its assets distributed to its parent corporation in a transaction qualifying for nonrecognition of gain or loss the basis of its assets on parent's

books was not to be reduced by the amount of subsidy; to hold the subsidy taxable would be contrary to both letter and spirit of the Industrial Incentive Program legislation and would frustrate legislative intent and also deny taxpayers a benefit they reasonably anticipated receiving; subsidies, which were received in year prior to its liquidation, were nontaxable. 26 U.S.C.A. (I.R.C.1954) §§ 362(c)(2), 934, 934(b); 33 V.I.C. §§ 4001-4116, 4071(a)(2); Laws V.I.1957, Act Nos. 224, 224, § 6(b); 28 U.S.C.A. §§ 1291, 1294(3).—HMW Industries, Inc. v. Wheatley, 504 F.2d 146.—Int Rev 3403, 3478, 3712.1.

### **NONSIGNER**

Ill.App. 1 Dist. 1973. Liquor retailer who had not contracted with distributor to sell distributor's products at fair trade prices was a "nonsigner" who was also prohibited from selling distributor's products at less than stipulated prices. S.H.A. ch. 121½, §§ 188 et seq., 189.—Buckingham Corp. v. Ewing Liquors Co., 305 N.E.2d 278, 15 Ill.App.3d 839.—Trade Reg 959.

### **NONSOLICITATION ZONES**

E.D.N.Y. 1993. Prevention of "blockbusting," whereby individuals prey on fears of property owners in racially transitional areas and thereby induce panic selling which results in community instability, was vital governmental goal, and thus state had substantial interest in enacting statute permitting Secretary of State to establish "nonsolicitation zones" in which real estate brokers were prohibited from directly soliciting prospective clients, for purposes of determining whether content-based restriction passed First Amendment scrutiny. U.S.C.A. Const.Amend. 1; N.Y.McKinney's Real Property Law § 442-h.—New York State Ass'n of Realtors, Inc. v. Shaffer, 833 F.Supp. 165, reversed 27 F.3d 834, certiorari denied 115 S.Ct. 511, 513 U.S. 1000, 130 L.Ed.2d 418, on remand 898 F.Supp. 128.—Brok 1; Const Law 90.2.

### **NONSPECIFIC**

Pa. 1996. Clause in deed excepting and reserving rights to oil and gas located under conveyed land was not "nonspecific," since the method of extraction, drilling, was incorporated by reference to prior deed.—Sheaffer v. Caruso, 676 A.2d 204, 544 Pa. 279.—Mines 55(2).

### **NONSTANDARD**

Cal. 1985. For purpose of statute making it a misdemeanor for anyone, without express authorization of a subscription television system, to sell a device designed to decode descramble or otherwise make intelligible any encoded, scrambled or other "nonstandard signal" carried by that subscription television system, a transcription is not rendered "nonstandard" merely because it is broadcast on a microwave frequency or because it could not be received in intelligible form by a standard television set. West's Ann.Cal.Penal Code § 593e.—People v. Babylon, 702 P.2d 205, 216 Cal.Rptr. 123, 39 Cal.3d 70, 39 Cal.3d 719.—Tel 494.1.

## NONSTATUTORY VOLUNTARY MANSLAUGHTER

### **NONSTANDARD SIGNAL**

Cal. 1985. For purpose of statute making it a misdemeanor for anyone, without express authorization of a subscription television system, to sell a device designed to decode descramble or otherwise make intelligible any encoded, scrambled or other "nonstandard signal" carried by that subscription television system, a transcription is not rendered "nonstandard" merely because it is broadcast on a microwave frequency or because it could not be received in intelligible form by a standard television set. West's Ann.Cal.Penal Code § 593e.—People v. Babylon, 702 P.2d 205, 216 Cal.Rptr. 123, 39 Cal.3d 70, 39 Cal.3d 719.—Tel 494.1.

### **NONSTAPLE**

U.S.Tex. 1980. A "nonstaple" is a product the unlicensed sale of which would constitute contributory infringement of a patent covering the product; a "staple" component is one which does not meet that definition. 35 U.S.C.A. § 271(c).—Dawson Chemical Co. v. Rohm and Haas Co., 100 S.Ct. 2601, 448 U.S. 176, 65 L.Ed.2d 696, rehearing denied 101 S.Ct. 40, 448 U.S. 917, 65 L.Ed.2d 1181, on remand 557 F.Supp. 739, reversed Rohm & Haas Co. v. Crystal Chemical Co., 722 F.2d 1556, certiorari denied 105 S.Ct. 172, 469 U.S. 851, 83 L.Ed.2d 107.—Pat 259(1).

### **NON-STAPLE ARTICLE OF COMMERCE**

E.D.Pa. 1989. "Non-staple article of commerce" under antitrust laws is one which was designed to carry out patented process and has little or no utility outside of patented process. 35 U.S.C.A. § 271(c, d).—Polysius Corp. v. Fuller Co., 709 F.Supp. 560, affirmed 889 F.2d 1100, affirmed Fuller Co. v. Krupp Polysius A.G., 889 F.2d 1100.—Monop 12(15).

### **NONSTAPLE GOOD**

D.Colo. 1996. "Nonstaple good," which patentee has statutory right to control use of under patent exception to antitrust laws, is component product the unlicensed sale of which would constitute contributory infringement on patent. 35 U.S.C.A. § 271.—Beal Corp. Liquidating Trust v. Valleylab, Inc., 927 F.Supp. 1350.—Monop 12(15).

### **NONSTATE FUNDS**

Mo. 1993. Statute imposing flat 1.5% use tax for privilege of storing, using or consuming tangible personal property in state of Missouri that was purchased outside state did not violate provision of Missouri Constitution governing treasury withdrawals of state funds; revenue collected under statute constituted "nonstate funds" in that it was tax imposed by state, collected by Department of Revenue, and distributed by Department of Revenue to political subdivisions. V.A.M.S. § 144.748; V.A.M.S. Const. Art. 4, §§ 15, 28.—Associated Industries of Missouri v. Director of Revenue, 857 S.W.2d 182, certiorari granted 114 S.Ct. 598, 126 L.Ed.2d 563, reversed 114 S.Ct. 1815, 511 U.S. 641, 128 L.Ed.2d 639, on remand 918 S.W.2d 780, as

modified on denial of rehearing.—States 115; Tax 1212.1.

### **NON-STATE PRISON SANCTION**

Fla. 1987. Sentence of community control as condition of probation did not constitute "nonstate prison sanction," under the sentencing guidelines; therefore, sentence of community control as condition of probation was departure sentence under the sentencing guidelines requiring written reasons for its imposition for defendant whose recommended sentence was any "nonstate prison sanction"; disapproving *Davis v. State*, 461 So.2d 1003 (Fla.App. 1 Dist.); *Louzon v. State*, 460 So.2d 551 (Fla.App. 5 Dist.)—State v. Mestas, 507 So.2d 587.—Sent & Pun 802.

Fla.App. 5 Dist. 1984. "Community Control" as used in sentencing guidelines does not encompass incarceration in state prison and is therefore properly classified as a "non-state prison sanction." West's F.S.A. §§ 948.001(1), 948.10(1); West's F.S.A. RCrP Rules 3.701, subd. d, par. 13, 3.701 note.—Louzon v. State, 460 So.2d 551.—Sent & Pun 789.

### **NON-STATUTORY EXEMPTION**

E.D.Wash. 1981. Term "non-statutory exemption" to federal antitrust laws describes interpretation of Sherman Act making such statute inapplicable to restraints imposed in interest of lawful monopoly power in labor market. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.—Plumbers & Steamfitters Local 598 v. Morris, 511 F.Supp. 1298.—Monop 12(8.1).

### **NONSTATUTORY LABOR EXEMPTION**

D.D.C. 1991. "Nonstatutory labor exemption" is narrow exception to antitrust liability, purpose of which is to effect accommodation between congressional policy favoring collective bargaining under NLRA and congressional policy favoring free competition in business markets. National Labor Relations Act, § 8(d), as amended, 29 U.S.C.A. § 158(d); Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.—Brown v. Pro Football, Inc., 782 F.Supp. 125, reversed 50 F.3d 1041, 311 U.S.App.D.C. 89, certiorari granted 116 S.Ct. 593, 516 U.S. 1021, 133 L.Ed.2d 513, motion granted 116 S.Ct. 905, 516 U.S. 1109, 133 L.Ed.2d 838, affirmed 116 S.Ct. 2116, 518 U.S. 231, 135 L.Ed.2d 521.—Monop 12(8.1).

### **NON-STATUTORY STANDING**

Bkrcty.E.D.Cal. 2002. Subcategory of prudential standing known as "non-statutory standing" consists of persons that either have not been named by Congress in a statute or who want to enforce some right not created by statute.—*In re Godon, Inc.*, 275 B.R. 555.—Fed Civ Proc 103.2.

### **NONSTATUTORY VOLUNTARY MANSLAUGHTER**

Cal.App. 4 Dist. 1970. "Nonstatutory voluntary manslaughter" is homicide which may be intention-

al, voluntary, deliberate, premeditated, and unprovoked; it differs from murder in that element of malice is rebutted by showing that defendant's mental capacity has been reduced by mental illness, mental defect, or intoxication.—*People v. Small*, 86 Cal.Rptr. 478, 7 Cal.App.3d 347.—Homic 657, 826.

Cal.App. 4 Dist. 1969. “Nonstatutory voluntary manslaughter” is the intentional killing of a human being in which the defendant did not attain the mental state constituting malice because of mental illness, mental defect, or intoxication and it may be intentional, voluntary, deliberate, premeditated and unprovoked.—*People v. Stines*, 82 Cal.Rptr. 850, 2 Cal.App.3d 970.—Homic 826.

#### NON-STOCK CORPORATION

N.Y.A.D. 3 Dept. 1934. Educational institution incorporated under Education Law with capital stock but without right to distribute dividends held not “stock corporation” nor “membership corporation” nor “business corporation,” but a “non-stock corporation” engaged in business activities and as such was subject to franchise tax. Tax Law, § 208 et seq.; General Corporation Law, § 3, subds. 3, 4, 8, 12, 15; Membership Corporation Law, § 2; Education Law, § 59.—*Rye Country Day School v. Lynch*, 269 N.Y.S. 761, 239 A.D. 614, affirmed 195 N.E. 194, 266 N.Y. 549.—Tax 117.

Wis.App. 1989. Trial court's finding that organization was nonprofit, “non-stock corporation” rather than “religious society” was not against great weight of evidence, and thus, trial court had jurisdiction to remove corporate director and trustee for gross misconduct; articles of incorporation stated intention to form corporation, purposes in articles included acquisition of funds for religious, charitable, and educational purposes, and amendment expressly stated that organization was subject to provisions of Non-Stock Corporation Act. W.S.A. 181.01 et seq., 182.030, 187.01 et seq., 776.32, 776.32(4).—*John v. John*, 450 N.W.2d 795, 153 Wis.2d 343, review denied 454 N.W.2d 805, certiorari denied 111 S.Ct. 53, 498 U.S. 814, 112 L.Ed.2d 28.—Corp 294.

#### NON-STRUCTURAL ALTERATIONS

N.Y.City Civ.Ct. 1979. Even if pegs which tenant added to walls of store for purpose of displaying merchandise were “alterations” of the premises, they would be “non-structural alterations” for purpose of lease provision permitting tenant to make “non-structural alterations” if contractors or mechanics approved by the landlord were employed.—*Rubinstein Bros. v. Ole of 34th St., Inc.*, 421 N.Y.S.2d 534, 101 Misc.2d 563.—Land & Ten 152(11).

#### NONSUBJECT WORKER

Or.App. 1994. In determining whether business entity is required to pay workers' compensation premiums for particular individuals, court first considers whether individuals are “workers” within meaning of workers' compensation statutes and, if so, it must then determine whether individuals fall within one of statutory “nonsubject worker” exemptions.

ORS 656.005(27) (1989).—*Oregon Country Fair v. National Council on Compensation Ins.*, 877 P.2d 1207, 129 Or.App. 73.—Work Comp 1045.

Or.App. 1981. Claimant, who lacerated his hand on corrugated metal siding of a bathhouse which he was nailing for his employer while trying to catch himself after ladder on which he was standing slipped, was not foreclosed from obtaining compensation under householders exemption of workmen's compensation law as a “nonsubject worker” employed to do gardening, maintenance, repair, remodeling or similar work in or about private home of employer, where claimant was hired by employer as a carpenter for a housing project and, on day he was injured, remained in his employment status as a carpenter while performing work at employer's residence which was incidental to his general employment. ORS 656.027(2).—*Matter of Compensation of Anfiloieff*, 627 P.2d 1274, 52 Or.App. 127.—Work Comp 164.

#### NON-SUBJECT WORKERS

Or.App. 1995. Shift-lease taxicab drivers, who leased cabs from the owners for part of day when owner did not drive cabs, did not “maintain” the taxicabs they used and, thus, did not qualify as “nonsubject workers” and owner/operator of taxicab business was required to pay workers' compensation premiums for those drivers, where any major repairs occasioned by shift-lease drivers' accident or negligence resulted only in drivers' forfeiture of a \$250 promissory note, repairs in excess of \$250 remained owner/operator's responsibility, shift-lease drivers were not responsible for vehicle's ordinary wear and tear resulting from their use during a 12-hour shift and drivers' obligations were to merely return vehicle at end of shift with a full gas tank. ORS 656.027(14)(c).—*Broadway Deluxe Cab Co. v. National Council on Compensation Ins.*, 891 P.2d 1326, 133 Or.App. 324, review denied 895 P.2d 786, 321 Or. 246.—Work Comp 332.

Or.App. 1993. Machines used by shearers to fell and stack logs in timber harvesting operation were “motor vehicles” where they had motors and moved logs and, therefore, shearers were “nonsubject workers” within meaning of workers' compensation law. ORS 656.027, 656.027(14)(a).—*Crisstad Enterprises, Inc. v. National Council on Compensation Ins.*, 847 P.2d 896, 118 Or.App. 416, review denied 856 P.2d 317, 317 Or. 162.—Work Comp 131.

#### NONSUBSTANTIVE

C.A.8 1992. Bank's failure to disclose composite interest rate on its discounted variable interest rate consumer installment loans was neither “technical” nor “nonsubstantive,” and did “adversely affect” borrowers, within meaning of Truth in Lending Act (TILA) section providing that agency need not require adjustment to debtors for technical and nonsubstantive disclosure violations that do not adversely affect information provided to consumer or mislead or deceive consumer. Truth in Lending Act, § 108(e)(2)(D), 15 U.S.C.A. § 1607(e)(2)(D).—First Nat. Bank of Council

Bluffs, Iowa v. Office of Comptroller of Currency, 956 F.2d 1456.—Cons Cred 62.

La.App. 1 Cir. 1990. Error in judgment originally entered in boundary action, which did not relate to location of points between which boundary line ran but only to inaccurate statement of bearing of such line, was “nonsubstantive” error which trial court could correct at any time by amendment of judgment. LSA-C.C.P. art. 1951.—Hurst v. Ricard, 558 So.2d 1269, writ denied 559 So.2d 1378.—Judgm 303, 321.

### NON SUI JURIS

E.D.N.Y. 1961. Child may be of such tender years that it lacks experience, which would enable it to realize presence of threatening danger, or judgment, which would enable it to avoid danger, and such child is incapable of personal negligence and is “non sui juris”.—Woods v. U.S., 197 F.Supp. 841.—Neglig 535(5).

Ariz. 1948. The term “non sui juris”, generally is a condition which among other things prevents a person from maintaining an action at law in his own name.—Harrison v. Laveen, 196 P.2d 456, 67 Ariz. 337.—Parties 1.

N.Y.A.D. 1 Dept. 1907. The phrase “non sui juris,” as used in an instruction in a personal injury suit submitting it to the jury to determine whether or not the person injured, who was under six years of age, was non sui juris, means that the child was not of sufficient age and discretion to care for his own safety, so that it would be imprudent to go about alone.—Kostenbaum v. New York City Ry. Co., 105 N.Y.S. 65, 120 A.D. 160.

N.Y.A.D. 2 Dept. 1909. The words “non sui juris,” as applied to a child, means that the child has not yet arrived at what is called the age of adult discretion, so that the burden of proof is on the party claiming that the child was, as a matter of fact, sui juris.—Grealish v. Brooklyn, Q.C. & S.R. Co., 114 N.Y.S. 582, 130 A.D. 238, motion denied 88 N.E. 1120, 195 N.Y. 563, affirmed 91 N.E. 1114, 197 N.Y. 540.

N.Y.A.D. 4 Dept. 1943. A boy, four years, one month and seven days old, was presumably “non sui juris” and at that age his capacity to exercise care in presence of danger was for jury.—Day v. Johnson, 39 N.Y.S.2d 203, 265 A.D. 383.—Neglig 1602, 1717.

### NON-SUIT

C.A.8 (Ark.) 2001. Under Arkansas law, dismissal of plaintiff’s prior suit in Arizona for lack of personal jurisdiction over defendant constituted “nonsuit” within meaning of savings statute, and thus savings statute could be applied to save otherwise untimely subsequent action filed in Arkansas. A.C.A. § 16-56-126.—Chandler v. Roy, 272 F.3d 1057.—Lim of Act 130(7).

C.A.8 (Ark.) 2001. Dismissal of a complaint on defendant’s motion without prejudice is the same as a “nonsuit” under Arkansas’ saving statute. A.C.A. § 16-56-126.—Miller v. Norris, 247 F.3d 736.—Lim of Act 130(5).

C.A.8 (Ark.) 1995. Under Arkansas’ savings statute, new action is timely if it was commenced within one year of plaintiff suffering nonsuit in original action; “nonsuit” is suffered when plaintiffs, from causes incident to administration of law, are compelled to abandon their present action, whether by their own act or by act of court, when either would leave them cause of action, yet undetermined. A.C.A. § 16-56-126.—Follette v. Wal-Mart Stores, Inc., 47 F.3d 311, certiorari denied 116 S.Ct. 66, 516 U.S. 814, 133 L.Ed.2d 28.—Lim of Act 130(5).

C.C.A.7 (Ill.) 1942. Under strict commonlaw interpretation, “nonsuit” meant a judgment rendered against plaintiff when he was unable to prove his case or when he refused or neglected to proceed to a trial on the merits.—Sachs v. Ohio Nat. Life Ins. Co., 131 F.2d 134.—Pretrial Proc 531.

C.C.A.7 (Ill.) 1942. The word “nonsuit”, as used in Illinois statute permitting new action to be commenced within one year after a judgment of nonsuit if time limited for bringing action expired during pendency of action, applies not only to situations where plaintiff has been unable to prove his case or has neglected to proceed to trial of the issues, but to all involuntary judgments of discontinuance or dismissal for want of proof or jurisdiction leaving merits untouched. Smith-Hurd Stats.Ill. c. 83, § 24a.—Sachs v. Ohio Nat. Life Ins. Co., 131 F.2d 134.—Lim of Act 130(5).

C.C.A.7 (Ill.) 1942. Where action to enforce superadded liability of stockholders of Illinois bank, which was removed to federal court by one of defendants, was dismissed for want of jurisdiction, dismissal was a “nonsuit” within Illinois statute permitting a new action within one year after judgment of nonsuit if time limited for bringing action expires during pendency of action, and hence new action instituted in federal district court more than ten years after cause of action accrued, but within one year after dismissal of prior action, was not barred by Illinois ten-year statute of limitations. Smith-Hurd Stats.Ill. c. 83, § 24a.—Sachs v. Ohio Nat. Life Ins. Co., 131 F.2d 134.—Lim of Act 130(7).

C.C.A.8 (Neb.) 1933. Order dismissing cause without prejudice is “nonsuit” and is so far final as to be appealable.—Iowa-Nebraska Light & Power Co. v. Daniels, 63 F.2d 322.—Fed Cts 471.

N.D.Ill. 1942. Where Illinois court entered final decree, in action to enforce superadded liability of stockholders of Illinois bank, without reservation of jurisdiction to bring in additional parties, and thereafter plaintiff filed supplemental complaint in which defendant was for first time made a party, and defendant removed action to federal district court which dismissed action for want of jurisdiction, dismissal was not a “nonsuit” within Illinois statute permitting a new action within one year after judgment of nonsuit if time limited for bringing action expires during pendency of action, and hence new action, instituted in federal district court more than ten years after cause of action accrued was barred by Illinois ten-year statute of limitations. Smith-

Hurd Stats.Ill. c. 83, §§ 17, 24 a.—Sachs v. Ohio Nat. Life Ins. Co., 44 F.Supp. 552, reversed 131 F.2d 134.—Lim of Act 130(7).

E.D.Mo. 2001. Plaintiff suffers “nonsuit,” under Missouri savings statute allowing plaintiff to commence new cause of action within one year of nonsuit, when court order finally terminates original cause of action without prejudice. V.A.M.S. § 516.230.—Pender v. Bell Asbestos Mines, Ltd., 145 F.Supp.2d 1107.—Lim of Act 130(5).

E.D.Mo. 2001. Family of decedent suffered “nonsuit” against automobile parts distributor, commencing time period under Missouri law for filing new cause of action seeking damages for decedent’s alleged exposure to asbestos, when family dismissed original action against all defendants, not when claim against distributor was involuntarily dismissed by court. V.A.M.S. § 516.230.—Pender v. Bell Asbestos Mines, Ltd., 145 F.Supp.2d 1107.—Lim of Act 130(5).

E.D.Mo. 1979. Where union member brought suit against union in Missouri court, but suit was dismissed because union was nonlegal entity under Missouri law, dismissal did not amount to “nonsuit” within meaning of Missouri savings statute and later suit against union in federal district court was barred by limitations where it was instituted only after previous suit had remained in state court for over six years without any action to correctly assert jurisdiction over union. V.A.M.S. §§ 516.120, 516.230.—Singen v. International Ass’n of Machinists and Aerospace Workers Dist. Lodge 837, 475 F.Supp. 663.—Lim of Act 130(8).

E.D.Mo. 1972. Voluntary dismissal of an action is a “nonsuit” within the meaning of statute providing “If any action shall have been commenced within the times respectively prescribed in sections 516.010 to 516.370, and the plaintiff therein suffer a nonsuit, \* \* \* such plaintiff may commence a new action from time to time, within one year after such nonsuit suffered \* \* \*.” V.A.M.S. § 516.230.—Tanner v. Presidents-First Lady Spa, Inc., 345 F.Supp. 950, remanded 1973 WL 158105.—Lim of Act 130(5).

W.D.Pa. 1941. Where exceptions to dismissal of taxpayers’ suit to restrain Pennsylvania county officers from making further payments on contract for purchase of voting machines were heard before court en banc which affirmed dismissal on chancellor’s opinion containing a finding of fact that machines conformed to requirements of contract and one of exceptions was directed to such finding, and opinion of Supreme Court which dismissed appeal on ground that question had become moot recognized the finding as such, judgment of dismissal was not equivalent to a “nonsuit,” on issue whether such judgment was “res judicata” of question whether machines conformed to requirements of contract. Acts Pa. April 18, 1929, P.L. 549, 25 P.S. § 1811 et seq.—Allegheny County, Pa. v. Maryland Cas. Co., 42 F.Supp. 672, vacated 42 F.Supp. 677, motion granted 42 F.Supp. 678, appeal dismissed 132 F.2d 894, certiorari denied County of Allegheny

v. Maryland Casualty Company., 63 S.Ct. 981, 318 U.S. 787, 87 L.Ed. 1154.—Judgm 828.9(5).

S.D.Tex. 1999. Under Texas law, “nonsuit” is a termination of the pleaded causes of action and asserted defenses without an adjudication of their merits that returns the litigants to the positions they occupied before the plaintiff invoked the court’s jurisdiction. Vernon’s Ann.Texas Rules Civ.Proc., Rule 162.—Santerre v. Agip Petroleum Co., Inc., 45 F.Supp.2d 558.—Pretrial Proc 517.1.

E.D.Va. 1952. Plaintiff’s motion to dismiss action against defendant without prejudice, made just as the jury was about to be impaneled, constituted a “nonsuit” within Virginia statute providing that after a nonsuit no new proceeding on same cause of action shall be had in any other court, except for cause shown, as well as under federal procedure. Code Va.1950, § 8–220; Fed.Rules Civ.Proc. rule 41, 28 U.S.C.A.—Popp v. Archbell, 108 F.Supp. 571, reversed 203 F.2d 287.—Fed Civ Proc 1713.1; Pretrial Proc 517.1.

Ala.App. 1949. Where two justices of the peace testified that they had dismissed previous actions on representation of defendant that they had no jurisdiction, and there were no trials on the merits, and plaintiff was not present, action of each justice amounted to a “dismissal”, rather than a “nonsuit”, and hence defendant was not entitled to judgment in third action on ground that two nonsuits are equivalent to a verdict against party suffering them. Code 1940, Tit. 7, § 254.—Brock v. Harris, 42 So.2d 39, 34 Ala.App. 593.—J P 106.

Ark. 1994. Dismissal of complaint on defendant’s motion is the same as a “nonsuit.” A.C.A. § 16–56–126.—West v. G.D. Searle & Co., 879 S.W.2d 412, 317 Ark. 525.—Pretrial Proc 531.

Ark. 1938. A dismissal of suit instituted by a company which exhibit attached to complaint showed was a partnership composed of certain individuals, for defect of parties plaintiff, was not a “dismissal on the merits,” but was a dismissal under statute authorizing dismissal without prejudice for want of necessary parties, and was in effect a “nonsuit” which tolled statute of limitations and entitled persons composing the partnership to bring a suit on the same cause of action within one year from the dismissal thereof. Pope’s Dig. §§ 1485, 8947.—Norm Co. v. Harris, 122 S.W.2d 532, 197 Ark. 124.—Lim of Act 130(8).

Ark. 1936. Action for trespass on real property brought within statutory period, wherein judgment was rendered against plaintiff on demurser held not to toll statute of limitations so as to permit suit on same cause of action within one year after judgment but more than three years after cause of action arose, where judgment was not arrested nor reversed on appeal, since such judgment was not “nonsuit” within statute permitting plaintiff suffering nonsuit to commence new action within one year. Crawford & Moses’ Dig. § 6950, subd. 1; § 6969.—Thompson v. Pulaski-Lonoke Drainage Dist., 90 S.W.2d 237, 192 Ark. 1178.—Lim of Act 130(10).

Cal. 1938. The effectiveness for all purposes of orders entered in clerk's minutes under statute authorizing dismissal of action or entry of judgment of nonsuit does not depend on whether word "dismissal" or word "nonsuit" is used, but in either event there is a "dismissal" within meaning of portion of statute relating to entry of dismissals. West's Ann.Code Civ.Proc. § 581, as amended by St.1935, p. 1954.—McColgan v. Jones, Hubbard & Donnell, 78 P.2d 1010, 11 Cal.2d 243.—Pretrial Proc 691.

Cal. 1938. The term "nonsuit" is broadly applied to a variety of terminations of an action which do not adjudicate issues on the merits.—McColgan v. Jones, Hubbard & Donnell, 78 P.2d 1010, 11 Cal.2d 243.—Pretrial Proc 531.

Cal.App. 1 Dist. 1911. Where both parties introduced their evidence, and plaintiff's evidence supported a judgment for him, and defendant made no motion for a judgment of dismissal, a judgment, though termed a dismissal, was a "final" decision, and deemed excepted to, within Code Civ.Proc. § 647, and not a judgment of "nonsuit," within section 581, authorizing a nonsuit, on motion of defendant, on plaintiff failing to prove a case.—Saul v. Moscone, 118 P. 452, 16 Cal.App. 506.—App & E 267(1).

Cal.App. 2 Dist. 1951. Purpose of a "nonsuit" is to save time, effort and expense of presenting a defense when plaintiff has failed to make out a case.—Howard v. General Petroleum Corp., 238 P.2d 145, 108 Cal.App.2d 25.—Trial 159.

Cal.App. 2 Dist. 1942. Trial court's action in dismissing plaintiff's second cause of action after trial court sustained defendant's motion to compel plaintiff to make an election between her first and second causes of action, and plaintiff elected to proceed under her first cause of action, was in effect the granting of a "nonsuit" as to the second cause of action, and hence plaintiff was not required to note a formal exception to that ruling. Code Civ.Proc. § 647.—Horstman v. Krumgold, 130 P.2d 721, 55 Cal.App.2d 296.—App & E 277.

Cal.App. 4 Dist. 1997. Difference between "retraxit" and "nonsuit" is that nonsuit is plaintiff's default and neglect, and he is thus allowed to bring suit again, upon payment of costs; conversely, retraxit is open and voluntary renunciation of suit in court, by which plaintiff forever loses his action.—Arciniega v. Bank of San Bernardino, 60 Cal. Rptr.2d 495, 52 Cal.App.4th 213.—Judgm 570(1), 570(16).

Cal.Super. 1949. "Nonsuit" is a judgment given against plaintiff when he is unable to prove his case, or when he refuses or neglects to proceed to the trial of a cause after it has been put at issue, without determining such issue, although the term "nonsuit" is sometimes broadly applied to a variety of terminations of an action which do not adjudicate the issues on the merits. West's Ann.Code Civ.Proc. §§ 581, 581c.—Salomons v. Lumsden, 213 P.2d 132, 95 Cal.App.2d Supp. 924.—Trial 159.

Conn. 1922. A "nonsuit" is the name of the judgment rendered against the plaintiff in a legal proceeding on his inability to maintain his cause in court or when he is in default in prosecuting his suit or in complying with the statutes or court orders.—Galvin v. Birch, 118 A. 826, 98 Conn. 228.—Pretrial Proc 531.

Fla. 1932. "Discontinuance" of common-law action is similar to "nonsuit."—Harrington v. Bowman, 143 So. 651, 106 Fla. 86.—Pretrial Proc 551.

Ga. 1931. "Nonsuit" is substitute of demurrer to evidence for trial of facts by jury.—Phillips v. Rozar, 159 S.E. 245, 172 Ga. 862.

Ga. 1903. Early in its history this court adopted the term "nonsuit" as the appropriate name for that proceeding known to the common-law practice as a "demurrer to the evidence." By a demurrer to the evidence the party demurring declares that he will not proceed because the evidence offered on the other side is not sufficient to maintain the issue. That the nonsuit of our practice is the same as the demurrer to the evidence of the common law is clearly pointed out by Mr. Justice Bleckley in Anderson v. Pollard, 62 Ga. 46, 50, where he says: "The want of necessary averments in the declaration is not cause for a nonsuit, for a nonsuit, under our practice, takes place for failure to support the declaration by evidence. We demur to the evidence as insufficient, and move to nonsuit the plaintiff. A motion of nonsuit is aimed at the evidence as compared with what the declaration is, not at the declaration as compared with what it ought to be."—Kelly v. Strouse, 43 S.E. 280, 116 Ga. 872.

Ga.App. 1963. "Nonsuit" terminates case without final passing upon issues of fact by jury, referee, or judge; it is ruling that plaintiff has not made out case entitling him to have jury pass on fact issues.—Bell v. Mutual Federal Sav. & Loan Ass'n, 130 S.E.2d 615, 107 Ga.App. 444.—Trial 159.

Ga.App. 1947. A "nonsuit" abruptly terminates whole case and puts it out of court, leaving plaintiff at liberty to bring it again.—Jones v. Britt, 42 S.E.2d 648, 75 Ga.App. 142.—Pretrial Proc 693.1.

Ga.App. 1907. The term "nonsuit," as used in Civ.Code 1895, § 5642, providing that, where a bill of particulars is not served in an action of assumpsit to recover unliquidated damages by the second term, a nonsuit shall be awarded, means a nonsuit in the sense of a non pros. of the English practice, or a dismissal only.—Souders v. Carolina Portland Cement Co., 59 S.E. 467, 3 Ga.App. 99.—Pretrial Proc 629.

Ill.App. 2 Dist. 1965. "Nonsuit," within statute to effect that when plaintiff has been nonsuited and time for bringing action has expired during pendency of suit, plaintiff may commence new action within one year after judgment, includes dismissal for want of prosecution. S.H.A. ch. 83, § 24a.—Patrick v. Burgess Norton Mfg. Co., 205 N.E.2d 643, 56 Ill.App.2d 145.—Lim of Act 130(5).

Ill.App. 4 Dist. 1983. "Nonsuit" is general term and includes two kinds of dismissals: voluntary and involuntary.—Conner v. Copley Press, Inc., 68 Ill.

Dec. 10, 445 N.E.2d 458, 112 Ill.App.3d 248, affirmed 76 Ill.Dec. 820, 459 N.E.2d 955, 99 Ill.2d 382.—Pretrial Proc 501, 551.

Ill.App. 5 Dist. 1973. Terms “nonsuit” and “voluntary dismissal without prejudice” are used interchangeably because there is no difference in effect between them. S.H.A. ch. 110, § 52.—Juen v. Juen, 297 N.E.2d 633, 12 Ill.App.3d 284.—Pretrial Proc 501.

La.App. 1 Cir. 1942. A suit that is dismissed on exception of vagueness for failure to allege facts that could be alleged is nothing more than a “nonsuit”.—Williams v. American Employers’ Ins. Co., 10 So.2d 516.—Plead 228.23.

Mass. 1943. A “nonsuit”, like its counterpart a “default” is generally imposed on party because of refusal or failure to take some step required for further progress of action, and if not removed it results in judgment for defendant.—Curley v. Boston Herald-Traveler Corp., 49 N.E.2d 445, 314 Mass. 31.—Pretrial Proc 581, 693.1.

Mich. 1932. Rule restricting plaintiff’s power of “dismissal” after answer held to include discontinuance by plaintiff by “nonsuit”. Court Rule 38, 1931.—Pear v. Graham, 241 N.W. 865, 258 Mich. 161.—Pretrial Proc 506.1.

Mo. 1943. The taking of a “nonsuit” has the effect of a dismissal of the case as to one or all defendants, and is not a final disposition of the cause of action on the merits but a final termination of the particular suit.—Rainwater v. Wallace, 174 S.W.2d 835, 351 Mo. 1044.—Judgm 570(3).

Mo. 1940. Under the statute permitting a plaintiff, who has commenced his action within the limitation period and who has suffered a “nonsuit,” to commence a new action within one year after such nonsuit, a voluntary dismissal of an action by plaintiff without prejudice of his rights to bring a new suit constituted a “nonsuit” so as to toll limitations. R.S.1929, § 874 (V.A.M.S. § 516.230).—Turner v. Missouri-Kansas-Texas R. Co., 142 S.W.2d 455, 346 Mo. 28, 129 A.L.R. 829.—Lim of Act 130(5).

Mo. 1932. Dismissal of death action against co-defendant, without prejudice, upon plaintiff’s motion, held voluntary “nonsuit” within statute authorizing new death action within year after “nonsuit”. V.A.M.S. § 537.100.—Anderson v. Asphalt Distributing Co., 55 S.W.2d 688, 86 A.L.R. 1033.—Death 39.

Mo. 1930. Dismissal for failure to prosecute suit is “nonsuit” within meaning of law authorizing another action within one year. Rev.St.1919, § 1329 (V.A.M.S. § 516.230).—Scanlon v. Kansas City, 28 S.W.2d 84, 325 Mo. 125.—Lim of Act 130(5).

Mo. 1905. A judgment of “nonsuit” and a judgment of “dismissal” serve the same purpose, have the same legal effect, and arrive at the same end, and hence should be treated alike and allowed the same office in the everyday administration of the

law.—Wetmore v. Crouch, 87 S.W. 954, 188 Mo. 647.

Mo.App. E.D. 1995. Dismissal without prejudice of action brought by former resident against nursing home based on allegedly negligent care due to failure of resident to file expert affidavit was “non-suit” under savings statute, and resident had one year to commence new action, where neither party challenged constitutionality of affidavit requirement and resident had not stood on right to maintain action unencumbered by affidavit requirement. V.A.M.S. § 538.255.—Ferrier-Harris, Ltd. v. Sanders, 905 S.W.2d 123.—Health 805, 812.

Mo.App. E.D. 1995. Plaintiff suffers “non-suit,” for purposes of applying savings statute, when court order finally terminates cause without prejudice. V.A.M.S. §§ 516.105, 516.230.—Korman v. Lefholz, 890 S.W.2d 771.—Lim of Act 130(5).

Mo.App. E.D. 1986. A plaintiff suffers a “non-suit” when a court order finally terminates the cause without prejudice.—Gray v. Chrysler Corp., 715 S.W.2d 282.—Pretrial Proc 531.

Mo.App. S.D. 2002. “Nonsuit,” for purposes of savings statute allowing plaintiff who suffers nonsuit to refile cause of action within specified time period, is suffered when court order finally terminates cause of action without prejudice.—Kirby v. Gaub, 75 S.W.3d 916.—Lim of Act 130(5).

Mo.App. S.D. 1992. Plaintiff suffers a “nonsuit” when court order finally terminates the cause without prejudice; where a timely suit is filed and subsequently nonsuited, plaintiff may thereafter refile the same cause of action within one year after the nonsuit, under the savings statute. V.A.M.S. § 516.230.—Webb v. Mayuga, 838 S.W.2d 96, rehearing, transfer denied, and transfer denied.—Lim of Act 130(5).

Mo.App. S.D. 1992. Term “nonsuit,” as used in statute governing application of one-year saving statute includes voluntary dismissal without prejudice of action by plaintiff. V.A.M.S. § 516.300.—Garoutte v. Farmers Mut. Ins. Co. of Lawrence County, 823 S.W.2d 526.—Lim of Act 130(5).

Mo.App. W.D. 1994. Savings statute that allows plaintiff grace period of one year to commence new action after nonsuit did not begin to run until date trial court modified its prior order of dismissal to be without prejudice; original dismissal was with prejudice due to fact that it did not specify otherwise, and “nonsuit” did not occur until court modified original order by indicating that dismissal was without prejudice. V.A.M.S. § 516.230; V.A.M.R. 67.03.—Litton v. Rhudy, 886 S.W.2d 191.—Lim of Act 130(5).

Neb. 1934. “Dismissal” in effect is equivalent of “nonsuit,” and, in practice, also imports the same thing as “discontinuance.”—Temple v. Cotton Transfer Co., 253 N.W. 349, 126 Neb. 287.—Pretrial Proc 501.

N.Y. 1943. Where automobile passengers’ actions against owners of two automobiles involved in collision were consolidated for trial with action

between owners, dismissal of passengers' actions because of failure to appear or put in evidence was merely a "nonsuit", and the recital that the dismissal was on the merits could not aid automobile owners' claim that the judgment, either as a technical estoppel or as evidence, conclusive per se barred maintenance of subsequent actions by passengers against owners. Civil Practice Act, § 482.—Mink v. Keim, 52 N.E.2d 444, 291 N.Y. 300.—Judgm 570(5).

N.Y. 1903. A "judgment of nonsuit" is a decision by the court that the plaintiff has produced no evidence upon which facts may be found. Hence the dismissal of an action against an insurance company on motion of defendant after plaintiff had established his application for a paid-up policy within six months after default in payment of the premium that he had complied with all the other requirements of the policy authorizing such issue except the surrender of the policy itself, which he had failed to find after a diligent search, that he had tendered to the company a release of all liability under such policy, and that it refused to accept the release and issue a paid-up policy, is a "nonsuit."—Lindenthal v. Germania Life Ins. Co., 66 N.E. 629, 174 N.Y. 76.

N.Y. 1901. A "nonsuit" is the name of a judgment given against the plaintiff when he is unable to prove a case, or when he refuses or neglects to proceed to the trial of the cause after it has been put at issue without determining such issue.—Deeley v. Heintz, 62 N.E. 158, 169 N.Y. 129.

N.Y.A.D. 1 Dept. 1906. A "nonsuit" is a judgment given against the plaintiff when he is unable to prove his case or when he refuses to proceed to the trial of the cause after it has been put at issue, without determining the issue. A voluntary nonsuit is an abandonment of his cause by the plaintiff, who suffers judgment for costs to be entered against him by absenting himself or failing to answer when called upon to hear the verdict. An involuntary nonsuit takes place when the plaintiff on being called when his case is before the court for trial neglects to appear, or when he has given no evidence on which a jury could find a verdict.—Wise v. Cohen, 99 N.Y.S. 663, 37 Civ.Proc.Rep. 152, 113 A.D. 859.

N.Y.A.D. 3 Dept. 1957. The word "nonsuit" within statute providing that where nonsuit is granted it shall not be necessary for court to make any finding of fact, is a term of art which has an historically settled meaning and constitutes a dismissal of complaint without prejudice to commencement of a new action for same relief, and in that sense, it is the antithesis of a judgment on merits which bars a new action. Civil Practice Act, §§ 441, 482.—Kazansky v. Bergman, 164 N.Y.S.2d 93, 4 A.D.2d 79.—Trial 388(3).

N.Y.Sup. 1945. The word "nonsuit", in Illinois statute providing that, if time limited for bringing action expires during pendency of suit nonsuited plaintiff may commence new action within year after such judgment, applies to all involuntary judgments of dismissal for want of proof or jurisdiction,

leaving merits untouched, so that dismissal of Illinois action for want of jurisdiction over person of defendant, New York administrator of decedent's estate, was a "nonsuit", and second action, commenced in New York Supreme Court within year thereafter, was not barred by such statute. Smith-Hurd Stats.Ill. c. 83, § 24a.—Smalley v. Hutcheon, 59 N.Y.S.2d 259, affirmed 63 N.Y.S.2d 378, 270 A.D. 1053, reversed 70 N.E.2d 161, 296 N.Y. 68.—Lim of Act 130(7).

N.Y.Sup.App.Term 1920. Where, at the close of plaintiffs' cases, defendant's attorney moved for dismissal of the complaints, which was granted, and judgment entered against plaintiffs, dismissing the complaints without prejudice, such disposition of the actions was a "nonsuit" merely, and not a "decision on the merits."—Beninato v. Hedges, 180 N.Y.S. 745.

N.Y.Sup.App.Term 1905. Where defendant rested at the close of plaintiff's case and moved for a dismissal of the complaint, and plaintiff moved for judgment, a judgment for defendant was not one of "nonsuit," but one involving a determination that plaintiff was not entitled to recover on the facts as submitted to the court.—M. Zimmerman Co. v. New York City R. Co., 95 N.Y.S. 598.

N.C. 1959. When a plaintiff fails to show coverage under insuring clause of a policy or plaintiff's evidence makes out a case of coverage and at the same time establishes defense that particular injury was excluded from coverage, "nonsuit" is proper.—Slaughter v. State Capital Life Ins. Co., 108 S.E.2d 438, 250 N.C. 265.—Insurance 2586.

N.C. 1958. When the plaintiff offers evidence sufficient to constitute a *prima facie* case in an action in which the defendant has set up an affirmative defense, and the evidence of the plaintiff establishes the truth of the affirmative defense as a matter of law, a judgment of "nonsuit" may be entered.—Goldberg v. United Life & Acc. Ins. Co., Concord, N. H., 102 S.E.2d 521, 248 N.C. 86.—Trial 139.1(13).

N.C. 1956. A "nonsuit" is judgment dismissing action and a final judgment in that it terminates action, though it does not necessarily decide merits of cause of action.—Burton v. City of Reidsville, 90 S.E.2d 700, 243 N.C. 405.—Action 71; Pretrial Proc 694.

N.C. 1956. A "nonsuit" is a judgment given against plaintiff when he is unable to prove a case.—Burton v. City of Reidsville, 90 S.E.2d 700, 243 N.C. 405.—Trial 159.

N.C. 1951. On motion by defendant to "nonsuit", evidence is taken in its light most favorable to the state.—State v. Holland, 67 S.E.2d 272, 234 N.C. 354.—Crim Law 752.5.

N.C. 1944. "Nonsuit" is the name of a judgment given against plaintiff when he is unable to prove case and it dismisses the action and though it does not necessarily decide merits of the cause of action, it is a final judgment in that it terminates the action. G.S. § 1-25.—Bourne v. Southern Ry. Co., 31 S.E.2d 382, 224 N.C. 444.—Pretrial Proc 517.1.

N.C. 1943. A husband and wife's agreement, that trial court might strike claim for husband's expenses and loss of time from his employment in traveling to the parties' home to assist his family after their home had been destroyed by fire, was tantamount to taking a "nonsuit" on such cause of action, and hence complaint for destruction of home, of which wife was owner and in which husband had an equity, and contents of home, primarily owned by the wife and in which husband had an equity, and records and accounts receivable which had been assigned to the parties, was not demurrable for "misjoinder of parties" and of "causes of action".—*Walker v. Standard Oil Co. of N. J.*, 24 S.E.2d 254, 222 N.C. 607.—Pretrial Proc 501, 518.

N.C. 1940. A "nonsuit" is term appropriate to designate court's action in ending case when complainant fails to proceed to trial or is unable to prove his case, in which event it is analogous to a demurral to evidence.—*Blades v. Southern Ry. Co.*, 12 S.E.2d 553, 218 N.C. 702.—Pretrial Proc 531; Trial 159.

N.C. 1939. A "retraxit" is an act by which the plaintiff makes an open and voluntary denunciation of his suit in court and it differs from a "nonsuit" in that it is an act of the plaintiff himself, for it cannot even be entered by attorney and it must be after declaration filed.—*Steele v. Beatty*, 2 S.E.2d 854, 215 N.C. 680.—Pretrial Proc 511.

N.C. 1939. Under statute authorizing commencement of new action within one year after nonsuit, "nonsuit" is the name of a judgment given against the plaintiff when he is unable to prove a case, or when he refuses or neglects to proceed to trial and leaves the issue undetermined. C.S. § 415.—*Carolina Transportation & Distributing Co. v. American Alliance Ins. Co.*, 200 S.E. 411, 214 N.C. 596.—Lim of Act 130(5).

N.C. 1931. "Nonsuit" is judgment given against plaintiff unable to prove case, or refusing or neglecting to proceed to trial of cause at issue (C.S. § 415).—*Cooper v. Crisco*, 161 S.E. 310, 201 N.C. 739.—Pretrial Proc 531.

N.C.App. 1978. Where only evidence in prosecution for unlawful burning of personal property on issue of intent to injure or prejudice owner of burnt automobile was the burning of the automobile itself, defendant was entitled to "nonsuit". G.S. § 14-66.—*State v. Murchinson*, 249 S.E.2d 871, 39 N.C.App. 163.—Arson 40.

Pa.Super. 1933. A "retraxit" differs from a "nonsuit" in that the one is negative and the other positive; the nonsuit is a mere default and neglect of the plaintiff, and therefore he is allowed to begin his suit again upon payment of costs, but a "retraxit" is an open and voluntary renunciation of his suit in court, and by this he forever loses his action.—*Bucci v. Detroit Fire & Marine Ins. Co.*, 167 A. 425, 109 Pa.Super. 167.

R.I. 1946. At common law, a "nonsuit" was a dismissal of plaintiff's action without an adjudication other than the imposition of costs and originally it was granted only where plaintiff made de-

fault.—*Giarrusso v. Brown & Sharpe Mfg. Co.*, 50 A.2d 72, 72 R.I. 229.—Pretrial Proc 531.

R.I. 1946. Under modern practice, "nonsuit" may be either voluntary, as at common law, or compulsory.—*Giarrusso v. Brown & Sharpe Mfg. Co.*, 50 A.2d 72, 72 R.I. 229.—Pretrial Proc 501, 531.

S.C. 1942. "Nonsuits" are applicable only to cases arising before common law tribunals and cannot be resorted to in actions of an equitable nature, unless by virtue of statutory authority, the object of "nonsuit" being to withdraw the case from the jury upon a question of law to be decided by the presiding judge.—*Jefferson Standard Life Ins. Co. v. Boddie*, 23 S.E.2d 817, 202 S.C. 1.—Trial 384.

Tex.App.—Amarillo 1997. "Nonsuit" is termination of pleaded causes of action and asserted defenses without adjudication of their merits that returns litigants to positions they occupied before plaintiff invoked court's jurisdiction, and thus, taking of voluntary nonsuit does not constitute litigation of issues in case and does not prejudice parties against seeking same relief in subsequent lawsuit under doctrines of res judicata and collateral estoppel.—*Rexrode v. Bazar*, 937 S.W.2d 614.—Judgm 570(3), 654.

Va. 1978. Within meaning of statute providing that party will not be allowed to suffer a nonsuit unless he does so before jury retires or before action has been submitted to court for decision, General Assembly intended term "nonsuit" to be used in a comprehensive sense, i. e., voluntary termination by plaintiff of pending litigation not precluding a later lawsuit upon the same cause of action, whether it be a nonsuit at law or a dismissal without prejudice in equity. Code 1950, § 8-220.—*Moore v. Moore*, 240 S.E.2d 535, 218 Va. 790.—Pretrial Proc 506.1.

Va. 1955. A dismissal not upon the merits is a "nonsuit".—*Norwood v. Buffey*, 86 S.E.2d 809, 196 Va. 1051.—Pretrial Proc 531.

Va.App. 1990. "Nonsuit" is procedural step that terminates pending litigation but that leaves issues of cause undecided.—*Clark v. Clark*, 398 S.E.2d 82, 11 Va.App. 286.—Pretrial Proc 517.1.

W.Va. 1891. "Non prosequitur," in our practice, is commonly called a "nonsuit," and covers judgment by non prosequitur, nolle prosequi, and technical nonsuits, and also judgments of nonsuit entered under statute at rules. According to the common-law practice, a non prosequitur was entered where plaintiff failed to take any necessary step after defendant had appeared and pleaded.—*Buena Vista Freestone Co. v. Parrish*, 12 S.E. 817, 34 W.Va. 652.

## NONSUITED

Ill.App. 1 Dist. 1979. Word "nonsuited" within limitations act, which stated in effect that if the plaintiff was nonsuited, then, whether or not the time limitation for bringing the action expired during pendency of the suit, the plaintiff would have at least one year for commencing a new action after

the nonsuit, referred only to involuntary nonsuits. S.H.A. ch. 83, § 24a.—Baird & Warner, Inc. v. Addison Indus. Park, Inc., 26 Ill.Dec. 1, 387 N.E.2d 831, 70 Ill.App.3d 59.—Lim of Act 130(5).

### **NONSUITS**

S.C. 1942. “Nonsuits” are applicable only to cases arising before common law tribunals and cannot be resorted to in actions of an equitable nature, unless by virtue of statutory authority, the object of “nonsuit” being to withdraw the case from the jury upon a question of law to be decided by the presiding judge.—Jefferson Standard Life Ins. Co. v. Boddie, 23 S.E.2d 817, 202 S.C. 1.—Trial 384.

### **NONSUMMARY CONTEMPT PROCEEDING**

Idaho 2002. A “nonsummary contempt proceeding” is one in which the alleged contemnor is given notice of the charge of contempt and an opportunity for a hearing on whether or not he is in contempt.—Camp v. East Fork Ditch Co., Ltd., 55 P.3d 304, 137 Idaho 850.—Contempt 55, 61(1).

### **NONSUPERVISED LENDERS**

C.A.6 (Mich.) 1976. “Supervised lender” is one which may make home loans which are automatically guaranteed by the Veterans Administration without the prior approval of the Administration; “nonsupervised lenders” must submit a detailed package to the Administration which the Administration will review before agreeing to guarantee the loan. 38 U.S.C.A. § 1810 et seq.—U.S. v. Ekelman & Associates, Inc., 532 F.2d 545, 35 A.L.R. Fed. 794.—Armed S 108.1.

### **NONSUPERVISORY EMPLOYEES**

C.A.7 (Ill.) 1967. Process supervisors were “nonsupervisory employees,” rather than supervisors, and were therefore subject to collective bargaining contracts in view of record showing that, although process supervisors had authority to release their operators from work and permit them to leave unit during working hours, there was not one instance of a process supervisor discharging an employee, exercising any of the other indicia of supervisory authority or indicating that in actual practice any of them was regarded as having authority to do so. National Labor Relations Act, § 2(11) as amended 29 U.S.C.A. § 152(11).—N. L. R. B. v. American Oil Co., 387 F.2d 786, certiorari denied 88 S.Ct. 1656, 391 U.S. 906, 20 L.Ed.2d 420.—Labor 67.

### **NONSUPERVISORY POSITION**

Iowa 1939. In certiorari proceedings to annul the action of board of civil service commissioners of city of Des Moines in ordering the reinstatement of a sanitary inspector discharged by city council, evidence supported findings of trial court that inspector occupied a “nonsupervisory position,” within meaning of civil service law, where general character of inspector’s employment was to pass upon and investigate complaints; and hence decree ordering that inspector be restored to his original position was proper. Code 1935, § 5695, as amended by

Acts 47th Gen. Assem. c. 156, § 6; § 12456.—City of Des Moines v. Board of Civil Service Com’rs of City of Des Moines, 287 N.W. 288, 227 Iowa 66.—Mun Corp 191.

### **NON-SUPPORT**

Hawai‘i 1968. “Nonsupport” of a child is not synonymous with “abandonment” of that child for purpose of determining whether consent of nonsupporting parent is necessary to permit another to adopt the child. R.L.H.1955, Suppl.1965, § 331-2.—In re Adoption of Minor Child, 438 P.2d 398, 50 Haw. 255, 50 Haw. 266.—Adop 7.4(6).

Idaho 1947. “Nonsupport” is not synonymous with “abandonment” as used in statute providing that notice to a parent in an adoption proceeding is not necessary where there has been an abandonment of the child by the parent or the parent has ceased to provide for the child’s support. Code 1932, § 31-1104.—Smith v. Smith, 180 P.2d 853, 67 Idaho 349.—Adop 12.

Mich. 1948. Husband’s failure when employed, to provide a home for wife and minor children other than with his parents, which was unsatisfactory, or to contribute to their support, amounted to “nonsupport” entitling wife to a divorce.—Van Houten v. Van Houten, 31 N.W.2d 734, 320 Mich. 604.—Divorce 31.

Miss. 1936. Indictment alleging that father did willfully desert “and neglect” child under age of 16 years, leaving it in destitute and necessitous circumstances, held to charge offense of child desertion under statute penalizing parent deserting or willfully neglecting or refusing to provide for support and maintenance of child; desertion of a child leaving it destitute implying “nonsupport,” words “and neglect” being surplusage. Code 1930, § 861.—Horton v. State, 166 So. 753, 175 Miss. 687.—Child S 656; Ind & Inf 119.

N.Y.Sur. 1949. “Non-support” within statute providing that in case a deceased child leaves a mother and a father who has abandoned him, or who has left his support to mother, recovery shall be for sole benefit of mother, connotes merely a failure to contribute to maintenance and material well-being of child. Decedent Estate Law, § 133, subd. 2.—In re Musczak’s Estate, 92 N.Y.S.2d 97, 196 Misc. 364.—Death 101.

N.Y.Sur. 1941. The elective rights of husband against will of his wife, or his rights of inheritance in intestacy are not forfeited by reason of his “nonsupport” of wife, unless it is demonstrated by his opponents that he, in fact, failed to support her, that he possessed means from which to furnish support, that wife had not been guilty of misconduct exonerating him from any obligation to support her, and that wife looked to him for support or desired it from him. Decedent Estate Law, §§ 18, subd. 4, 87(c).—In re Barc’s Estate, 31 N.Y.S.2d 139, 177 Misc. 578, affirmed 41 N.Y.S.2d 213, 266 A.D. 677, appeal denied 41 N.Y.S.2d 953, 266 A.D. 742.—Des & Dist 63; Wills 785.5(4).

N.Y.Sur. 1941. In proceeding to bar husband from participating in intestate inheritance of wife's estate, evidence was insufficient to show that act of husband in leaving wife and returning to Poland constituted an "abandonment" or "nonsupport", within statute barring husband who has abandoned and failed to provide for wife's support from participating in intestate inheritance of wife's estate. Decedent Estate Law, § 87(c).—In re Barc's Estate, 31 N.Y.S.2d 139, 177 Misc. 578, affirmed 41 N.Y.S.2d 213, 266 A.D. 677, appeal denied 41 N.Y.S.2d 953, 266 A.D. 742.—Des & Dist 63.

### **NONSUPPORT ORDER**

Pa.Super. 1941. A "nonsupport order" directing a parent to contribute to support of a minor child does not have attributes of a "money judgment," and purpose of such an order is to provide for child's support, and the order is not to be used to punish a parent, nor should it result in a bestowal of a gratuity on one who may not have contributed anything to child's welfare. 17 P.S. § 263.—Com. ex rel. Grossman v. Grossman, 22 A.2d 758, 146 Pa.Super. 405.—Child S 669.

### **NONSUSCEPTIBLE**

Neb. 1928. Under Comp.St.1922, § 2878, subd. 3, authorizing refund of irrigation district assessments on lands which are nonsusceptible of irrigation from the district's canal, the word "nonsusceptible" is used in the sense of incapable, and was intended to refer to lands which for some cause could not make use of waters from the canal.—Morrow v. Farmers' Irr. Dist., 220 N.W. 680, 117 Neb. 424.

### **NON-SUSPECT**

Tenn.Crim.App. 1996. Such terms as "incriminating," "suspicious," "innocent," or "non-suspect," in determining whether there is sufficient corroboration of anonymous tip to provide "reasonable suspicion" justifying *Terry* stop, are only of value in context of facts and circumstances of any particular case; activity which may be viewed as innocent in one case may be highly suspicious or incriminating in another. U.S.C.A. Const.Amend. 4.—State v. Kelly, 948 S.W.2d 757.—Arrest 63.5(4).

### **NON-TABLE CASE**

Fed.Cl. 1995. Petitioner may prove entitlement to compensation under National Childhood Vaccine Injury Act "non-Table case" by demonstrating actual causation through proof by preponderance of evidence that vaccine was cause in fact of petitioner's injury, and first inquiry in such case is whether, on record as whole, petitioner has proved by preponderance of all the evidence that listed vaccine caused injury; if petitioner proves causation by preponderance of evidence, there cannot be preponderance of evidence showing causation by some other factor, no further inquiry into alternate causes is required, and petitioner is entitled to program award. Public Health Service Act, §§ 2111(c)(1)(C)(ii), 2113(a)(1), (a)(1)(A, B), as amended, 42 U.S.C.A. §§ 300aa-11(c)(1)(C)(ii),

300aa-13(a)(1), (a)(1)(A, B).—Johnson v. Secretary of Health and Human Services, 33 Fed.Cl. 712, affirmed 99 F.3d 1160.—Health 389.

### **NONTAXABLE**

N.Y.A.D. 1 Dept. 1897. "Nontaxable" naturally means not taxable at all, and under Laws 1892, c. 202, providing that, in determining the amount of a tax on personal property, no reduction shall be made on account of any debt incurred in the purchase of nontaxable property, or for the purpose of exacting taxation, the term "nontaxable" does not apply to shares of stock of a domestic corporation liable to taxation which were purchased on credit, though the holder of such stock is not, under the statute, liable for a personal tax thereon.—People ex rel. Keppler & Schwarzmam v. Barker, 47 N.Y.S. 958, 22 A.D. 120, affirmed 49 N.E. 1102, 155 N.Y. 661.

### **NONTAXABLE EXCHANGE**

C.C.A.3 (Pa.) 1941. Where a corporation was formed, receiving assets of partnership and taxpayer who had interest in partnership received out of total issue of corporate stock a number of shares proportionate to his interest in the partnership, the exchange involved in the acquisition by taxpayer of stock was a "nontaxable exchange", inasmuch as properly received on the exchange had, for purpose of determining gain or loss from sale or exchange, the same basis in whole or in part in his hands as the property exchanged and, hence, taxpayer was entitled to tack onto period during which he held the stock the additional period during which he held the property exchanged in computing net income derived from sale of the stock. Revenue Act 1934, §§ 113, 117(a) (c) (1), 26 U.S. C.A. Int.Rev. Acts, pages 696, 707.—Kessler v. U.S., 124 F.2d 152.

### **NONTAXABLE GIFTS**

E.D.Wis. 1958. Payments of strike benefits made to members of a striking union by international union, under a moral obligation imposed by its constitution, did not constitute "nontaxable gifts," but represented taxable income to such union members. 26 U.S.C.A. (I.R.C.1954) § 102(a).—Kaiser v. U.S., 158 F.Supp. 865, reversed 262 F.2d 367, certiorari granted 79 S.Ct. 1150, 359 U.S. 1010, 3 L.Ed.2d 1035, affirmed 80 S.Ct. 1204, 363 U.S. 299, 4 L.Ed.2d 1233.—Int Rev 3129.

### **NONTAXABLE LOANS**

C.A.6 1991. Withdrawals by taxpayer from his wholly owned professional corporation were "taxable dividends", rather than "nontaxable loans", even though taxpayer may have been prohibited under Michigan law from formally declaring dividend, and even though ERISA rendered him personally liable to repay approximately \$237,000 borrowed from corporation's pension plan; during relevant period, taxpayer "borrowed" nearly \$1,220,000, and he had repaid only approximately \$48,000 during years at issue. 26 U.S.C.A. § 316; M.C.L.A. §§ 450.1107(1), 450.1351, 450.1351(2);

Employee Retirement Income Security Act of 1974, § 409(a), 29 U.S.C.A. § 1109(a).—Jaques v. C.I.R., 935 F.2d 104, rehearing denied.—Int Rev 3754.

#### **NONTAXABLE REORGANIZATION**

C.C.A.3 1939. The transfer by corporation of all its assets to wholly owned subsidiaries of corporation from which transferor received cash and bonds in exchange held not a "nontaxable reorganization," on ground that parent corporation was not a "party to the reorganization" as required, and that transferor did not receive a definite and material interest in affairs of the subsidiaries as likewise required in order that gain be exempt. Revenue Act 1928, § 112(a), (b)(3, 4), (c, d), (i)(1, 2), (j), 26 U.S.C.A. (I.R.C.1939) § 112.—Hedden v. Commissioner of Internal Revenue, 105 F.2d 311, certiorari denied 60 S.Ct. 116, 308 U.S. 575, 84 L.Ed. 482, rehearing denied 60 S.Ct. 172, 308 U.S. 636, 84 L.Ed. 529, certiorari denied Conneen v. Commissioner of Internal Revenue, 60 S.Ct. 116, 308 U.S. 575, 84 L.Ed. 482, rehearing denied 60 S.Ct. 172, 308 U.S. 636, 84 L.Ed. 529, certiorari denied 60 S.Ct. 116, 308 U.S. 575, 84 L.Ed. 482, rehearing denied 60 S.Ct. 172, 308 U.S. 636, 84 L.Ed. 529, certiorari denied 60 S.Ct. 117, 308 U.S. 5—Int Rev 3677.

M.D.Pa. 1939. Stipulated facts showing circumstances under which taxpayer and other principal stockholders of baking company sold the company's stock to individual, who in turn transferred the stock to holding company, which bought baking company's equipment, and gave in return first mortgage, and thereafter, baking company declared liquidating dividends, held to establish that there was a taxable "sale" or "exchange," not a "nontaxable reorganization," since there was a purchase and repurchase by the individual and no "plan of reorganization."—Caldwell v. U.S., 30 F.Supp. 308, affirmed 114 F.2d 995.

#### **NONTAXABLE TRANSFER OF INTANGIBLE PROPERTY**

Cal. 1994. Company's trade secrets and other intellectual works which were embodied in documents were "tangible personal property," for purposes of sales tax; intellectual content of documents did not render the sale a "nontaxable transfer of intangible property." West's Ann.Cal. Rev. & T.Code § 6051.—Navistar Internat. Transportation Corp. v. State Bd. of Equalization, 884 P.2d 108, 35 Cal.Rptr.2d 651, 8 Cal.4th 868.—Tax 1241.1.

#### **NON-TAX-PAID**

N.C. 1949. Warrant charging generally that defendant unlawfully had in his possession "non-tax-paid" whiskey for purpose of sale used quoted word merely to describe the whiskey and designate it as unlawful and not to predicate offense on a violation of statute making it unlawful to possess for sale any quantity of liquor on which required taxes have not been paid, and hence instruction that proof of possession would raise a *prima facie* presumption that possession was for the purpose of sale was not

#### **NON-TECHNICAL ALIMONY**

error. G.S. §§ 18-11, 18-32, 18-49, 18-50.—State v. Merritt, 55 S.E.2d 804, 231 N.C. 59.—Int Liq 239(2).

#### **NONTAXPAID WHISKEY**

C.A.4 (N.C.) 1969. Evidence was sufficient to prove that containers purchased from defendant contained distilled spirits even though terms "whiskey," "liquor," and "nontaxpaid whiskey" rather than term "distilled spirits" were used during trial in referring to contents of containers. 26 U.S.C.A. (I.R.C.1954) §§ 5205(a) (2), 5604(a) (1).—U.S. v. Baugess, 419 F.2d 125.—Int Rev 5307.

#### **NON-TAXPAYER**

S.D.N.Y. 1968. Where government in suit to foreclose lien for taxes on ancillary receipts from boxing match sought declaration that seized fund was property of New York corporation and sought foreclosure of lien on New York corporation's property, Massachusetts corporation was a "non-taxpayer" for purposes of action and could assert interest in fund by way of counterclaim. 26 U.S.C.A. (I.R.C.1954) § 7426.—U.S. v. Championship Sports, Inc., 284 F.Supp. 501.—Int Rev 4797.

#### **NON-TAX SUPPORTED**

Ohio 1988. City charter which provided that municipally owned public utilities were to be "non-tax supported" prohibited use of tax-generated funds to subsidize municipally owned public utilities; words "non-tax supported" were intended to establish that municipally owned and operated utilities would be self-supporting enterprises independent of public subsidies.—Cleveland Elec. Illuminating Co. v. City of Cleveland, 524 N.E.2d 441, 37 Ohio St.3d 50, rehearing denied 532 N.E.2d 1321, 38 Ohio St.3d 704, appeal after remand 1992 WL 281369, jurisdictional motion overruled Cleveland Elec. Illum. Co. v. Cleveland, 607 N.E.2d 846, 66 Ohio St.3d 1424, rehearing denied 616 N.E.2d 243, 67 Ohio St.3d 1415, jurisdictional motion overruled 607 N.E.2d 846, 66 Ohio St.3d 1424, rehearing denied 616 N.E.2d 243, 67 Ohio St.3d 1415, stay granted 609 N.E.2d 1270, 66 Ohio St.—Mun Corp 985.

#### **NONTEACHING EMPLOYEE**

Ohio App. 11 Dist. 1987. Treasurer of school board of education was not "nonteaching employee" and was thus not entitled to accrue vacation pay upon separation from employment. R.C. §§ 3319.081, 3319.084.—Erkkila v. Painesville Tp. Bd. of Educ., 535 N.E.2d 385, 41 Ohio App.3d 283.—Schools 63(5).

#### **NON-TECHNICAL ALIMONY**

Md.App. 1975. Terms "technical alimony" and "non-technical alimony" used by courts on occasion tend to lead to confusion and the former is alimony while the latter is not since it does not meet the strict test required of alimony.—LaChance v. LaChance, 346 A.2d 676, 28 Md.App. 571.—Divorce 231.

**NON-TESTAMENTARY IN NATURE**

Ill.App. 5 Dist. 1975. Warranty deed, which provided in effect that, in consideration of certain conveyance, grantees were to pay grantor \$500 per year for 18 years, that yearly payments were to be made to grantor's widow after his death and that, if both grantor and wife died prior to expiration of 18 years, remainder of payments were to be made to two other specified persons, was "non-testamentary in nature" and was not subject to requirements of formality in execution set forth in probate court, in view of fact that grantees' right to title to real estate and duty to make payments were a right and duty over which grantor had no unilateral control after execution without consent of grantees. S.H.A. ch. 3, §§ 1 et seq., 43; ch. 30, § 8.—*Berry v. Berry*, 336 N.E.2d 239, 32 Ill.App.3d 711.—Wills 88(1).

**NONTESTAMENTARY TRANSFERS**

S.C.App. 2002. Husband's Individual Retirement Accounts (IRAs) were "nontestamentary transfers" to wife, and thus were not a bequest under husband's will, despite will provision giving IRAs to wife, since provision acted as a designation rather than a specific bequest. Code 1976, § 62-6-201.—*McInnis v. McInnis*, 560 S.E.2d 632, 348 S.C. 585, rehearing denied.—Wills 754.

**NON-TESTIFYING CO-DEFENDANT**

Miss. 1991. Alleged assailant who claimed privilege against self-incrimination was "non-testifying co-defendant" within meaning of confrontation clause prohibition against prosecution using statement of nontestifying defendant or accomplice. Rules of Evid., Rule 804(a)(1); U.S.C.A. Const. Amends. 5, 6; Const. Art. 3, § 26.—*Hansen v. State*, 592 So.2d 114, certiorari denied 112 S.Ct. 1970, 504 U.S. 921, 118 L.Ed.2d 570, rehearing denied 112 S.Ct. 3060, 505 U.S. 1231, 120 L.Ed.2d 924, post-conviction relief denied 649 So.2d 1256, rehearing denied, certiorari denied 116 S.Ct. 513, 516 U.S. 986, 133 L.Ed.2d 422, rehearing denied 116 S.Ct. 801, 516 U.S. 1085, 133 L.Ed.2d 748.—Crim Law 662.10.

**NONTESTIFYING EXPERT**

S.D. 1996. Trial court improperly excluded testimony of electrical testing specialist hired to diagnose alleged problem on farm, granting motion to quash nonprofit rural electric cooperative's sought deposition of specialist, as specialist was not "non-testifying expert" for purposes of rule restricting discovery as to such experts retained in anticipation of litigation, and specialist was to be treated as ordinary witness, in dairy farmers' stray voltage action against cooperative; facts leading to specialist being hired did not make him nontestifying expert, part of specialist's report was received into evidence, and record was devoid of any evidence that specialist was retained in anticipation of litigation or to prepare for trial. SDCL 15-6-26(b)(4)(B).—*Kuper v. Lincoln-Union Elec. Co.*, 557 N.W.2d 748, 1996 SD 145.—Pretrial Proc 202.

S.D. 1996. Facts leading to electrical specialist being hired to diagnose alleged problem on farm did not make him "nontestifying expert" for purposes of rule restricting discovery as to such experts retained in anticipation of litigation, in dairy farmers' stray voltage action against nonprofit rural electric cooperative, where specialist was hired prior to litigation, specialist was contacted at cooperative's suggestion, not at request of farmers' counsel, cooperative employees assisted specialist during his testing, and specialist mailed copy of his report directly to cooperative. SDCL 15-6-26(b)(4)(B).—*Kuper v. Lincoln-Union Elec. Co.*, 557 N.W.2d 748, 1996 SD 145.—Pretrial Proc 171.

**NONTESTIFYING EXPERT EMPLOYED TO ASSIST IN PREPARATION FOR TRIAL**

Bkrtcy.E.D.Va. 2000. Chapter 11 debtor's government contracts expert, who was a "party representative" or "consultant" for purposes of rule governing which materials are subject to the work-product doctrine, also qualified as a "nontestifying expert employed to assist in preparation for trial," pursuant to rule governing issuance of interrogatories to, or taking depositions of, experts; in its application to employ expert, debtor asserted that he would be a non-testifying expert in the case engaged to assist counsel in trial preparation, and expert's role in the litigation was to assist debtor's counsel in evaluating the validity of creditor's and debtor's claims. Fed.Rules Bankr.Proc.Rule 7026, 11 U.S.C.A.; Fed.Rules Civ.Proc.Rule 26(b)(3, 4), 28 U.S.C.A.—*In re S3 Ltd.*, 252 B.R. 355.—Bankr 3047(2).

**NON-TESTIMONIAL**

Cal.App. 2 Dist. 1994. Criminal defendant's inculpatory writings, although communicative, were "nontestimonial," within meaning of provision of reciprocal discovery statutes limiting effect of statutes on nontestimonial evidence obtained by state. West's Ann.Cal.Penal Code § 1054.4.—*People v. Sanchez*, 30 Cal.Rptr.2d 111, 24 Cal.App.4th 1012, rehearing denied, and review denied.—Crim Law 627.5(3).

Del.Fam.Ct. 1984. Failure of officer to give *Miranda* warnings to juvenile stopped for driving under the influence of alcohol did not require suppression of physical coordination tests performed by minor, results of preliminary chemical blood test, or results of chemical test, since such evidence was "non-testimonial" in nature.—*State in Interest of James C.F.*, 488 A.2d 118.—Autos 421.

**NONTESTIMONIAL IDENTIFICATION PROCEDURES**

Vt. 1987. "Nontestimonial identification procedures" within meaning of rule requiring trial court to determine whether nontestimonial identification procedures would aid in determining whether defendant committed offense include both photo arrays and lineups. Rule Crim.Proc., Rules 41.1, 41.1(k), (m)(3), 41.1 note.—*State v. Emerson*, 541 A.2d 466, 149 Vt. 171.—Crim Law 339.7(1), 339.8(1).

## NONTRADITIONAL PUBLIC FORUM

### **NON-THEFT OFFENSE**

Tex.App.—Corpus Christi 1992. Credit card abuse is “non-theft offense,” which may be used to enhance third-degree felony theft offense to second-degree felony. V.T.C.A. Penal Code § 12.42(a).—Meshell v. State, 841 S.W.2d 895.—Larc 23.

### **NONTRADER**

Ala.App. 1936. Depositor *held* entitled to nominal damages only for bank’s breach of contract to honor check drawn on savings account, where depositor was “nontrader” and bank had stamped on check that it was not paid because not accompanied by passbook, in absence of evidence of actual damage. Code 1923, § 9221.—First Nat. Bank v. Ducros, 168 So. 704, 27 Ala.App. 193.—Banks 143(7).

### **NONTRADERS**

Cal.App. 2 Dist. 1943. That depositor whose check was dishonored by bank was not a trader or merchant did not preclude recovery of damages resulting from dishonoring of check, in absence of malice, since under statute common-law distinction between “traders” and “nontraders” is abolished. Civ.Code, § 3320.—Allen v. Bank of America Nat. Trust & Sav. Ass’n, 136 P.2d 345, 58 Cal.App.2d 124.—Banks 143(1).

### **NON-TRADING PARTNERSHIP**

Iowa 1940. In action against alleged partner on notes, where the alleged partnership trucking lines, if a partnership at all, was a “non-trading partnership” in which borrowing money and giving negotiable paper was neither a necessity nor ordinary incident, and actual partnership was not established, recovery on ground alleged partner was “estopped” by his having held himself out as a partner from denying that he was a partner was precluded by failure of plaintiff to make any effort to determine alleged partner’s actual relationship to the trucking lines.—Central Nat. Bank & Trust Co. v. Redman Freight Lines, 294 N.W. 915, 229 Iowa 661.—Partners 37.

Iowa 1940. In determining liability of alleged ostensible partner for debt of alleged “non-trading partnership” in which borrowing money and giving negotiable paper is neither a necessity nor ordinary incident, where the alleged partnership desires to borrow money or a member or officer proposes to give or tenders a promissory note in firm name, the lender or creditor must inquire into the authority of person who proposes to bind others not present or consenting.—Central Nat. Bank & Trust Co. v. Redman Freight Lines, 294 N.W. 915, 229 Iowa 661.—Partners 146(1).

Iowa 1940. In determining liability of alleged ostensible partner for debt of alleged “nontrading partnership” in which borrowing money and giving negotiable paper is neither a necessity nor ordinary incident, where the alleged partnership desires to borrow money or a member or officer proposes to give or tenders a promissory note in firm name, the lender or creditor must inquire into the authority of

person who proposes to bind others not present or consenting. Central Nat.—Central Nat. Bank & Trust Co. v. Redman Freight Lines, 294 N.W. 915, 229 Iowa 661.

Ky. 1908. Partnerships, when considered with reference to the business in which they are engaged, may generally be divided into two classes, one of which is known as “trading” or commercial partnerships, and the other as “nontrading” or non-commercial partnerships. Any member of an ordinary trading partnership can bind the firm by the signing of the firm name in the usual course of business as a part of the usual routine of their affairs, irrespective of restrictions in the articles of partnership not brought to the knowledge of the payee. In a “nontrading partnership,” however—that is, a partnership engaged in some occupation which is not of a commercial character—a partner does not generally possess the power to bind the firm, and the extent of his powers is not fixed by the rules of law. The general rule is that the partners in such a firm have no implied power to bind the partnership, but each case is left to be decided upon its particular facts, and one who seeks to hold the firm bound upon a contract made by a single member must be able to show such acts as will warrant the conclusion that the partner had been invested by his copartner with the requisite authority to make the contract.—Smallhouse v. Morris, 107 S.W. 708, 32 Ky.L.Rptr. 1005.

Wash. 1941. Where business of partnership was limited to disposal of garbage under a contract with city and did not directly or indirectly include buying and selling for profit, the partnership, for purpose of determining the authority of a member to act therefor, was a “non-trading partnership”.—Hyland v. City Garbage & Contracting Co., 114 P.2d 153, 9 Wash.2d 163.—Partners 127.

Wyo. 1931. Partner in “nontrading partnership” does not generally possess power to act for and bind firm and copartners, unless such power is expressly conferred or arises by implication.—Rue v. Merrill, 297 P. 375, 42 Wyo. 497.—Partners 127.

### **NONTRADITIONAL PUBLIC FORA**

Conn. 2002. “Nontraditional public fora,” for purposes of First Amendment’s free speech clause, are state-owned properties that have not traditionally been dedicated to public discourse, but that the state has opened to be used for expressive activity. U.S.C.A. Const.Amend. 1.—State v. Ball, 796 A.2d 542, 260 Conn. 275.—Const Law 90.1(4).

### **NONTRADITIONAL PUBLIC FORUM**

C.A.7 (Ill.) 1998. Site which is not traditionally used for public assembly, demonstrations, or debate will nevertheless be classified as a “nontraditional public forum” under free-speech law if the government by throwing it open to the public for a range of expressive purposes has dedicated it as a public forum. U.S.C.A. Const.Amend. 1.—Chicago Acorn v. Metropolitan Pier and Exposition Authority, 150 F.3d 695, on remand 1999 WL 199597, on remand 1999 WL 413480.—Const Law 90.1(4).

Ohio App. 4 Dist. 1999. A “nontraditional public forum” is public property opened by the government for use by the public as a place for expressive activity. U.S.C.A. Const. Amend. 1.—State v. Spingola, 736 N.E.2d 48, 136 Ohio App.3d 136, dismissed, appeal not allowed 727 N.E.2d 921, 88 Ohio St.3d 1496.—Const Law 90.1(4).

**NONTRADITIONAL PUBLIC FORUMS**

C.A.7 (Ill.) 1998. Walkways, plaza, and indoor park at a government-owned, renovated naval pier containing recreational and commercial facilities were not “nontraditional public forums” under free-speech law, where they had not been thrown open for assembly, debate, demonstrations, or other forms of mass expressive activity. U.S.C.A. Const. Amend. 1.—Chicago Acorn v. Metropolitan Pier and Exposition Authority, 150 F.3d 695, on remand 1999 WL 199597, on remand 1999 WL 413480.—Const Law 90.1(4).

C.A.3 (Pa.) 1986. Sidewalk areas, within ten feet, and one foot, respectively, of entrances to post offices, used by political activists for solicitation of funds in exchange for political literature were “non-traditional public forums” for purpose of determining whether Postal Service regulations prohibiting soliciting and depositing of literature were reasonable, and not discriminatory on basis of content, as applied to political activists who were convicted of violating those regulations; declining to follow *National Anti-Drug Coalition v. Bolger*, 737 F.2d 717 (7th Cir.1984). U.S.C.A. Const. Amend. 1.—U.S. v. Bjerke, 796 F.2d 643.—Const Law 90.1(4).

**NON-TRANSFERABLE AND ARE PAYABLE ONLY TO THE OWNERS NAMED THEREON**

N.D.Cal. 1970. Within meaning of treasury regulations providing that United States savings bonds are “non-transferable and are payable only to the owners named thereon”, the term “transferable” means a transfer by one or more of the registered co-owners to strangers to the bonds, that is, to persons who are not “owners named thereon.”—Chandler v. U. S., 312 F.Supp. 1263, affirmed 460 F.2d 1281, reversed 93 S.Ct. 880, 410 U.S. 257, 35 L.Ed.2d 247.—U S 91.

**NON-TRANSFER SIMULATION**

La.App. 4 Cir. 1982. “Non-transfer simulation,” is act of sale or conveyance, typically in authentic form and containing requisite recitals of consideration which, to all appearances, is valid act and is translatable of title, but, in reality, is sham, generally enacted for benefit of vendor as aid in fending off creditors; that is, true intention of parties is that there be no real transfer of ownership to vendee.—Sabrier v. Leard, 426 So.2d 213.—Des & Dist 69; Fraud Conv 1.

**NONTRANSPARENT**

Ohio 1983. Where darkly tinted glass on vehicle did not in any way obstruct driver's vision, but merely made it appear as if occupants inside vehicle were looking through sunglasses, and arresting officer admitted that he could see through glass and

into vehicle once he got close, windows were not “nontransparent” under all circumstances, and thus the phrase “other nontransparent material” as used in statute providing that no person shall drive any motor vehicle, other than a bus, with any sign, poster, or other nontransparent material on front windshield, sidewings, side, or rear windows of such vehicle could not be said to include darkly tinted automobile windows. R.C. § 4513.24.—State v. Myers, 456 N.E.2d 1207, 8 Ohio St.3d 33, 8 O.B.R. 343.—Autos 327.

**NON-TRAUMATIC INJURY**

Ill.App. 1 Dist. 1979. For purposes of determining when a patient knew or should have known of an injury in determining when limitation period begins to run in medical malpractice case, a “traumatic injury” is immediate and caused by an external force while a “non-traumatic injury” is one which does not immediately put one on notice of its origination by negligent means.—Lind v. Zekman, 32 Ill.Dec. 583, 395 N.E.2d 964, 77 Ill.App.3d 432.—Lim of Act 95(12).

**NONTREATABLE**

Neb. 1985. Mentally disordered sex offender for whom program of treatment will not lead to cure is “nontreatable” within meaning of Neb.Rev.St. § 29-2914, which provides for imprisonment of nontreatable mentally disordered sex offenders.—State v. Reddick, 376 N.W.2d 797, 221 Neb. 322.—Mental H 465(1).

**NONTREATMENT**

Minn. 1988. For purposes of rule that physician does not have duty to disclose availability of additional treatment, physician's order of bed rest combined with specific instructions constituted “treatment,” as opposed to “nontreatment.”—Madsen v. Park Nicolet Medical Center, 431 N.W.2d 855.—Health 906.

**NONTRIBUTARY**

Colo. 1999. Ground water that is either not hydrologically connected or is minimally connected to any surface stream is considered “nontributary” and does not fall within the doctrine of prior appropriation, but rather is subject to administration and allocation as the General Assembly sees fit. West's C.R.S.A. Const. Art. 16, § 5.—Water Rights of Park County Sportsmen's Ranch LLP v. Bargas, 986 P.2d 262, as modified on denial of rehearing.—Waters 130.

**NON-TRUCKING USE INSURANCE**

C.A.6 (Mich.) 1996. “Bob-tail/deadhead insurance,” also known as “non-trucking use insurance,” is coverage that applies to operation of tractor only when tractor is being used without trailer or with empty trailer, and is not being operated in business of authorized carrier.—Prestige Cas. Co. v. Michigan Mut. Ins. Co., 99 F.3d 1340, 1996 Fed.App. 347P, on remand 969 F.Supp. 1029.—Insurance 2894.

**NON-TRUST FUND TAXES**

D.Colo. 1994. “Non-trust fund taxes” generally refers to corporate tax liabilities, such as corporate income taxes and employer’s share of FICA taxes, other than employers’ withholding of employees’ personal income taxes and social security taxes.—*In re Evans*, 173 B.R. 725.—Int Rev 4849.

Bkrcty.W.D.Tenn. 1986. Corporate tax liabilities for funds other than trust fund taxes, which are those taxes withheld by employers from employees’ paychecks that are required to be held in trust pursuant to statute governing liability for taxes withheld or collected, are generally denominated “non-trust fund taxes,” which includes such corporate tax liabilities as corporate income taxes and employer’s share of social security taxes. 26 U.S.C.A. § 7501.—*In re B & P Enterprises, Inc.*, 67 B.R. 179.—Int Rev 4849.

**NONUSE**

Mo.App. E.D. 1983. Terms “nonuse” and “abandonment” are not synonymous, and showing of intent to abandon is not necessary element to justify forfeiture of franchise for nonuse, at least where there is total nonuse by franchisee from inception of franchise.—*State ex inf. Peach, ex rel. City of St. Louis v. Melhar Corp.*, 650 S.W.2d 633.—Franch 13.

**NONUSE OF PREMISES**

Ark. 1959. Nonuse of top three floors of five-story building did not constitute “nonuse of premises” within meaning of provision in lease of building by which lessee agreed not to permit leased premises to remain vacant or unused for purposes for which leased for more than 30 consecutive days without written consent of lessor.—*Meers v. Tommy’s Men’s Store, Inc.*, 320 S.W.2d 770, 230 Ark. 49.—Land & Ten 105.

**NON-USE OF TANGIBLE PERSONAL PROPERTY****TY**

Tex.App.-Houston [1 Dist.] 1999. Police officers’ decisions not to call dispatch upon arriving at scene where truck was blocking two lanes of traffic on road, not to use marked car to alert traffic to stalled truck, and not to park unmarked car in street constituted “non-use of tangible personal property,” rather than “misuse of tangible personal property,” within meaning of statutory waiver in Texas Tort Claims Act (TTCA) of governmental immunity for injuries caused by condition or use of tangible personal property, and thus city’s immunity was not waived by TTCA, even though officers may have used negligent judgment in failing to perform those actions. V.T.C.A., Civil Practice & Remedies Code § 101.021(2).—*City of Houston v. Rushing*, 7 S.W.3d 909, rehearing overruled, and review denied, and rehearing of petition for review denied, dissenting opinion 39 S.W.3d 685, review denied, and rehearing of petition for review denied.—Autos 187(2), 252.

**NON-USER**

Ga. 1942. The fact that owner of building who had an easement to use adjoining owners’ wall, wrecked his building preparatory to the erection of a new building, did not cause loss of the easement by “abandonment” or “nonuser”, where the new structure was immediately built and tied into the adjoining owners’ wall.—*Joel v. Publix-Lucas Theater*, 19 S.E.2d 730, 193 Ga. 531.—Party W 5.

N.Y.A.D. 1 Dept. 1972. The term “non-user”, as used in a products liability case, refers to a bystander, that is, to a person who has no real nexus to the instrumentality causing the injury except that he is injured.—*Singer v. Walker*, 331 N.Y.S.2d 823, 39 A.D.2d 90, affirmed 345 N.Y.S.2d 542, 32 N.Y.2d 786, 298 N.E.2d 681.—Prod Liab 19.1.

S.D. 1944. Trial court’s findings that private corporation withdrew from business approximately a year before commencement of action to annul its charter and had not thereafter exercised its franchise and that all but a very small minority in interest of its stockholders favored dissolution and opposed resumption of business activities showed such “nonuser” as is contemplated by statute authorizing annulment of corporate charters and supported judgment annulling charter. SDC 37.0502(3).—*State ex rel. Sheilds v. Farmers Union Co-operative Brokerage*, 13 N.W.2d 809, 70 S.D. 14.—Corp 613(2).

Tex.Civ.App.—Austin 1948. The failure of owners of damaged oil well to repair and operate well constituted mere “nonuser” and did not constitute an “abandonment”.—*Humble Oil & Refining Co. v. Cook*, 215 S.W.2d 383, ref. n.r.e.—Aband L P 3.

Wyo. 1939. The fact that landowner did not use all the water to which it was entitled, when it could not get the water, did not make out a case of “nonuser,” which would amount to “abandonment” under statute. W.C.S.1945, §§ 71-701 to 71-707.—*Horse Creek Conservation Dist. v. Lincoln Land Co.*, 92 P.2d 572, 54 Wyo. 320.—Waters 151.

Wyo. 1936. Statute providing for forfeiture of water rights by “nonuser” held to provide for forfeiture for “nonuser” of water and not of particular ditch, canal or reservoir, and change of point of diversion does not constitute “nonuser” if water is actually used thereafter. W.C.S.1945, § 71-701.—*Van Tassel Real Estate & Live Stock Co. v. City of Cheyenne*, 54 P.2d 906, 49 Wyo. 333, certiorari denied 57 S.Ct. 38, 299 U.S. 574, 81 L.Ed. 423.—Waters 151.

**NONUSE VARIANCE**

Mo.App. E.D. 1997. “Use variance” permits use other than one permitted by zoning ordinance, while “nonuse variance” permits deviations from restrictions which relate to permitted use, rather than limitations on use itself, such as height and size of buildings, lot size, and yard requirements.—*Housing Authority of the City of St. Charles, Mo. v. Board of Adjustment of the City of St. Charles, Mo.*, 941 S.W.2d 725.—Zoning 481, 503.

Mo.App. W.D. 1997. While “nonuse variance” allows for deviations from restrictions related to permitted use, “use variance” permits use which ordinance prohibits.—*State ex rel. Klawuhn v. Board of Zoning Adjustment of City of St. Joseph*, Mo., 952 S.W.2d 725, rehearing denied.—Zoning 481.

Mo.App. W.D. 1991. “Use variance” permits a use that the zoning ordinance prohibits, whereas a “nonuse variance” authorizes deviations from restrictions which relate to a permitted use rather than limitations on the use itself.—*Slate v. Boone County Bd. of Adjustment*, 810 S.W.2d 361, rehearing, transfer denied.—Zoning 481.

## NON-USE VARIANCES

E.D.Mich. 2000. Under Michigan law, there are two types of variances: use variances and non-use variances; “use variances” allow the use of land in a way that a zoning ordinance otherwise forbids, while “non-use variances” do not concern real estate’s use, but relate to changes in a structure’s area, height, setback, and the like.—*Laurence Wolf Capital Management Trust v. City of Ferndale*, 128 F.Supp.2d 441.—Zoning 481.

Mich.App. 1985. “Non-use variances” are not concerned with use of land, but rather, with changes in structure’s area, height, setback, and the like, and include right to enlarge nonconforming uses or alter nonconforming structures.—*National Boatland, Inc. v. Farmington Hills Zoning Bd. of Appeals*, 380 N.W.2d 472, 146 Mich.App. 380.—Zoning 481.

Mich.App. 1973. Two customary types of variances are use variances and nonuse variances; a “use variance,” as its name implies, permits use of land a zoning ordinance otherwise proscribes, while “nonuse variances” are concerned with changes in a structure’s area, height, setback, and the like.—*Heritage Hill Ass’n, Inc. v. City of Grand Rapids*, 211 N.W.2d 77, 48 Mich.App. 765.—Zoning 481, 503.

Minn.App. 2002. While “use variances” allow a use prohibited under a zoning ordinance, area or “nonuse variances” control area, height, setback, density, and parking requirements for uses that are permitted by the ordinance; unlike a use variance, a nonuse or area variance does not change the character of the zoned district.—*Mohler v. City of St. Louis Park*, 643 N.W.2d 623.—Zoning 503.

## NON-VESSEL OPERATING COMMON CARRIER

C.A.9 (Cal.) 1996. “Nonvessel-operating common carrier” (NVOCC) is a consolidator who acts as carrier by arranging for transportation of goods from port to port.—*Logistics Management, Inc. v. One (1) Pyramid Tent Arena*, 86 F.3d 908.—Ship 112.

C.D.Cal. 1997. “Non-vessel operating common carrier” (NVOCC), which is a common carrier that does not operate vessels by which ocean transportation is provided, but who arranges for vessel to

carry shipper’s cargo, is a carrier in relation to the shipper, although a shipper in relation to the vessel.—*International Fire & Marine Ins. Co., Ltd. v. Silver Star Shipping America, Inc.*, 951 F.Supp. 913.—Ship 112.

S.D.N.Y. 1995. “Nonvessel operating common carrier,” that is, a carrier that does not operate vessels by which ocean transportation is provided, and which is a shipper in its relationship with ocean carrier, is subject to COGSA’s terms and conditions. Carriage of Goods by Sea Act, 46 App. U.S.C.A. § 1300 et seq.; 46 CFR § 510.2(k).—*William H. McGee & Co. v. M/V Ming Plenty*, 164 F.R.D. 601.—Ship 134.

## NONVESTED

S.D. 1996. For purpose of dividing marital property upon divorce, “nonvested” pension is pension that has not fulfilled time period required for vesting.—*Grude v. Grude*, 543 N.W.2d 795, 1996 SD 15.—Divorce 252.3(4).

## NONVESTED INTEREST

Colo. 1996. “Nonvested interest” is expectancy and not property for purposes of determining status as marital property, as holder of interest has no enforceable rights. West’s C.R.S.A. §§ 14–10–101 to 14–10–133.—*In re Marriage of Miller*, 915 P.2d 1314.—Divorce 252.3(1).

## NON-VESTED PENSION RIGHT

Ariz. 1981. A “non-vested pension right” is one which is forfeited if the employment relationship terminates before retirement, e.g., because the employee quits, is discharged, or dies.—*Johnson v. Johnson*, 638 P.2d 705, 131 Ariz. 38.—Pensions 61.

## NONViable FETUS

N.M. 1995. “Person” as used in Wrongful Death Act does not include “nonviable fetus,” i.e., fetus that is incapable of sustaining life outside mother’s womb, where fetus is nonviable at time of injury, even if fetus subsequently shows signs of life outside mother’s womb. NMSA 1978, § 41–2–3.—*Miller v. Kirk*, 905 P.2d 194, 120 N.M. 654.—Death 15.

N.M. 1995. “Nonviable fetus” is incapable of living outside its mother’s womb and cannot be regarded as separate entity capable of maintaining independent action in its own right.—*Miller v. Kirk*, 905 P.2d 194, 120 N.M. 654.—Action 13; Infants 72(2).

## NONVICARIOUS

Mass. 1991. A “nonvicarious” violation of statute, prohibiting unfair or deceptive acts or practices in connection with the leasing of real property for residential purposes, means action by tenant who asserts he has suffered direct harm as a result of landlord, as distinguished from action brought by party who asserts that he has not been directly harmed but who seeks (vicariously) to redress alleged violations of statute. M.G.L.A. c. 93A, §§ 9,

9(1).—Haddad v. Gonzalez, 576 N.E.2d 658, 410 Mass. 855.—Cons Prot 8.

## **NONVIOLENT**

C.A.3 (N.J.) 1990. Defendant's crime of sending threatening communication through mail with intent to extort money through threat of injury was not a "nonviolent" crime as would arguably entitle defendant to downward departure due to his condition as a compulsive gambler. 18 U.S.C.A. § 876; U.S.S.G. § 5K2.13, 18 U.S.C.A.App.—U.S. v. Rosen, 896 F.2d 789, rehearing denied.—Sent & Pun 862.

C.A.9 (Wash.) 1993. Offense is "nonviolent," so that defendant may be considered for downward departure on the basis of significantly reduced mental capacity, if it is not listed as a crime of violence under the career offender guidelines. U.S.S.G. §§ 4B1.2(1)(i), 5K2.13, p.s., 18 U.S.C.A.App.—U.S. v. Cantu, 12 F.3d 1506.—Sent & Pun 862.

D.Neb. 1998. Defendant's offense of being an accessory after the fact to bank robbery was "non-violent" for purposes of Sentencing Guideline allowing for downward departure due to defendant's diminished capacity during nonviolent crime. 18 U.S.C.A. § 3; U.S.S.G. § 5K2.13, p.s., 18 U.S.C.A.—U.S. v. Follette, 990 F.Supp. 1172.—Sent & Pun 862.

## **NONVIOLENT FELONY OFFENDER**

Mont. 1999. For purposes of statute requiring that a court sentencing a nonviolent felony offender first consider alternatives to imprisonment in state prison, "nonviolent felony offender" does not encompass misdemeanor offenders. MCA 46-18-101(3)(f), 46-18-201(11), 46-18-225.—State v. Renee, 983 P.2d 893, 294 Mont. 527, 1999 MT 135.—Sent & Pun 2045.

## **NONVIOLENT OFFENDER**

Colo.App. 1983. Defendant who was convicted of menacing was a "nonviolent offender" for purposes of sentencing to community corrections. C.R.S. 16-11-309(2), 17-27-102(4), 17-27-105(1)(a).—People v. Patrick, 683 P.2d 801.—Prisons 13.3.

## **NON-VIOLENT OFFENSE**

C.A.D.C. 1993. "Nonviolent offense" within meaning of guideline permitting sentence reduction for nonviolent offenses committed while suffering from significantly reduced mental capacity is not contrapositive of or mutually exclusive with "crime of violence" within meaning of enhancement scheme for career offenders who commit crimes of violence. U.S.S.G. §§ 4B1.1, 4B1.2, 4B1.2(1), 5K2.13, p.s., 18 U.S.C.A.App.—U.S. v. Chatman, 986 F.2d 1446, 300 U.S.App.D.C. 97.—Sent & Pun 862.

C.A.4 (Md.) 1994. Definition of "crime of violence" contained in sentencing guideline addressed to career offenders does not define phrase "nonviolent offense" in guideline providing for downward departure if defendant commits nonviolent

offense while suffering from significantly reduced mental capacity. U.S.S.G. §§ 4B1.2(1), 5K2.13, p.s., 18 U.S.C.A.App.—U.S. v. Weddle, 30 F.3d 532.—Sent & Pun 862.

C.A.6 (Mich.) 1998. Defendant's offense of transmitting a threat to extort money through interstate commerce was not "non-violent offense," so defendant was not eligible for downward sentence departure based on diminished capacity; offense was "crime of violence" under separate guideline, and, even if court had to look to facts of case, defendant's threat to detonate two explosive devices if his demands were not satisfied was clearly not non-violent conduct. 18 U.S.C.A. § 875(d); U.S.S.G. § 5K2.13, p.s., 18 U.S.C.A.; § 4B1.2(1)(ii) (1995)—U.S. v. Shane Clements, 144 F.3d 981, 1998 Fed.App. 155P.—Sent & Pun 862.

C.A.6 (Mich.) 1989. Armed bank robbery was not a "non-violent offense" within meaning of guidelines policy statement permitting court to consider reduced mental capacity as a basis for departure if the defendant committed a non-violent offense while suffering from reduced mental capacity. 18 U.S.C.A. §§ 16, 1113(a, d); U.S.S.G. §§ 4B1.2(1), 5K2.13, p.s., 18 U.S.C.A.App.—U.S. v. Maddalena, 893 F.2d 815, rehearing denied, appeal after remand 931 F.2d 57, certiorari denied 112 S.Ct. 233, 502 U.S. 882, 116 L.Ed.2d 190.—Sent & Pun 862.

C.A.8 (Minn.) 1998. Carrying firearm during drug trafficking offense was not "nonviolent offense" within meaning of statute that permits sentence reduction for inmate who successfully completes treatment program while serving sentence for nonviolent offense. 18 U.S.C.A. §§ 924(c)(1), 3621(e)(2)(B).—Love v. Tippy, 133 F.3d 1066, certiorari denied 118 S.Ct. 2376, 524 U.S. 956, 141 L.Ed.2d 743.—Prisons 15(3).

C.A.8 (Minn.) 1997. Use of firearm during and in relation to drug trafficking crime is not "nonviolent offense" within meaning of statute under which prisoner who has been convicted of nonviolent offense and who remains in custody after successfully completing residential substance abuse treatment program may have sentenced reduced by up to one year. 18 U.S.C.A. §§ 924(c)(1), 3621(e)(2)(B); 28 C.F.R. § 550.58.—Sesler v. Pitzer, 110 F.3d 569, certiorari denied 118 S.Ct. 197, 522 U.S. 877, 139 L.Ed.2d 135.—Prisons 15(3).

C.A.8 (Neb.) 1998. Attempted robbery was not a "nonviolent offense," making defendant ineligible for downward departure under Sentencing Guidelines based on diminished capacity, even though shotgun was not loaded and accomplice was carrying shotgun. U.S.S.G. § 5K2.13, p.s., 18 U.S.C.A.—U.S. v. Valdez, 146 F.3d 547, certiorari denied Johnson v. U.S., 119 S.Ct. 355, 525 U.S. 938, 142 L.Ed.2d 293.—Sent & Pun 862.

C.A.3 (N.J.) 1997. Crime of possession of child pornography was "nonviolent offense," such that defendant was eligible for downward sentence departure based on significantly reduced mental capacity. U.S.S.G. § 5K2.13, p.s., 18 U.S.C.A.—U.S.

v. McBroom, 124 F.3d 533, on remand 991 F.Supp. 445.—Sent & Pun 862.

C.A.9 (Or.) 1997. Being a felon in possession of firearm had to be regarded as “nonviolent offense,” for purposes of statute authorizing the Bureau of Prisons to grant sentence reduction to prisoner convicted of nonviolent offense who successfully completed drug and alcohol treatment program. 18 U.S.C.A. § 3621(e)(2)(B).—Davis v. Crabtree, 109 F.3d 566.—Prisons 15(3).

C.A.9 (Or.) 1996. Inmate’s conviction of possession of more than 100 grams of methamphetamine was a conviction of a “nonviolent offense,” for purposes of statute permitting reduction in sentence for inmate convicted of nonviolent offense who completes drug treatment program, even though inmate had received dangerous weapons sentence enhancement based on firearms that had been found at location where inmate had been arrested. 18 U.S.C.A. § 3621(b)(2)(B); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1); U.S.S.G. §§ 2D1.1(b)(1), 4B1.2(1), 18 U.S.C.A.—Downey v. Crabtree, 100 F.3d 662.—Prisons 15(3).

C.A.6 (Tenn.) 1998. Offense of possession of a firearm by a previously convicted felon was “nonviolent offense,” and prisoner convicted of such offense was thus eligible for sentence reduction based on completion of drug treatment program; no existing federal statute defined such offense as crime of violence. 18 U.S.C.A. §§ 16, 922(g), 3621(e)(2)(B), 4042(b)(3)(B); 28 C.F.R. § 550.58.—Orr v. Hawk, 156 F.3d 651, 1998 Fed. App. 281P, rehearing en banc denied 172 F.3d 411.—Prisons 15(3).

C.A.4 (Va.) 1997. Defendant’s offense of attempting to arrange murder-for-hire was not “nonviolent offense,” and sentencing departure based on defendant’s diminished capacity was thus not warranted, notwithstanding defendant’s reduced mental capacity. U.S.S.G. § 5K2.13, p.s., 18 U.S.C.A.—U.S. v. Morin, 124 F.3d 649, appeal after remand 162 F.3d 1157.—Sent & Pun 862.

C.A.7 (Wis.) 1998. Bureau of Prisons (BOP) did not act unreasonably in deciding that possession of firearm by convicted felon was not “nonviolent offense” and, thus, in determining that conviction would render inmate ineligible for early release after completion of drug treatment program; given substantial risk of danger and inherently violent nature of firearms, particularly firearms in possession of convicted felon, there was nothing unreasonable about BOP’s decision to classify conviction as crime of violence in all cases. 18 U.S.C.A. §§ 922(g), 924(c)(3), 3621(e)(2)(B).—Parsons v. Pitzer, 149 F.3d 734.—Prisons 15(3).

D.Md. 1998. Offense of possession of a firearm by a convicted felon was “nonviolent offense,” as required for eligibility for sentence reduction for having completed a residential drug abuse program. 18 U.S.C.A. §§ 922(g)(1), 3621(e)(2)(B).—McPeek v. Henry, 17 F.Supp.2d 443.—Prisons 15(3).

E.D.Mich. 1997. Defendant, convicted of conspiracy to distribute and possession with intent to distribute more than 1000 kilograms of marijuana, was not convicted of “nonviolent offense,” and thus, defendant was not eligible for sentence reduction after successfully completing drug treatment program; defendant possessed firearms and such possession created substantial risk that force might be used against persons or property during drug offense. 18 U.S.C.A. § 3621(e)(2)(B); Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a), 406, 21 U.S.C.A. 4F§ 841(a) 846.—LaPlante v. Pontesso, 961 F.Supp. 186.—Sent & Pun 2250.

D.N.J. 1996. Bureau of Prisons was entitled to determine that possession of firearm by felon was not “nonviolent offense,” for purpose of statute granting trial court discretion to reduce sentence of defendant convicted of nonviolent offense who completes treatment program, and so defendant who pleaded guilty to possession of firearm by felon was not eligible for discretionary sentence reduction for his completion of drug treatment program; regulation defining “nonviolent offense” did not define “nonviolent offense” as any offense other than “crimes of violence” as defined for firearm penalties, but rather listed inmates convicted of such crimes of violence among categories of inmates not eligible for reduction of sentence. 18 U.S.C.A. §§ 922(g)(1), 924(c), 3621(e)(2)(B); 28 C.F.R. § 550.58.—Piccolo v. Lansing, 939 F.Supp. 319.—Prisons 15(3).

D.Or. 1997. Being in possession of explosives had to be regarded as “nonviolent offense” for purposes of statute authorizing the Bureau of Prisons to grant sentence reduction to prisoner convicted of nonviolent offense who successfully completed drug and alcohol treatment program; crime of possession of explosives does not have as an element the actual, attempted, or threatened use of violence, nor does the actual conduct it charges involve a serious potential risk of physical injury to another. 18 U.S.C.A. § 3621(e)(2)(B).—Johnson v. Crabtree, 996 F.Supp. 999.—Prisons 15(3).

D.Or. 1996. Conviction for being felon in possession of firearm was “nonviolent offense” under provision permitting prisoner to seek sentence reduction based on completion of residential substance abuse program if prisoner committed nonviolent offense; prison bureau defined “nonviolent offense” in terms of statute defining crimes of violence, statute was interpreted to exclude being felon in possession in firearm from definition of crime of violence, and bureau was bound by judicial interpretations of statute. 18 U.S.C.A. §§ 922(g), 924(c)(3), 3621(e).—Hines v. Crabtree, 935 F.Supp. 1104.—Prisons 15(3).

W.D.Wis. 1997. Bureau of Prisons could determine that possession of firearm by felon was not “nonviolent offense,” for purpose of statute granting Bureau discretion to reduce sentence of defendant convicted of nonviolent offense who completed treatment program, and so defendant convicted of being felon in possession of firearm was not eligible for discretionary sentence reduction for his

completion of drug treatment program; Bureau of Prisons did not act unreasonably in putting all felon-in-possession convictions into crime of violence category. 18 U.S.C.A. §§ 922(g)(1), 924(c)(3), 3621(e)(2)(B); 28 C.F.R. § 550.58.—Parsons v. Pitzer, 960 F.Supp. 191, affirmed 149 F.3d 734.—Prisons 15(3).

## NONVIOLENT OFFENSES

C.A.8 (Mo.) 1994. Defendant's armed bank robbery convictions were not for "nonviolent offenses," so as to permit downward departure upon finding of reduced mental capacity, even though defendant used pellet gun and witnesses to first robbery may have believed that defendant had a toy gun, where defendant stipulated that he used large revolver-like weapon during second robbery. U.S.S.G. §§ 4B1.2(1)(i), 5K2.13, p.s., 18 U.S.C.A.App.—U.S. v. Premachandra, 32 F.3d 346, denial of post-conviction relief affirmed 101 F.3d 68.—Sent & Pun 862.

## NONVOTING CAUSATION THEORY

C.A.3 (Pa.) 1991. "Nonvoting causation theory" posits nexus between alleged misrepresentation and security fraud plaintiff's loss other than through vote by which transaction is legally authorized. Securities Exchange Act of 1934, §§ 10(b), 14(a), 15 U.S.C.A. §§ 78j(b), 78n(a).—Scattergood v. Perelman, 945 F.2d 618, rehearing denied.—Sec Reg 60.47.

## NONVOTING SECURITIES

D.Nev. 1999. Preferred shares which do not have voting rights other than minimum rights required to be afforded to satisfy requirements of state law and rules of national securities exchanges are "nonvoting securities" not covered by shareholder disclosure requirements of Williams Act. Securities Exchange Act of 1934, §§ 3(a)(11), 13(d), 15 U.S.C.A. §§ 78c(a)(11), 78m(d); 17 C.F.R. § 240.13d-1(i).—Santa Fe Gaming Corp. v. Hudson Bay Partners, L.P., 49 F.Supp.2d 1178.—Sec Reg 5.25(1).

D.Nev. 1999. Preferred shares of corporation were "nonvoting securities" and thus not subject to shareholder disclosure requirements of Williams Act, as they were non-voting except in case of amendments to articles of incorporation or number of authorized shares that would affect preferred shareholders, or in event that dividends remain unpaid for four dividend periods, and such shares did not become "voting securities" once their owners became entitled to vote for two special directors upon corporation's failure to pay dividends. Securities Exchange Act of 1934, §§ 3(a)(11), 13(d), 15 U.S.C.A. §§ 78c(a)(11), 78m(d); 17 C.F.R. § 240.13d-1(i).—Santa Fe Gaming Corp. v. Hudson Bay Partners, L.P., 49 F.Supp.2d 1178.—Sec Reg 5.25(1).

## NONVOTING STOCK

C.C.A.1 1937. Where Commissioner, Board of Tax Appeals, and courts in construction of revenue acts prior to 1926 generally followed rule that stock,

which must be taken into consideration in determining whether grounds for affiliation existed so as to authorize corporations to file consolidated income tax return, was stock having a right to control the management of a corporation, Congress in enacting the 1926 and 1928 Revenue Acts, providing that term "stock" did not include "nonvoting stock," was deemed to have meant by "nonvoting stock" stock not having the right to vote for directors who controlled the management of the corporation. Revenue Act 1926, § 240(d), 44 Stat. 46, 26 U.S.C.A.Int.Rev.Acts, page 191; Revenue Act 1928, § 142(c), 45 Stat. 832, 26 U.S.C.A.Int.Rev. Code, § 141.—Erie Lighting Co. v. Commissioner of Internal Revenue, 93 F.2d 883.—Statut 223.5(1).

C.C.A.1 1937. Where holders of preferred stock of Pennsylvania corporation had right to vote regarding certain matters, but had no power to vote at election for directors unless dividend on preferred stock should remain unpaid for two quarterly periods, and where during taxable periods conditions giving right to participate in election of directors had not arisen, the preferred stock was "nonvoting stock" for purpose of determining whether grounds for affiliation existed so as to entitle corporations to file consolidated income tax return. Revenue Act 1926, § 240(d), 26 U.S.C.A.Int.Rev.Acts, page 191; Revenue Act 1928, § 142(c), 26 U.S.C.A.Int.Rev.Acts, page 398; 15 P.S.Pa. § 164.—Erie Lighting Co. v. Commissioner of Internal Revenue, 93 F.2d 883.—Int Rev 3870.

## NON VULT

C.A.6 1993. Plea of "non vult" is variation of *nolo contendere*.—Zaitona v. I.N.S., 9 F.3d 432.—Crim Law 275.

C.A.3 (Pa.) 1965. Plea of "non vult" is legally equivalent to that of guilty, being variation of form of *nolo contendere*.—U.S. v. Washington, 341 F.2d 277, 9 A.L.R.3d 448, certiorari denied Degregory v. U.S., 86 S.Ct. 96, 382 U.S. 850, 15 L.Ed.2d 89, rehearing denied 86 S.Ct. 317, 382 U.S. 933, 15 L.Ed.2d 346.—Crim Law 275.

E.D.Pa. 1963. "Non vult" plea is a variation of the form of "*nolo contendere*" which means that defendant does not wish to contest. Fed.Rules Crim.Proc. rule 11, 18 U.S.C.A.—U.S. v. DeGregory, 220 F.Supp. 249, affirmed U.S. v. Washington, 341 F.2d 277, 9 A.L.R.3d 448, certiorari denied 86 S.Ct. 96, 382 U.S. 850, 15 L.Ed.2d 89, rehearing denied 86 S.Ct. 317, 382 U.S. 933, 15 L.Ed.2d 346.—Crim Law 275.

N.J.Super.A.D. 1954. A plea of "non vult" in effect is a statement that no defense will be presented.—Kokinda v. Carty, 104 A.2d 65, 30 N.J.Super. 253.—Crim Law 275.

N.J.Super.A.D. 1953. A plea of "non vult" or of "*nolo contendere*" has the same effect as a plea of guilty and its acceptance does not abridge or reduce the power of court to impose the maximum penalty fixed by statute for the offense charged.—In re 17 Club, Inc., 97 A.2d 171, 26 N.J.Super. 43.—Crim Law 275.

N.J.Sup. 1942. Where physician entered a plea of "nolo contendere" and "non vult" to counts in indictment returned by federal grand jury charging crimes involving moral turpitude, and thereafter a judgment was entered sentencing the physician to federal penitentiary, proceeding in federal court constituted a "conviction", within statute authorizing the State Board of Medical Examiners to revoke license of a physician who has been convicted of a crime involving moral turpitude. N.J.S.A. 45:9-16.—Schireson v. State Board of Medical Examiners of New Jersey, 28 A.2d 879, 129 N.J.L. 203, reversed 33 A.2d 911, 130 N.J.L. 570.—Health 207.

N.Y. 1934. Plea of "non vult" or "nolo contendere," though abolished in New York, is ancient plea in criminal cases, and means that defendant will not contend against charge but will submit to punishment which court inflicts, usually less than would have been imposed after guilty plea.—People v. Daiboch, 191 N.E. 859, 265 N.Y. 125.—Crim Law 275.

N.Y. 1934. Plea of "non vult" or "nolo contendere" subjects defendant to judgment of conviction, and court on such plea may sentence defendant to same punishment as if convicted after trial or on guilty plea.—People v. Daiboch, 191 N.E. 859, 265 N.Y. 125.—Crim Law 275; Sent & Pun 401.

N.Y. 1934. Plea of "non vult" or "nolo contendere" subjects defendant to judgment of conviction.—People v. Daiboch, 191 N.E. 859, 265 N.Y. 125.—Crim Law 275.

N.C. 1954. A plea of "nolo contendere", sometimes called also a plea of "non vult" or a plea of "nolle contendere", means literally "I do not wish to contend", and it has its origin in the early English common law.—Fox v. Scheidt, 84 S.E.2d 259, 241 N.C. 31.—Crim Law 275.

#### **NON VULT CONTENDERE**

Del.Gen.Sess. 1913. By a plea of "non vult contendere," accused submits to the court to say whether he is guilty of an infraction of the law charged.—State v. Hopkins, 88 A. 473, 27 Del. 306, 4 Boyce 306.

#### **NON-WAIVABLE RIGHT**

C.A.D.C. 1990. A union's right to strike in protest of an unfair labor practice is not a "non-waivable right," and thus an employer's negotiating to impasse on a proposal to waive unfair labor practice strikes does not violate the National Labor Relations Act. National Labor Relations Act, § 8(a)(5), as amended, 29 U.S.C.A. § 158(a)(5).—Teamsters Local Union No. 515, Affiliated With Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. N.L.R.B., 906 F.2d 719, 285 U.S.App.D.C. 25, rehearing denied, certiorari denied Reichhold Chemicals, Inc. v. Teamsters Local Union No. 515, 111 S.Ct. 767, 498 U.S. 1053, 112 L.Ed.2d 786.—Labor 291, 555.

#### **NONWAIVER AGREEMENT**

Oklahoma. 1942. A "nonwaiver agreement" entered into between insurer and insured reserves to insurer

every right under fire policy not previously waived, and to the insured every right which had not been forfeited, but such an agreement does not prevent insurer from thereafter waiving any requirements of the policy nor does it forfeit any right of the insured which he then has under the policy.—Aetna Ins. Co. of Hartford, Conn. v. Powers, 121 P.2d 599, 190 Okla. 116, 1942 OK 28.—Insurance 3120.

#### **NON-WATER DEPENDENT STRUCTURE**

Md.App. 2000. Landowner's proposed boathouse to be attached to existing pier over state tidal wetlands was a water dependent structure, rather than a "non-water dependent structure," under Wetlands Act section prohibiting Board of Public Works from issuing a license for a project "involving the construction of a dwelling unit or other non-water dependent structure on a pier located on State wetlands." Code, Environment, § 16-104(b).—Serra v. Maryland Dept. of Environment, 758 A.2d 1057, 133 Md.App. 643, certiorari denied 762 A.2d 969, 362 Md. 36.—Environ Law 135.

#### **NON-WEIGHING**

Colo. 1999. Under both "weighing" and "non-weighing" methods of narrowing class of defendants eligible for imposition of death penalty, Eighth Amendment mandates that at least one aggravating circumstance or aggravating factor must be found at either guilt or penalty phase. U.S.C.A. Const. Amend. 8.—People v. Dunlap, 975 P.2d 723, rehearing denied, certiorari denied Dunlap v. Colorado, 120 S.Ct. 221, 528 U.S. 893, 145 L.Ed.2d 186.—Sent & Pun 1652.

Colo. 1999. In state employing "non-weighing" method of narrowing class of defendants eligible for imposition of death penalty, aggravating factors as such have no specific function in jury's decision whether defendant who has been found to be eligible for death penalty should receive it; instead, in making decision as to penalty, factfinder takes into consideration all circumstances before it from both guilt-innocence and sentence phases of trial.—People v. Dunlap, 975 P.2d 723, rehearing denied, certiorari denied Dunlap v. Colorado, 120 S.Ct. 221, 528 U.S. 893, 145 L.Ed.2d 186.—Sent & Pun 1658.

#### **NON-WEIGHING STATUTE**

C.A.3 (Del.) 2000. Delaware's death penalty sentencing scheme was "non-weighing statute," and, thus, even if robbery and pecuniary gain aggravating factors considered by jury were duplicative, such consideration did not violate Eighth Amendment, given existence of other valid statutory aggravating factors rendering defendant death penalty eligible; jury charge and special interrogatory did not transform statute as applied into weighing scheme by leading jury to believe that it was required to rely on statutory aggravating factors in recommending sentence. U.S.C.A. Const. Amend. 8; 11 Del.C. § 4209(d).—Hameen v. State of Delaware, 212 F.3d 226, certiorari denied Hameen v.

Delaware, 121 S.Ct. 1365, 532 U.S. 924, 149 L.Ed.2d 293.—Sent & Pun 1658, 1660.

### **NONWILLFUL VIOLATION**

D.Minn. 1993. For limitations purposes, “non-willful violation,” or ordinary violation, of ADEA occurs when employer incorrectly but in good faith and nonrecklessly believes that statute permits particular age-based decision. Portal-to-Portal Act of 1947, § 6(a), 29 U.S.C.A. § 255(a); Age Discrimination in Employment Act of 1967, § 7(e), as amended, 29 U.S.C.(1988 Ed.) § 626(e).—Wiehoff v. GTE Directories Corp., 851 F.Supp. 1312, affirmed in part, reversed in part 61 F.3d 588, rehearing en banc denied, and rehearing denied.—Civil R 373.

### **NONWITHDRAWABLE**

C.A.9 (Cal.) 1993. Under California law, “non-withdrawable,” as used in memorandum of understanding (MOU) which expressed parties’ agreement to enter into contract for sale of power, was ambiguous; nothing in language of MOU required that “nonwithdrawability” be free of any and all exceptions, and on other hand, nothing in language of MOU required inclusion of provisions allowing utility to withdraw power from its customers on pro rata basis if necessary to satisfy power demands of what parties referred to as “the three stated purposes.”—City of Santa Clara v. Watkins, 984 F.2d 1008, certiorari denied City of Palo Alto v. O’Leary, 114 S.Ct. 684, 510 U.S. 1041, 126 L.Ed.2d 651.—Electricity 11(3).

### **NONWITNESS EXPERT**

Mich.App. 1991. Real estate appraiser, whose name was added to, but later deleted from, witness list, and who was expected by plaintiff to testify at condemnation trial at time plaintiff retained appraiser, was “nonwitness expert,” so that facts known or opinions held by appraiser would be subject to discovery only upon showing of exceptional circumstances, rather than an “expert witness” subject to less restrictive discovery rule; at time defendants decided to depose appraiser, he was not expected to be called as witness at trial. Fed.Rules Civ.Proc.Rule 26(b)(4)(B), 28 U.S.C.A.—Nelson Drainage Dist. v. Bay, 470 N.W.2d 449, 188 Mich.App. 501.—Pretrial Proc 97.

### **NON-WORK AREA**

C.A.6 2000. ALJ’s determination that check-in area was “non-work area” or “mixed area” during time when truck drivers congregated before their assigned driving times to drink coffee, read magazines and newspapers, and converse, and that employer thus was required to allow distribution of union literature there at that time, was supported by substantial evidence; although drivers were occasionally given instructions before their assigned driving times, this was exception to normal practice, and drivers were not compensated for these brief interchanges. National Labor Relations Act, §§ 7, 8(a)(1), as amended, 29 U.S.C.A. §§ 157,

158(a)(1).—United Parcel Service, Inc. v. N.L.R.B., 228 F.3d 772, 2000 Fed.App. 332P.—Labor 572.

C.A.6 2000. Substantial evidence supported ALJ’s finding that area along border of break area, in room in which there was no strict delineation between break and work area, was “non-work area” in which employer could not prohibit employee’s attempted distribution of union literature during non-work time; distribution occurred at most a few feet from break area in open room, while all employees involved were on break, and while no one else was working in the room. National Labor Relations Act, §§ 7, 8(a)(1), as amended, 29 U.S.C.A. §§ 157, 158(a)(1).—United Parcel Service, Inc. v. N.L.R.B., 228 F.3d 772, 2000 Fed.App. 332P.—Labor 572.

C.A.2 (N.Y.) 1964. Taxicab company’s waiting room which was open to drivers as lounging place when they were waiting to be dispatched was a “non-work area” and discharge of driver because he distributed union literature in waiting room on non-work time was unfair labor practice. National Labor Relations Act, § 8(a)(1) as amended 29 U.S.C.A. § 158(a)(1).—N. L. R. B. v. Willow Maintenance Corp., 332 F.2d 367.—Labor 374.

### **NONWORKING AREA**

C.A.8 1968. Parking lot was a “nonworking area” not included within company rule prohibiting distribution of literature in working areas and employees were thus free to solicit or to distribute union literature in it without requesting permission of company so long as distribution or solicitation was made on employees’ own time. National Labor Relations Act, § 8(a) (1) as amended 29 U.S.C.A. § 158(a) (1).—N. L. R. B. v. General Industries Electronics Co., 401 F.2d 297.—Labor 386.

### **NONWORKING INTEREST OWNERS**

Colo. 1994. Lease of mineral estate is entered into for mutual benefit of the parties, but not all parties participate equally in lease development decisions; owners of royalty and overriding royalty interests, that is, “nonworking interest owners,” must defer to risk-bearing parties, that is, “working interest owners,” to decide where and when to drill, formations to be tested, and, ultimately, whether to complete a well and establish production.—Garman v. Conoco, Inc., 886 P.2d 652.—Mines 73.1(1), 74(1).

### **NO OBJECTION**

Cal.App. 4 Dist. 1975. Statement of husband that he had “no objection” to having residence, which was principal community property asset, awarded to wife upon dissolution of marriage was not “stipulation,” within purview of section providing that except upon written agreement of parties or on oral stipulation of parties in open court, court shall divide community property equally, and thus such statement could not be construed as stipulation that community property was to be divided other than equally. West’s Ann.Civ.Code,

§ 4800.—*In re Marriage of Eastis*, 120 Cal.Rptr. 861, 47 Cal.App.3d 459.—Divorce 249.2.

## NOON

Iowa 1899. Noon is the middle of the day; midday; the time when the sun is in the meridian; 12 o'clock in the daytime. *Webst.Dict.* “Noon” has in common parlance a similar meaning, and refers to the middle of the day, not to a period after or before that. It is the beginning of the sidereal day used by the astronomers, as midnight marks the opening of the civil day. As used in a policy of insurance insuring property from 12 o'clock noon of a certain day, it will be held to mean noon by the meridian time, and not noon by the standard time, as fixed by the railroad.—*Jones v. German Ins. Co. of Freeport, Ill.*, 81 N.W. 188, 110 Iowa 75, 46 L.R.A. 860.

Ky. 1905. Where a policy expired on a certain day at “noon,” parol evidence was admissible to establish that by a well-known custom of the place where the contract was made the word “noon” was used to mean 12 o'clock midday standard time, and was so intended by the parties to the contract, instead of 12 o'clock sun-time.—*Rochester German Ins. Co. v. Peaslee Gaulbert Co.*, 87 S.W. 1115, 120 Ky. 752, 27 Ky.L.Rptr. 1155, 1 L.R.A.N.S. 364.—Insurance 1854.

Ky. 1905. Where a policy terminated on a specified day at noon, an instruction that if at the time the policy was issued there existed at the place where the contract was made a custom or usage with reference to the meaning of the word “noon” so well settled and uniformly acted on, and of such continuance, as to raise a presumption that plaintiffs and defendants knew thereof and entered into the contract with reference to it, such usage would govern in determining whether the policy had expired, was proper.—*Rochester German Ins. Co. v. Peaslee Gaulbert Co.*, 87 S.W. 1115, 120 Ky. 752, 27 Ky.L.Rptr. 1155, 1 L.R.A.N.S. 364.—Insurance 2095.

N.J.Err. & App. 1924. Where the statute provided that the office of the old board of city commissioners expired at noon on a certain date, “noon” meant standard time, and not daylight saving time, in view of 4 Comp.St.1910, p. 4879, N.J.S.A. 1:1-2.3, 48:3-30.—*Carroll v. City of Bayonne*, 124 A. 613, 99 N.J.L. 493.—Time 14.

N.J.Err. & App. 1906. In exact use “noon” means 12 o'clock, midday.—*Andrecsik v. New Jersey Tube Co.*, 63 A. 719, 73 N.J.L. 664, 44 Vroom 664, 4 L.R.A.N.S. 913, 9 Am. Ann.Cas. 1006.

## NO ONGOING PARENT-CHILD RELATIONSHIP

Conn.App. 1999. Phrase “no ongoing parent-child relationship” contemplates a situation in which, regardless of fault, child either has never known his parents, so that no relationship has ever developed between them, or has definitely lost that relationship so that, despite its former existence, it has now been completely displaced, as that phrase is used in statute authorizing termination of parental rights if it is proved that no ongoing

parent-child relationship has existed in excess of one year. C.G.S.A. § 17a-112(c)(3)(D).—*In re John G.*, 740 A.2d 496, 56 Conn.App. 12.—Infants 155.

## NOON HOUR

N.J.Err. & App. 1906. As used in a promise to repair machinery during the “noon hour,” it meant the time from 12 o'clock noon to 1 o'clock p.m.—*Andrecsik v. New Jersey Tube Co.*, 63 A. 719, 73 N.J.L. 664, 44 Vroom 664, 4 L.R.A.N.S. 913, 9 Am. Ann.Cas. 1006.

## NO OTHER

N.Y.A.D. 1 Dept. 1906. Surrogate’s Court Act, § 6, provides that the Surrogate’s Court of each county has exclusive jurisdiction to grant letters testamentary where a nonresident decedent dies without the state leaving personal property in that county and “no other.” Subdivision 4 gives such exclusive jurisdiction where decedent was not a resident of the state, and a petition for probate of his will or for a grant of letters of administration has not been filed in any Surrogate’s Court, but real property of the decedent, to which the will relates, or which is subject to sale for his debts, is situated within that county and “no other.” Section 2477 provides that, where personal property of a decedent is within two or more counties, under the circumstances specified in section 2476, subd. 3, or real estate of the decedent is situated in two or more counties under the circumstances specified in subdivision 4, § 2476, the Surrogates’ Courts of such counties have concurrent jurisdiction to issue letters testamentary. Held that, where a nonresident decedent left personal property in several counties and left real estate in another county, and no letters of administration had been issued in the state, the Surrogates’ Courts of the counties in which there was personal property had concurrent jurisdiction to issue letters. The words “no other,” as used in section 2476, relate to exclusive jurisdiction, and do not affect the concurrent jurisdiction which section 2477 confers upon Surrogate Courts, where personal property is in two or more counties.—*In re Arnold*, 99 N.Y.S. 740, 37 Civ.Proc.Rep. 177, 114 A.D. 244.

N.Y.Sur. 1935. In section giving Surrogate’s Court of each county exclusive jurisdiction to grant letters of administration where nonresident decedent died without the state, leaving personality within such county and “no other,” or leaving personality which has since his death come into that county and “no other” and remains unadministered, words “no other” relate to such exclusive jurisdiction, and do not affect concurrent jurisdiction conferred by the succeeding section. Surrogate’s Court Act, § 45, subd. 3; § 46.—*In re Mendley’s Estate*, 276 N.Y.S. 555, 154 Misc. 59.—Courts 475(2).

## NO OTHER ACTION

N.Y.A.D. 3 Dept. 1941. Under statute governing actions on contract with village and providing that “no other action” shall be maintained against village unless commenced within one year or unless

verified claim is filed within specified time, quoted words are all-inclusive and statute applies to all cases of a continuing wrong, including a continuing nuisance resulting from operation of a sewage disposal plant. Village Law, § 341-b.—Schenker v. Village of Liberty, 24 N.Y.S.2d 511, 261 A.D. 54, affirmed 47 N.E.2d 47, 289 N.Y. 788.

N.Y.Sup. 1942. Under statute providing that “no other action” shall be maintained against village unless commenced within one year or unless verified claim is filed within specified time, complaint alleging that village in or about 1936 diverted natural flow of water onto plaintiff’s land and that in 1939 erosive action of water and other damage first became apparent but not alleging filing of claim against city did not state cause of action since the quoted words of statute were all inclusive. Village Law, § 341-b.—Harrigan v. Village of Delhi, 34 N.Y.S.2d 168.—Mun Corp 845(2).

### **NO OTHER MANNER**

Wis. 1880. “No other manner,” in Rev.St. § 3377, providing that any person whose land is overflowed or otherwise injured by any milldam may obtain compensation therefor in a civil action in the circuit court of the county where the land lies, “but in no other manner,” limits the recovery of compensation to the form of remedy described as a civil action, but does not affect the jurisdiction of the county court prescribed by Rev.St. § 2465, authorizing such court to exercise judicial powers in all civil actions or proceedings in law or equity concurrent with the circuit court.—Geiss v. Greene, 5 N.W. 869, 49 Wis. 334.

### **NO OTHER NAMES SHALL BE PLACED UPON THE BALLOT**

Iowa 1908. A provision in an election statute that “no other names shall be placed upon the ballot” than the names of those who have filed a statement of their candidacy was not intended to forbid voting for persons other than those named on the ballot by inserting their names in writing.—Eckerson v. City of Des Moines, 115 N.W. 177, 137 Iowa 452.

### **NO OTHER PLAIN, SPEEDY, OR ADEQUATE REMEDY**

Tenn.Crim.App. 1975. Where trial court’s suppression of evidence completely and effectively ended prosecution, district attorney general was left with “no other plain, speedy, or adequate remedy” other than other certiorari. T.C.A. § 27-801.—State v. Gant, 537 S.W.2d 711.—Crim Law 1011.

### **NO OTHER PROMISE**

Mass. 1964. “No other promise” provision of statute which requires negotiable instrument to contain an unconditional promise or order to pay a sum certain and no other promise refers only to promises by maker. M.G.L.A. c. 106 § 3-104(1)(b).—Universal C.I.T. Credit Corp. v. Ingel, 196 N.E.2d 847, 347 Mass. 119.—Bills & N 164.

### **NO OTHER PURPOSE**

Mich.App. 1983. Existence on property, which was deeded for exclusive use as private burial grounds, of residence, which was more than caretaker’s shack and used more than incidentally as residence, in light of caretaker’s minimal duties in tending seven old burial plots, precluded finding that property was used for “no other purpose” than as burial ground and negated tax-exempt status for entire parcel. M.C.L.A. §§ 128.111, 128.112, 211.7.—Berlin v. Gaines Tp., 343 N.W.2d 544, 130 Mich.App. 337.—Tax 245.

N.J.Sup. 1921. School building held exempt as being used for school purposes only; ‘actually used.’ A three-story school building, owned by an educational institution, is ‘actually used’ for school purposes, and for “no other purpose,” within the meaning of section 203, subd. 4, of the Tax Act (Revision of 1918, P. L. p. 849), it appearing that all of the rooms on the first floor, 26 of the 29 rooms on the second floor, and 9 of the 19 rooms on the third floor, were in actual use by the school, and that all were required for use in the near future; and the mere fact that some of the rooms were used as dormitories by teachers and caretakers of the school, who paid rent which was applied to the salaries of the teachers, does not deprive the school if its exemption under the act.—Borough of Princeton v. State Bd. of Taxes and Assessments, 115 A. 342, 96 N.J.L. 334.—Tax 242(4).

### **NO OTHER SIGN**

N.Y.Mag.Ct. 1952. Under statute prohibiting signs advertising any brand of alcoholic beverages from being displayed in or upon licensed liquor premises and permitting “no other sign” except by permission of liquor authority, the general words “no other sign” fell within the *ejusdem generis* rule and were limited to type and kind of signs specifically dealt. Alcoholic Beverage Control Law, § 106, subd. 7; 1 McKinney’s Consol.Laws, Statutes § 239.—People v. Weinstein, 114 N.Y.S.2d 726, 202 Misc. 171.—Statut 195.

N.Y.Mag.Ct. 1952. Defendant’s  displaying, without permission of liquor authority, of two signs in a bar advertising public dances was not violation of statute prohibiting signs advertising any brand of alcoholic beverages from being displayed in or upon licensed liquor premises and permitting “no other sign” except by permission of liquor authority. Alcoholic Beverage Control Law, § 106, subd. 7; 1 McKinney’s Consol.Laws, Statutes, § 239.—People v. Weinstein, 114 N.Y.S.2d 726, 202 Misc. 171.—Int Liq 131.

### **NO OTHER SPACE OR MARGIN SHALL BE LEFT IN ANY SUCH GROUP OF CANDIDATES**

Kan. 1920. Names of party candidates for presidential electors on the official ballot should not be followed by squares; G.S. § 4208, providing that they may be voted for collectively by placing a cross in the square opposite the names of the nominees of the party for President and Vice President, and that “no other space or margin shall be left in any

such group of candidates.”—State v. Pettijohn, 194 P. 328, 107 Kan. 447.—Elections 173.

**NO PARKING SIGNS**

Wis. 1961. Driveway was “place of employment” as to hotel and cab company within safe-place statute, although located on city land, where it was used almost exclusively for hotel guests and luggage from taxis and private automobiles, city had never removed snow therefrom and posted no signs along it, police never ticketed automobiles there, hotel doorman assisted guests there, hotel kept private “no parking signs”, cabs of company exclusively used cab stand, and company employees sometimes shoveled and sanded driveway. W.S.A. 101.01(1).—Schwenn v. Loraine Hotel Co., 111 N.W.2d 495, 14 Wis.2d 601.—Emp. Liab. 30; Neglig. 1127.

**NO PARTICULAR**

Wash. 1908. A charge that premeditated malice exists where the intention to unlawfully take life is deliberately formed in the mind, and that determination meditated upon before the fatal stroke is given, and that there need be no particular length of time between the formation of the intention to kill and the killing amply stated the necessity for deliberation and time therefor, but that no definite standard as to lapse of time was necessary; the words “no particular” being used in the explanatory sense that no fixed or definite time was necessary, it being only necessary that there be actual time for deliberation.—State v. Bridgman, 97 P. 1096, 51 Wash. 18.—Homicide 1395, 1396.

**NO PERPETUITIES SHALL BE ALLOWED EXCEPT FOR ELEEMOSYNARY PURPOSES**

Cal.App. 3 Dist. 1972. Within meaning of statute providing that “No perpetuities shall be allowed except for eleemosynary purposes”, the term “eleemosynary purposes” is synonymous with “charitable purposes”. West’s Ann. Const. art. 20, § 9; West’s Ann.Civ.Code, §§ 715, 715.2, 771.—Lynch v. Surprise Valley Lodge No. 2, 103 Cal.Rptr. 1, 26 Cal.App.3d 265.—Perp. 8(1).

**NO PERSON**

U.S.Pa. 1926. In National Prohibition Act, tit. 2, § 10, 27 U.S.C.A. § 22, providing that “no person” shall manufacture any liquor without making record, etc., “no person” refers to person authorized under other provisions of act to carry on traffic in alcoholic liquors.—United States v. Katz, 46 S.Ct. 513, 271 U.S. 354, 70 L.Ed. 986.

D.D.C. 1954. Under statute providing that “no person” not being authorized by sender shall intercept communication and divulge contents thereof, “no person” includes party placing call. Communications Act of 1934, §§ 1 et seq., 605, 47 U.S.C.A. §§ 151 et seq., 605.—U.S. v. Stephenson, 121 F.Supp. 274, appeal dismissed 223 F.2d 336, 96 U.S.App.D.C. 44.—Tel 495.

Kan.App. 1982. Under statute providing that “no person” shall transport in any vehicle an open

container of cereal malt beverage, phrase “no person” is broad enough to include passengers as well as driver of vehicle. K.S.A. 41-2719.—State v. Erbacher, 651 P.2d 973, 8 Kan.App.2d 169.—Autos 316.

Minn. 1908. The words “no person” in a criminal statute are to be given their literal meaning, and, when a statute provided that no person should practice dentistry without having complied with its provisions, there was no implied exception of persons holding certificates entitling them to practice as a physician or surgeon.—State v. Taylor, 118 N.W. 1012, 106 Minn. 218, 19 L.R.A.N.S. 877, 16 Am. Ann. Cas. 487.

N.D. 1999. Provision of an automobile liability policy stating that “no person” using the named insured’s vehicle would be considered an insured if the use was without the named insured’s permission applied to all users of the named insured’s vehicle, including the named insured’s family members.—Midwest Cas. Ins. Co. v. Whitetail, 596 N.W.2d 341, 1999 ND 133.—Insurance 2663.

Pa. 1946. The statute providing that “no person” shall hang or ride on the outside or rear of any vehicle includes infants as well as adults. 75 P.S. § 632.—D’Ambrosio v. City of Philadelphia, 47 A.2d 256, 354 Pa. 403, 174 A.L.R. 1166.—Autos 11.

**NO PERSON BID**

Kan. 1907. A tax deed of record more than five years before suit attacking it is not void because it substitutes the words “no person bid” for the words “said property could not be sold” in stating the necessity for a sale to the county.—Baughman v. Harvey, 93 P. 146, 76 Kan. 767.—Tax 761.

**NO PERSON ENTITLED TO COMPENSATION**

D.Md. 1942. Sum payable into treasury, under provisions of Longshoremen’s Compensation Act, as compensation for death of employee where there is “no person entitled to compensation” is payable only where there is no person entitled to compensation at time of injury.—Terminal Shipping Co. v. Branham, 47 F.Supp. 561, opinion affirmed 136 F.2d 655.

**NO PERSON HOLDING OFFICE UNDER THE STATE SHALL EXECUTE THE OFFICE OF GOVERNOR**

Mich. 1897. The office of mayor of the city of Detroit is an office under the state, within Const. art. 5, § 15, providing that “no person holding office under the state shall execute the office of Governor.”—Attorney General v. Common Council of City of Detroit, 70 N.W. 450, 112 Mich. 145, 37 L.R.A. 211.

**NO PERSONS ENTITLED TO COMPENSATION**

N.Y.A.D. 3 Dept. 1953. As used in statute providing in part for an award to the Commissioner of Taxation and Finance for the Special Funds in any case of injury causing death in which there are no persons entitled to compensation, the term “no persons entitled to compensation” means that there

**NO PRETRIAL STEPS**

was no person to whom the employer or the carrier was ultimately required to pay compensation. Workmen's Compensation Law, § 15, subd. 8, as amended by Laws 1941, c. 588; § 15, subd. 9; § 25-a.—Chiappano v. City of N.Y., 120 N.Y.S.2d 598, 281 A.D. 996.—Work Comp 1056.

**NO PERSON SHALL ANTEDATE OR POSTDATE A PRESCRIPTION**

Cal.Super. 1978. Provision of California Uniform Control Substances Act that "no person shall antedate or postdate a prescription" is not unconstitutionally vague for failure to adequately define term "prescription," since another section of Act adequately defines "prescription" to include orders for controlled substances only and controlled substances are defined in still another provision so that the statutes are sufficient to advise a defendant of the conduct which is proscribed. West's Ann. Health & Safety Code, §§ 11000, 11001, 11007, 11027, 11157, 11172.—People v. Smith, 151 Cal. Rptr. 276, 87 Cal.App.3d Supp. 26.—Controlled Subs 6.

**NO PERSON SHALL BE HELD TO ANSWER**

N.Y.A.D. 3 Dept. 1928. Code Cr.Proc. § 222, as amended by Laws 1925, c. 597, and Laws 1927, c. 597, providing that, where defendant has been held to answer to criminal charge in Supreme Court, County Court, or City Court, court may on defendant's written application direct information to be filed against him for offense of which he stands charged, *held* not violative of Const. art. 1, § 6, providing that no person shall be held to answer for a capital or infamous crime, unless on presentment or indictment of a grand jury; words "no person shall be held to answer" implying compulsion.—People ex rel. Battista v. Christian, 229 N.Y.S. 644, 224 A.D. 243, reversed 164 N.E. 111, 249 N.Y. 314, 61 A.L.R. 793.—Ind & Inf 2(1).

**NO PERSON SHALL SELL, DELIVER OR GIVE AWAY**

N.Y.A.D. 3 Dept. 1980. Use of phrase "no person shall sell, deliver or give away" is no indication of legislative intent to include the social host under scope of Dram Shop Act as its plain purpose was to cover those instances where proprietor of licensed establishment, or his agent or employee, provides the customer with the traditional "drink on the house." Alcoholic Beverage Control Law § 65; General Obligations Law § 11-101.—Gabrielle v. Craft, 428 N.Y.S.2d 84, 75 A.D.2d 939.—Int Liq 299.

**NO PERSON SHALL TREAT AN ADDICT FOR ADDICTION EXCEPT**

Cal.App. 1 Dist. 1966. Under statute providing that "No person shall treat an addict for addiction except" in designated institutions and places, the requisites of "addiction" are: (1) emotional dependence on the drug in the sense that user experiences a compulsive need to continue its use, (2) a tolerance to its effects which leads user to require larger and more potent doses, and (3) physical

dependence so that the user suffers withdrawal symptoms if he is deprived of his dosage. West's Ann. Health & Safety Code, § 11391.—Elder v. Board of Medical Examiners, 50 Cal.Rptr. 304, 241 Cal.App.2d 246, certiorari denied 87 S.Ct. 701, 385 U.S. 1001, 17 L.Ed.2d 541.—Health 211.

**NO PREFERENCE SHALL EVER BE GIVEN, BY LAW, TO ANY RELIGIOUS ESTABLISHMENT OR MODE OF WORSHIP**

Tenn.Ct.App. 1995. City ordinance prohibiting sale of beer on Sunday did not violate provision of State Constitution requiring that "no preference shall ever be given, by law, to any religious establishment or mode of worship," particularly as prohibiting sale of beer on Sunday neither advanced nor inhibited religion, and reasonable observer would not have equated adoption of such ordinance as governmental approval or disapproval of his or her particular religious beliefs; while Sunday was originally day of religious observance, passage of time has converted it into secular day for many citizens and has freed it from its exclusively religious origins. West's Tenn.Code, Const. Art. 1, § 3; West's Tenn.Code § 57-5-301(b)(1), 3; Dickson, Tenn. Mun. Code ch. 2, § 2-213(3).—Martin v. Beer Bd. for City of Dickson, 908 S.W.2d 941.—Const Law 84.5(15); Int Liq 15.

**NO PREJUDICE**

C.A.2 (N.Y.) 1994. New York has adopted "no prejudice" rule with respect to disputes between insured and its primary insurer and, under that rule, insurer need not demonstrate that it was prejudiced from insured's failure to give prompt notice.—State of N.Y. v. Blank, 27 F.3d 783, on remand 1994 WL 487581.—Insurance 3168.

**NO PREJUDICE RULE**

Ala. 1997. "No prejudice rule" requires primary insurer to demonstrate prejudice in order to use untimely notice of claim as bar to coverage.—Midwest Employers Cas. Co. v. East Alabama Health Care, 695 So.2d 1169.—Insurance 3168.

**NO PREPAYMENT**

Tex.App.—Dallas 1993. "No prepayment" provision in residential home loan is "prepayment charge or penalty" within meaning of statute prohibiting such charges or penalties when interest rate exceeds specified amounts, since intent of statute is to protect homeowners by allowing them to prepay loans when they finance homes at high rates of interest. Vernon's Ann.Texas Civ.St. art. 5069-1.07(f).—Groseclose v. Rum, 860 S.W.2d 554.—Mtg 298(1).

**NO PRETRIAL STEPS**

Ky. 1981. Phrase "no pretrial steps", in civil rule requiring yearly review of court docket, encompasses situations in which no action of record has been taken by either party during year next preceding judges' review of docket. Rules of Civil Procedure, Rule 77.02(2).—Bohannon v. Rutland, 616 S.W.2d 46.—Pretrial Proc 581.

## NO PROCEEDINGS FOR THE DISBARMENT OF ANY ATTORNEY

Ga. 1946. The words, "no proceedings for the disbarment of any attorney," in act providing that no such proceedings shall be prosecuted, unless begun within four years after commission of act complained of, do not extend to disbarment based on final conviction of crime involving moral turpitude, since no proceedings to disbar are necessary on such conviction. Ga.Code Ann. § 9-520.—Jacobs v. State, 37 S.E.2d 187, 200 Ga. 440, opinion conformed to 37 S.E.2d 438, 73 Ga.App. 550.—Atty & C 46.

## NO-PROFIT-TO-AFFILIATES

C.A.5 (Fla.) 1966. Under the "no-profit-to-affiliates" rule, Federal Power Commission excludes from actual legitimate cost, in determining cost-of-service as it relates to rate-making, those profits paid by natural gas company to any other with which it is either directly or indirectly in a control relationship.—Florida Gas Transmission Co. v. Federal Power Commission, 362 F.2d 331, opinion modified on rehearing 391 F.2d 114.—Gas 14.4(11).

## NO PROJECT ALTERNATIVE

Cal.App. 4 Dist. 1985. "No project alternative" of environmental impact report must describe maintenance of existing environment as basis for comparison of suggested alternatives to status quo.—Dusek v. Redevelopment Agency, 219 Cal. Rptr. 346, 173 Cal.App.3d 1029, review denied.—Environ Law 601.

## NO PROPERTY

Wash. 1907. Ballinger's Ann.Codes & St. § 5248, provides that "no property" shall be exempt from execution issued on a judgment against an attorney or agent on account of any liability incurred for failure to account for money or other property coming into his hands belonging to his principal. Held, that the words "no property" were applicable only to personal property, and that the section did not apply to homestead exemptions.—Ervy v. Hill, 90 P. 590, 46 Wash. 457.—Home 91.

## NO PROPERTY FOUND

Ala. 1916. Notwithstanding Code 1907, § 3693, and Act Feb. 21, 1907 (Loc.Acts 1907, p. 86), amending the act which established the inferior criminal court of Mobile (Loc.Acts 1898-99, p. 1164), the sheriff of Mobile county is entitled to receive from Mobile county fees for guarding in the county jail prisoners convicted of misdemeanors in such court where execution was issued in each of the cases and returned "No property found," under Code 1907, § 6638, as amended by Act Feb. 28, 1911 (Gen.Acts 1911, p. 41), and sections 6646, 6889, and in view of Const.1901, § 68.—Stone v. State, 72 So. 536, 197 Ala. 293.—Prisons 18(1).

Ill. 1939. Sheriff's return of execution indorsed defendant "not found" and "no property" of defendant found in county on which to levy, and returned "no property found" and "no part satisfied," consti-

tuted a return of execution "no property found" within garnishment statute. S.H.A. ch. 62, § 1.—Zimek v. Illinois Nat. Cas. Co., 19 N.E.2d 620, 370 Ill. 572.—Garn 8.

Mo.App. 1907. Rev.St.1899, § 4019, Ann.St. 1906, p. 2191, V.A.M.S. § 517.780 note, declares that the circuit clerk may not issue execution on a transcript judgment until after the justice has issued an execution, and the constable has made return that "the defendant had no goods or chattels whereof to levy the same." Held, that a constable's return on a justice's execution, "No property found," constituted a substantial compliance with such provision, and authorized the issuance of an execution out of the circuit court on a transcript of such judgment.—Bick v. Paris, 101 S.W. 716, 124 Mo.App. 341.—Execution 63.

## NOR

Cal. 1955. Where employee contracted silicosis in course of his employment, and date of injury was fixed as July 24, 1949, and disability payments and medical expenses were awarded for 240 weeks, and employee died on June 4, 1954, which was about 253 weeks after date of injury, and five weeks later his widow filed application for death benefits, her claim was barred by provision of the Labor Code that proceedings for collection of death benefits may be commenced one year from date of death where death occurs within one year from date of injury, or date of last furnishing of any benefits where death occurs more than one year from date of injury, and that no such proceedings may be commenced more than one year after date of death, "nor" more than 240 weeks from date of injury. West's Ann.Labor Code, §§ 4701, 5406.—Ruiz v. Industrial Acc. Commission, 289 P.2d 229, 45 Cal.2d 409.—Work Comp 1274.

Mich. 1953. The word "nor" in provision in deed that no building other than a dwelling house, private garage or other such buildings as might be necessary for use and enjoyment of realty for dwelling purposes should be erected, "nor" should realty be used or occupied by building erected for manufacturing or mercantile purposes, or as machine shop, public garage, bakery, laundry, or other similar purposes, indicated continuation of force of negative in first recited part of deed to apply equally to second part.—Abrams v. Shuger, 57 N.W.2d 445, 336 Mich. 59.—Covenants 51(2).

Minn. 1889. "Or," as used in Sp.Laws 1885, c. 7, § 19, M.S.A. § 306.05, providing that no action shall be maintained against the city of St. Paul on account of any injuries from a defect in a bridge or highway unless such action shall be commenced within one year from the happening of the injury, "or" unless notice shall first have been given in writing to the mayor or the city clerk within 30 days of the injury, should be read as "nor."—Maylone v. City of St. Paul, 42 N.W. 88, 40 Minn. 406.

Mo. 1927. The word "or" between "miles" and "has" in Rev.St.1919, § 11258, as re-enacted by Laws 1925, p. 331, V.A.M.S. § 165.280, prohibiting formation of consolidated school district, unless it

## NO REASONABLE ALTERNATIVES

contains 50 square miles “or” has enumeration of at least 200 children of school age, held not inadvertently used instead of “and” or “nor,” in view of its use in Laws 1913, p. 722, § 2, V.A.M.S. § 165.280, differing from 1925 act only as to prescribed area.—State ex inf. Gentry v. Lamar, 291 S.W. 457, 316 Mo. 721.

N.J.Ch. 1906. Where testator provided that a farm should not be sold during the lifetime of his daughters without their consent, “nor” unless necessary to pay debts, the word “nor” was used in the sense of or.—Reed v. Longstreet, 63 A. 500, 71 N.J.Eq. 37.—Wills 466.

N.Y. 1894. In the charter of the city of Amsterdam, providing that “when the grade of a street has been established and the street graded accordingly, the grade shall not be changed and the street graded according to the changed grade except upon petition of the owners of the majority of the lineal feet fronting on a part of the street to be graded, ‘or’ unless compensation be made to the owners of the property injured by the regrading,” the word “or” should be “and” or “nor,” to effect the plain purpose of the statute.—Folmsbee v. City of Amsterdam, 36 N.E. 821, 142 N.Y. 118.

N.Y.Sup.Gen.Term 1892. In Const. art. 8, § 11, providing that no county containing a city of over 100,000 inhabitants, or any such city, “shall be allowed to become indebted, for any purpose ‘or’ in any manner, to an amount which, including existing indebtedness, shall exceed ten per centum of the assessed valuation of its real estate,” “or” is a disjunctive conjunction connecting the two clauses, and expressing at the same time a separation, and has the same effect, where it stands, as the word “nor.”—Adams v. East River Sav. Inst., 47 N.Y.St. Rep. 175, 20 N.Y.S. 12, 64 Hun 635, 65 Hun 145, affirmed 32 N.E. 622, 49 N.Y.St.Rep. 61, 136 N.Y. 52.

Wyo. 1978. The conjunction “nor” performs the same function in negative propositions as does the word “or” in positive propositions, i. e., marking distribution, an alternative, or apposition; the word “or” is usually used in the disjunctive sense and, when two clauses are expressed in the disjunctive, it is generally an indication of alternatives, requiring separate treatment; the subject of each clause should be considered separately, without requiring that the subjects both be satisfied.—Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557.—Statut 197.

Wyo. 1943. Where machinery and equipment bought by Wyoming mining corporation outside state and used within state for mining was not generally stocked in state for sale at time they were purchased but were at the time of their purchase promptly purchasable in state, through a regularly established agency, the property was not exempt from use tax under statute exempting machinery and equipment used in mining when such machinery and equipment are not generally stocked in state for sale “or” are not promptly purchasable in state from a regularly established agency, since the quoted word “or” is used in a conjunctive sense or

in the sense of “nor”. Laws 1937, c. 118, §§ 4(k), 13.—Manning & Martin v. State Board of Equalization, 133 P.2d 373, 58 Wyo. 425.—Tax 1241.1.

Wyo. 1943. The term “or” may be used in the sense of “nor” in a statute when intention to that effect appears.—Manning & Martin v. State Board of Equalization, 133 P.2d 373, 58 Wyo. 425.—Statut 197.

### NO READY MARKET

C.A.3 (Pa.) 1978. For purposes of substitute facilities doctrine which permits private property owner to recover cost of constructing substitute facilities to replace facilities taken in condemnation if property is operated on a not-for-profit basis, if there is no ready market for particular type of property, and if property is reasonably necessary to public welfare, the “no ready market” element of doctrine is met if facilities are sufficiently unique to be irreplaceable in market so as to require displaced property owner to purchase property and construct facilities equivalent to those taken. (Per Van Dusen, Circuit Judge, with one Judge concurring specially.)—U.S. v. 564.54 Acres of Land, More or Less, in Monroe and Pike Counties, Com. of Pa., 576 F.2d 983, certiorari granted U.S. v. 564.54 Acres of Land, More or Less, Situated in Monroe and Pike Counties, Pennsylvania, 99 S.Ct. 562, 439 U.S. 978, 58 L.Ed.2d 649, reversed 99 S.Ct. 1854, 441 U.S. 506, 60 L.Ed.2d 435.—Em Dom 133.

### NO REAL QUARREL

Ill.App. 2 Dist. 1990. Trial court’s statement that it had “no real quarrel” with defense counsel’s fee request could not be equated with “finding” that fees were “reasonable,” within meaning of statute providing that trial court at conclusion of in absentia proceedings may order clerk of court to pay counsel such sum as court deems “reasonable” from any bond moneys which were posted by defendant, and thus remand was necessary to determine reasonableness of request. S.H.A. ch. 38, ¶ 115-4.1(a).—People v. Barraza, 140 Ill.Dec. 577, 550 N.E.2d 59, 193 Ill.App.3d 655.—Bail 96.

### NO REASONABLE ALTERNATIVES

Ariz.App. Div. 1 1973. Where evidence before Employment Security Commission showed that illness which caused inadequate performance had not ceased at time employee returned to her employment following leave of absence and it appeared from actions of employee herself that she was physically unable to adequately perform her duties in immediate future, and illness was not attributable to her employer and did not disqualify her from benefits, employer had “no reasonable alternatives” other than termination, so that “compelling personal reasons” existed for discharge and precluded employer’s experience rating from being charged for employment security benefits paid employee. A.R.S. §§ 23-726, 23-727, subsecs. A, D, 23-728, 23-730, 23-731.—Employment Sec. Commission v. Valley Nat. Bank of Arizona, 513 P.2d 1343, 20 Ariz.App. 460.—Tax 347.1.

**NO REASONABLE BASIS FOR THE PETITION**

Cal.App. 2 Dist. 1989. In applying statute allowing award of attorney's fees to workers' compensation applicant in connection with petition for writ of review filed by employer when there is "no reasonable basis for the petition," court may find "no reasonable basis for the petition" when petitioning employer contends award is not supported by substantial evidence and review of evidence shows that award is supported by competent opinion of one physician, although inconsistent with other medical opinion, or petitioning employer raises issue not raised in petition for reconsideration before Workers' Compensation Appeals Board. West's Ann.Cal.Labor Code § 5801.—Klee v. Workers' Comp. Appeals Bd., 260 Cal.Rptr. 217, 211 Cal.App.3d 1519, review denied.—Work Comp 1981.

**NO REASONABLE CAUSE**

C.A.4 (N.C.) 1971. A "no reasonable cause" determination of Equal Employment Opportunity Commission is not a "written interpretation or opinion of Commission" within meaning of provision of Equal Employment Opportunities Law that no person shall be subject to liability or punishment for or on account of the commission by such person of unlawful employment practice if he pleads and proves that act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission. Civil Rights Act of 1964, § 713(b), 42 U.S.C.A. § 2000e-12(b).—Robinson v. Lorillard Corp., 444 F.2d 791, 21 A.L.R. Fed. 453, certiorari dismissed 92 S.Ct. 573, 404 U.S. 1006, 30 L.Ed.2d 655, certiorari dismissed Tobacco Workers Intern'l Union v. Robinson, 92 S.Ct. 651, 404 U.S. 1007, 30 L.Ed.2d 655.—Civil R 372.

**NO REASONABLE EXPECTATION OF REFORM**

La.App. 2 Cir. 1995. Natural parents had "no reasonable expectation of reform," within meaning of statute governing involuntary termination of parental rights, though parents were immature and counseling was initially recommended, where Office of Community Services (OCS) consistently sought termination of parental rights after initially deciding to do so, parents tried to manipulate OCS on several occasions rather than cooperating with agency, psychologist opined that parents prospects of reform were dim, and parents refused to apologize to OCS worker for making death threats and hurling racial epithets at her. LSA-Ch.C. art. 1015(5)(b).—State in Interest of DMH v. DMH, 661 So.2d 643, 27,807 (La.App. 2 Cir. 9/27/95).—Infants 155.

**NO REASON TO DOUBT**

Ala. 1896. The phrase "no reason to doubt," in an instruction that if, from the evidence, the jury have no reason to doubt the defendant's guilt, then they might convict, exacted too high a degree of proof. There may be a reason to doubt which does not justify a reasonable doubt, or the inference of probable guilt.—Peagler v. State, 20 So. 363, 110 Ala. 11.

**NO REASON TO KNOW**

C.A.5 1994. Transitional rule of Technical and Miscellaneous Revenue Act providing for "innocent spouse" relief, particularly phrase stating "without regard to any determination before October 21, 1988," does not exclude consideration of case law regarding "no reason to know" requirement decided prior to that date, but rather, provides that spouse falling within rule's objective parameters is entitled to determination of tax liability notwithstanding that earlier determination of his liability was made prior to enactment of rule. Technical and Miscellaneous Revenue Act of 1988, § 6004, 102 Stat. 3342.—Park v. C.I.R., 25 F.3d 1289, certiorari denied Jones v. C.I.R., 115 S.Ct. 673, 513 U.S. 1061, 130 L.Ed.2d 606.—Int Rev 3566.1.

C.A.5 1994. "No reason to know" requirement of transitional rule of Technical and Miscellaneous Revenue Act providing for "innocent spouse" relief is no different from "no reason to know" requirement of statute providing for innocent spouse relief. 26 U.S.C.A. § 6013(e)(1); Technical and Miscellaneous Revenue Act of 1988, § 6004, 102 Stat. 3342.—Park v. C.I.R., 25 F.3d 1289, certiorari denied Jones v. C.I.R., 115 S.Ct. 673, 513 U.S. 1061, 130 L.Ed.2d 606.—Int Rev 3566.1.

**NO RECOMMENDATION**

C.A.5 (Tex.) 1992. To extent that government corrected factual misstatements in defendant's pre-sentence investigation report, government's memoranda did not violate its plea agreement to make "no recommendation" as to defendant's sentence.—U.S. v. Goldfaden, 959 F.2d 1324, appeal after remand 987 F.2d 225.—Crim Law 273.1(2).

**NO RECOURSE**

Ill.App. 1 Dist. 1950. "No recourse" means no access to, no return, no coming back upon, no assumption of any liability whatsoever, no looking to the party using the term for any reimbursement in case of loss, or damage, or failure of consideration in that which was the cause, the motive, the object, of the understanding or contract.—Garofalo Co. v. St. Marys Packing Co., 90 N.E.2d 292, 339 Ill.App. 412.

Oklahoma. Term "no recourse" or "without recourse" in assignment does not, without more, evidence intent to disclaim implied warranty of genuineness and validity, but is meant only to make clear that assignor does not guaranty debtor's solvency or that debtor will fulfill his obligation.—Indiana Nat. Bank v. State Dept. of Human Services, 880 P.2d 371, 1994 OK 98.—Assign 97.

**NO RELIABLE ADJUDICATION OF GUILT OR INNOCENCE**

Pa.Super. 2001. Where a petitioner has demonstrated that counsel's ineffectiveness has created a reasonable probability that the outcome of the proceedings would have been different, then "no reliable adjudication of guilt or innocence" could have taken place, as element under the Post Conviction Relief Act (PCRA) for a post-conviction claim of

ineffective assistance of counsel. U.S.C.A. Const. Amend. 6; Const. Art. 1, § 9; 42 Pa.C.S.A. § 9543(a)(2)(i, ii).—Com. v. Showers, 782 A.2d 1010, reargument denied, appeal denied 814 A.2d 677.—Crim Law 1519(1).

### NO REMEDY AT LAW

Iowa 1993. Showing of “no remedy at law” exists, as required for permanent injunction, when defendant has threatened repeated misconduct.—Hockenberg Equipment Co. v. Hockenberg’s Equipment & Supply Co. of Des Moines, Inc., 510 N.W.2d 153, rehearing denied.—Inj 16.

### NO REQUEST

W.D.Mich. 1987. District court lacked jurisdiction over gladiolus growers’ suit to preliminarily enjoin Administrator of Environmental Protection Agency from enforcing emergency suspension order during pendency of herbicide cancellation proceedings; registrant’s withdrawal of request for expedited hearing after entry of that order was equivalent of “no request” within meaning of relevant statutory provision, so suspension order was final and no judicial review was available. Federal Insecticide, Fungicide, and Rodenticide Act, § 6(c)(2), as amended, 7 U.S.C.A. § 136d(c)(2).—Nagel v. Thomas, 666 F.Supp. 1002.—Admin Law 701; Environ Law 645.

### NO RETROGRESSION

D.D.C. 1994. Under “no retrogression” rule, administrative preclearance for legislation must be denied under “effects” prong of Voting Rights Act if new system imposed by legislation places minority voters in weaker position than existing system. Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.—State of Tex. v. U.S., 866 F.Supp. 20.—Elections 12(8).

### NO RETURN

N.Y.A.D. 1 Dept. 1994. Activity reports filed annually by New Jersey corporation on form promulgated by Commissioner of Finance for corporations disclaiming liability for general corporation tax were “returns” for purposes of “no return” exception to three-year statute of limitations. New York City Administrative Code, § 11–674, subd. 3(a)(1).—Apex Air Freight, Inc. v. O’Cleireacain, 619 N.Y.S.2d 38, 210 A.D.2d 7, leave to appeal denied 635 N.Y.S.2d 949, 86 N.Y.2d 712, 659 N.E.2d 772.—Lim of Act 58(6).

### NO REVERSIBLE ERROR

Tex.Civ.App.—Amarillo 1954. One of the meanings of term “no reversible error,” stamped on application for writ of error to review a judgment of Court of Civil Appeals by Supreme Court, is that the Supreme Court, by such notation, recognizes that the Court of Civil Appeals has reached a correct result in the cause but that the Supreme Court does not necessarily approve the principle of law upon which the decision was based.—Standard Acc. Ins. Co. v. Knight, 267 S.W.2d 227, ref. n.r.e.—App & E 1194(2).

### NORGAARD PLEA

Minn. 1994. In “Norgaard plea,” defendant may plead guilty to offense while claiming loss of memory regarding circumstances of offense due to amnesia or intoxication, provided record establishes that evidence against defendant is sufficient to persuade defendant and defense counsel that defendant is guilty or likely to be convicted of crime charged.—State v. Ecker, 524 N.W.2d 712.—Crim Law 273(4.1).

### NO RIGHT OF ACTION

La.App. 1 Cir. 1996. Exception of “no right of action” is threshold device that questions whether remedy afforded by law can be invoked by plaintiff and determines if plaintiff has right or legal interest in subject matter of suit. LSA-C.C.P. art. 927(5).—Guidry v. Dufrene, 687 So.2d 1044, 1996-0194 (La.App. 1 Cir. 11/8/96).—Plead 228.12.

La.App. 1 Cir. 1996. When facts alleged in petition provide remedy to someone, but plaintiff who seeks relief for himself is not person in whose favor law extends remedy, proper objection is exception of “no right of action.” LSA-C.C.P. art. 927(5).—Guidry v. Dufrene, 687 So.2d 1044, 1996-0194 (La.App. 1 Cir. 11/8/96).—Plead 228.12.

La.App. 1 Cir. 1985. Objection of “no right of action” asserted in peremptory exception raises question of whether remedy afforded by law can be invoked by plaintiff and determines if plaintiff has right or legal interest in subject matter of suit.—Fulford v. Green, 474 So.2d 972.—Plead 228.12.

La.App. 1 Cir. 1954. The exceptions of “no right of action” and “no cause of action” are separate and distinct exceptions, the first questions the right of a litigant to dispute his interest in the subject matter of the proceeding and the second questions the sufficiency of the allegations in the petition for obtaining the desired relief.—Martino v. Fairburn, 71 So.2d 358.—Plead 228.11, 228.12.

La.App. 2 Cir. 1982. Exception of “no right of action” contests whether the plaintiff is in the class to which the law extends a remedy.—Frazier v. Green Steel Bldg., Inc., 409 So.2d 1290.—Plead 228.12.

La.App. 3 Cir. 1981. Exception of “no right of action” serves to question right of plaintiff to maintain his suit, i.e., his interest in the subject matter of the proceedings, and relates to whether the particular plaintiff falls, as a matter of law, within the general class in whose favor the law grants the cause of action sought to be asserted by suit. LSA-C.C.P. art. 927(5).—Mercier v. Flugence, 408 So.2d 52.—Plead 228.12.

La.App. 3 Cir. 1976. Generally speaking, exception of “no right of action” serves to question the right of a plaintiff to maintain his suit, i. e., his interest in the subject matter of the proceedings, whereas an exception of “no cause of action” addresses itself to the sufficiency in law of the petition and the exhibits attached thereto.—Parks v. Winnfield Life Ins. Co., 336 So.2d 1021, writ refused 339 So.2d 351.—Plead 228.11, 228.12.

La.App. 3 Cir. 1975. Exception of “no cause of action” is to raise the question of whether any remedy is afforded by law; exception of “no right of action” is to raise the question of whether a remedy afforded by law can be invoked by a particular plaintiff. (Per Watson, J., with one Judge concurring in the result.)—Taylor v. Castille, 318 So.2d 106, writ denied 321 So.2d 366.—Plead 228.11, 228.12.

La.App. 4 Cir. 2000. The peremptory exception of “no right of action” questions whether plaintiff has an interest in judicially enforcing the right alleged against the defendant.—State ex rel. A.R., 765 So.2d 395, 1999-3228 (La.App. 4 Cir. 5/24/00).—Plead 228.11.

La.App. 4 Cir. 1987. Exceptions of “no cause of action” and “no right of action” are separate and distinct; “no cause of action” tests sufficiency of petition, while “no right of action” determines whether party belongs to particular class of individuals that has a legally recognized interest in judicially enforcing the right asserted.—Hatheway v. John, 517 So.2d 1218, writ denied 520 So.2d 425.—Plead 228.11, 228.12.

La.App. 4 Cir. 1979. An exception of “no right of action” questions the right of the plaintiff to institute the suit, i. e., whether he has an interest in the subject matter of the proceedings. LSA-C.C.P. art. 927(5).—Worcester County Inst. for Sav. v. Franklin, 377 So.2d 457.—Plead 228.12.

La.App. 4 Cir. 1977. Exception of “no right of action” questions capacity of plaintiff to sue, while one of “no cause of action” tests whether the pleadings and exhibits, if proved, afford a remedy at law.—Marchand v. Armstrong, 354 So.2d 581, writ denied 355 So.2d 254, writ denied 355 So.2d 255, writ denied 355 So.2d 255, writ denied 355 So.2d 255.—Plead 228.11, 228.12.

La.App. 4 Cir. 1966. Peremptory exception of “no cause of action” is used to raise issue as to whether law affords remedy to anyone for particular grievance alleged by plaintiff, and peremptory exception of “no right of action” is employed to raise question whether plaintiff belongs to particular class in whose exclusive favor the law extends the remedy, or to raise issue as to whether plaintiff has right to invoke a remedy which the law extends only conditionally. LSA-C.C.P. art. 927.—Roloff v. Liberty Mut. Ins. Co., 191 So.2d 901.—Plead 228.11, 228.12.

La.App. 5 Cir. 1995. Exception of “no cause of action” questions whether law extends remedy to anyone under factual allegations of petition, while exception of “no right of action” is designed to test whether plaintiff has real and actual interest in action, i.e., whether plaintiff belongs to particular class to which law grants remedy for particular harm alleged.—Ferguson v. Dirks, 665 So.2d 585, 95-560 (La.App. 5 Cir. 11/28/95), appeal after remand 714 So.2d 1272, 98-160 (La.App. 5 Cir. 6/30/98), writ denied 728 So.2d 866, 1998-2083 (La. 11/6/98).—Plead 228.11.

La.App. 5 Cir. 1992. Exception of “no cause of action” raises question of whether law affords any remedy to plaintiff under the allegations of the petition, while exception of “no right of action” raises issue of whether plaintiff belongs to the particular class to which the law grants remedy for the particular harm alleged by the plaintiff.—Franks v. Royal Oldsmobile Co., Inc., 605 So.2d 633.—Plead 228.11, 228.12.

La.App. 5 Cir. 1990. Exception of “no right of action” puts at issue whether plaintiff falls as a matter of law within the general class in whose favor the law grants the cause of action asserted in the suit, while exception of “no cause of action” raises question of whether plaintiff’s allegations, taken as true, entitle him to any legal remedy against the defendant. LSA-C.C.P. art. 927(4, 5).—LeBlanc v. Stan Weber and Associates, Inc., 556 So.2d 132.—Plead 228.11, 228.12.

## **NOR IN NAY EVENT FOR MORE THAN INTEREST OF INSURED**

N.Y.A.D. 4 Dept. 1959. In standard fire policy insuring to extent of cash value of property at time of loss but not exceeding repair or replacement cost “nor in nay event for more than interest of insured”, the quoted clause insures against physical loss and not against financial loss, and the policy does not constitute an agreement to indemnify insured to extent of his financial loss. Insurance Law, § 168.—Federowicz v. Potomac Ins. Co. of District of Columbia, 183 N.Y.S.2d 115, 7 A.D.2d 330.—Insurance 2187.

## **NOR LESS THAN FORTY (40) DAYS BEFORE THE DAY OF ELECTION**

Mont. 1955. The statutory phrase, “nor less than forty (40) days before the day of election,” which refers to time in which public nominating meetings for school trustees for school districts can be held, means not a fewer or smaller number of days than 40 days before day of election. R.C.M. 1947, § 75-1606.—State ex rel. Burns v. Lacklen, 284 P.2d 998, 129 Mont. 243.—Time 9(1).

## **NORM**

Tex.Civ.App.-Austin 1943. The noun “norm” is defined as a rule or authoritative standard, model, type, pattern.—Railroad Commission v. Konowa Operating Co., 174 S.W.2d 605.

## **NORMAL**

C.A.2 1962. “Normal” as used in section of the excess profits tax statute providing an alternative method of determination of base period net income if normal production, output, or operation was interrupted because of occurrence of events unusual and peculiar in experience of the taxpayer, means what would have occurred but for unusual and peculiar events that produce deviation from the norm, and under such statutes there could be a finding of diminution of normal production even though taxpayer’s actual sales in the years claimed to be abnormal exceeded those for year preceding the abnormality. 26 U.S.C.A. Excess Profits Taxes,

§ 442(a) (1).—Oxford Paper Co. v. C.I.R., 302 F.2d 674.—Int Rev 4130.

C.A.5 (Miss.) 1975. Within meaning of doctrine that operator of gas pipeline has duty to maintain pipeline so that it will be safe for those making ordinary use of the land, word "ordinary" connotes use that is "usual," "regular," and "normal," something of a continuing nature so that a person should be familiar with it.—Wideman v. Mississippi Val. Gas Co., 507 F.2d 658, certiorari denied 95 S.Ct. 2631, 422 U.S. 1008, 45 L.Ed.2d 671.—Gas 17.

Ct.Cl. 1977. Evidence that even after value of government-furnished material and comparable materials were excluded from both renegotiable and commercial sales for the three-year period from 1966 through 1968, contractor's reconstructed renegotiable net profits for fiscal year 1967 were at a rate 70% higher than the rate of profit on commercial sales for the same year and more than twice the average rate on commercial sales for the three-year period sufficiently established that contractor's rate of profit on sales to and for the use of the Government in 1967 was far in excess of its "normal" rate of profit on sales to others, for purpose of code provision that excessive profit determination requires taking into account the reasonableness of costs and profits, with particular regard to volume of production, "normal" earnings and comparison of war and peacetime products. Renegotiation Act of 1951, § 103(e) as amended 50 U.S.C.A. App. § 1213(e).—Blue Bell, Inc. v. U. S., 556 F.2d 1118, 213 Ct.Cl. 442.—War 59.

C.C.A.1 (Mass.) 1943. The Revenue Act section defining natural wine as the product made from the normal alcoholic fermentation of the juice of sound, ripe grapes uses the term "normal" as synonymous with common, natural, or ordinary, and as an adjective it is descriptive of the process of fermentation and does not refer to the alcoholic content of the resultant product. Revenue Act 1918, Sec. 610, as amended by Act June 26, 1936, Sec. 330, 49 Stat. 1957.—Sterling Cider Co v. Hassett, 133 F.2d 590.—Int Rev 4317.

S.D.Cal. 1952. The word "normal" means ordinary, usual condition, degree, quantity or the like; average, mean.—U.S. v. Fallbrook Public Utility Dist., 109 F.Supp. 28.

W.D.La. 1979. Within section of the Federal Water Pollution Control Act exempting from permit requirement for discharges of dredged or fill material "normal" farming and silviculture, "normal" connotes an established and continuing activity, with result that only activities that are part of an ongoing agricultural or silvicultural operation were intended to be exempted from the permit program and not activities, such as land-clearing operations, which convert forested bottom land into farmland. Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), §§ 404, 404(f)(1)(A) as amended 33 U.S.C.A. §§ 1344, 1344(f)(1)(A).—Avoyelles Sportsmen's League v. Alexander, 473 F.Supp. 525.—Environ Law 137.

D.N.J. 1965. "Normal" within Excess Profits Tax Act provision regarding average base net in-

come and providing that if taxpayer establishes that for taxable period normal production was interrupted because of unusual and peculiar events, average base period should be amount computed under one of two subsections, means that which would have occurred but for the unusual and peculiar events that produced deviation from the norm. 26 U.S.C.A. Excess Profits Taxes § 442(a)(1).—New York Shipbuilding Corp. v. U.S., 237 F.Supp. 995, affirmed 362 F.2d 550.—Int Rev 4130.

M.D.Pa. 1975. Curfew ordinance provision authorizing mayor to issue permit when normal or "necessary night-time activities" of minor, particularly minor well along road to maturity, might be inadequately provided for by other provisions of ordinance was valid and not unconstitutional for vagueness except that word "normal" and phrase "particularly a minor well along the road to maturity" were impermissibly vague and would be deleted pursuant to severability provisions. U.S.C.A. Const. Amend. 14.—Bykofsky v. Borough of Middletown, 401 F.Supp. 1242, affirmed 535 F.2d 1245, certiorari denied 97 S.Ct. 394, 429 U.S. 964, 50 L.Ed.2d 333.—Mun Corp 111(4), 594(2).

Cal. 1978. Playing of tape recording during trial was part of "oral proceedings" taken on trial of the cause, within court rule, and would thus ordinarily be included as part of the "normal" record. Cal. Rules of Court, rule 33(a)(2).—People v. Gaston, 573 P.2d 423, 143 Cal.Rptr. 205, 20 Cal.3d 476.—Crim Law 1088.10.

Idaho 1948. "Normal" defined.—Payette Lakes Protective Ass'n v. Lake Reservoir Co., 189 P.2d 1009, 68 Idaho 111.

Ill.App. 1 Dist. 1969. Fact that insured decides not to resume business does not change nature of expense as "normal" under business interruption clause of fire policy defining condition that would have existed had no loss occurred as result of damage or destruction by perils insured against.—DiLeo v. U.S. Fidelity & Guaranty Co., 248 N.E.2d 669, 109 Ill.App.2d 28.—Insurance 2163(1).

La.App. 2 Cir. 1960. In its ordinary usage, "normal" is synonymous with "regular," and, for purposes of automobile liability policy definition of "temporary substitute automobile" as one temporarily replacing owned automobile while latter was withdrawn from "normal" use, it was not necessary that withdrawal be from all normal use, and, therefore, vehicle which named insured was driving at time of collision qualified as a "temporary substitute automobile" even though bad condition of tires on owned automobile did not prevent his wife from driving such vehicle, as was her custom when her husband was not using vehicle.—Fullilove v. U. S. Cas. Co. of N. Y., 120 So.2d 285, annulled 125 So.2d 389, 240 La. 859.—Insurance 2658.

Neb. 1965. Rule that "normal" response to stimulus of situation created by negligent conduct of defendant is not superseding cause of harm which defendant's conduct was substantial factor in causing uses quoted word as the opposite of highly extraordinary and such response need not be reasonable or such as a reasonable man would regard

as not involving unreasonable risk to himself or others.—*Hoffman v. Jorgensen Awnings, Inc.*, 132 N.W.2d 867, 178 Neb. 261.—Neglig 431.

N.J. 1952. “Normal” describes those forces which operate habitually, periodically or with a certain degree of frequency.—*In re New Jersey Power & Light Co.*, 89 A.2d 26, 9 N.J. 498.

N.J.Super.A.D. 1971. Provisions of ordinance directing issuance of parade permit if conduct of parade would not require diversion of so great a number of police officers and ambulances as to interfere with “normal” police protection and ambulance service were not vague; the word “normal” meant a substantial interference with the police and first-aid men so that other parts of borough would be left unprotected. U.S.C.A.Const. Amend. 1.—*Hurwitz v. Boyle*, 284 A.2d 190, 117 N.J.Super. 196.—Mun Corp 703(2).

N.Y.Sup. 1930. In covenant to maintain “normal” and “natural” flow of water, exclusive of “storm water,” below point of diversion, by replacement from impounded storm waters above point, of amount of water equal to amount taken, “storm water” meant excess flow over mean flow during March, April, and May which could regularly be counted on.—*Adirondack Power & Light Corp. v. City of Little Falls*, 265 N.Y.S. 567, 148 Misc. 191.—Waters 156(2).

N.Y.Sup. 1930. In covenant to maintain “normal” and natural flow of water, exclusive of “storm water,” below point of diversion by returning from impounded storm waters, amount equal to that diverted, “storm waters” meant those flows of stream in excess of mean flow of 600 c.f.s., and flow remaining after deduction of “storm waters” was “normal flow,” which at point of diversion was 58 c.f.s.—*Adirondack Power & Light Corp. v. City of Little Falls*, 265 N.Y.S. 567, 148 Misc. 191.—Waters 156(2).

N.Y.Sup. 1930. In covenant to maintain “normal” and “natural” flow of water, exclusive of “storm water,” below point of diversion, by replacement from impounded storm waters above point, of amount of water equal to amount taken, “storm water” meant excess flow over mean flow during March, April, and May which could regularly be counted on. “Storm water” is water that promptly runs off the surface into a stream after storms, although all water is storm water, because, whether denominated ground water, surface water, or storm water, it comes from the heavens in rain or snow storms. Broadly speaking, “storm water” includes the freshet flows of spring months brought about through the melting of snows, spring rains, and also the flows following on heavy rains in other months so far as they suddenly and temporarily raise the flow of the stream above the normal flow. “Normal flow” means flow that is not affected by “storm water.” “Natural flow” is the flow of the stream unaffected by artificial conditions.—*Adirondack Power & Light Corp. v. City of Little Falls*, 265 N.Y.S. 567, 148 Misc. 191.

S.D. 1967. “Substitute automobile” provision of automobile liability policy does not require that

insured vehicle be withdrawn from all use but that it be withdrawn from “normal” use which is “ordinary, customary or usual use”.—*Nelson v. St. Paul Mercury Ins. Co.*, 153 N.W.2d 397, 83 S.D. 32.—Insurance 2658.

Tex. 1962. The word “normal” in the rule that the actor as a reasonable man must provide against “normal” operation of natural forces describes not only those forces which are constantly and habitually operating but also those forces which operate periodically or with a certain degree of frequency.—*Employers Mut. Cas. Co. of Des Moines, Iowa v. Nelson*, 361 S.W.2d 704.—Neglig 213.

Tex.Civ.App.—Austin 1943. The adjective “normal” is defined as according to, constituting, or not deviating from, an established norm, rule, or principle.—*Railroad Commission v. Konowa Operating Co.*, 174 S.W.2d 605.

Wash. 1980. Where county council had passed motion supporting or opposing ballot propositions on numerous occasions, other area governmental bodies also endorsed antipornography ballot measure, endorsement differed little from resolution or memorial and motion was routinely handled, motion endorsing antipornography ballot measure passed by county council was “normal,” within meaning of statute that prohibited use of facilities of public office to promote or oppose ballot propositions but excepted “normal and regular conduct” from the prohibition. West’s RCWA 42.17.130.—*King County Council v. Public Disclosure Commission*, 611 P.2d 1227, 93 Wash.2d 559.—Counties 54.

#### **NORMAL ACCESSORY STRUCTURES**

N.Y.Sup. 1989. Dedication of 50-foot right-of-way to town was contrary to terms of restrictive covenant and common plan providing that premises could be used for residential purposes only and could be improved only by single-family residential dwelling together with “normal accessory structures”; contemplated public roadway was not normal accessory structure contemplated by common plan.—*Irish v. Besten*, 536 N.Y.S.2d 956, 142 Misc.2d 183, affirmed 551 N.Y.S.2d 659, 158 A.D.2d 867.—Covenants 49.

#### **NORMAL ACTIVITIES OF DAY-TO-DAY LIVING**

Wyo. 1999. If the employer has the right to control the employee’s work environment, the details of the activity the employee was engaged in when injured, and the injury arises out of the employee’s course of employment, then the injury does not arise from “normal activities of day-to-day living” and is not excluded from coverage under the Worker’s Compensation Act. W.S.1977, § 27-14-102(a)(xi)(G).—*Sellers v. State ex rel. Wyoming Workers’ Safety and Compensation Div.*, 979 P.2d 959.—Work Comp 611.

Wyo. 1999. Worker’s Compensation Division’s mere statement that exiting a vehicle is an act of daily living was insufficient to establish that claimant’s injury to her back while exiting her work truck arose from “normal activities of day-to-day living,” for purposes of Worker’s Compensation Act’s ex-

clusion for daily living activities. W.S.1977, § 27-14-102(a)(xi)(G).—Sellers v. State ex rel. Wyoming Workers' Safety and Compensation Div., 979 P.2d 959.—Work Comp 1533.

#### **NORMAL AGRICULTURAL PLANTING OR HARVESTING**

C.A.5 (La.) 1999. Objective test should be used to determine if scattering grain falls under "normal agricultural planting or harvesting" exception to Migratory Bird Treaty Act's (MBTA) prohibition against hunting birds over baited areas; under such test, activity will be deemed "normal" if it could be thought consistent with commonly accepted methods used in area to produce crop, considering normal area planting dates, seed distribution, seed bed preparation, application rates, seed vitality, and eventual yields and results. Migratory Bird Treaty Act, § 2, 16 U.S.C.A. § 703; 50 C.F.R. § 20.21(i)(1).—U.S. v. Adams, 174 F.3d 571.—Game 3.5.

#### **NORMAL AND INTENDED USE**

C.A.Fed. 1990. In determining whether article is not always concealed in its "normal and intended use," and thus whether article is ornamental and design patent can issue, "normal and intended use" excludes time in which article is manufactured or assembled; however, evidence that article is visible at other times is not legally irrelevant. 35 U.S.C.A. § 171.—In re Webb, 916 F.2d 1553, on remand Ex Parte Webb, 1993 WL 610927.—Pat 28.

#### **NORMAL AND ORDINARY IMPROVEMENT OF A STREET**

Wash. 1940. In property owner's action against municipality for damages to real estate allegedly caused by construction of viaduct on a street adjoining owner's property where street, at place where owner's building was located, had been an existing street for 15 years and was level, owner was not bound to prove that official grade of street had been established by municipality before viaduct was constructed and that building was constructed in reliance upon established grade, since building of viaduct for overhead crossing was not a "normal and ordinary improvement of a street" for purpose of bringing street to a grade line.—Docksteader v. City of Centralia, 100 P.2d 377, 3 Wash.2d 325.—Em Dom 295.

#### **NORMAL AND REGULAR COURSE OF BUSINESS**

Wash. 1955. As used in rule that even in absence of express statutory exception, statutes allowing minority stockholder to force corporation to purchase his corporate shares, are inapplicable where, in view of purposes and objects of corporation, sale, lease, or exchange of all its assets may be regarded as one in normal and regular course of business, words "normal and regular course of business" refer not to equity of fairness of particular transaction, but to whether it was of a class which, in normal course of its business, corporation was expressly authorized to consummate. RCW

23.16.140, 23.16.160, 23.36.140.—Van Buren v. Highway Ranch, 283 P.2d 132, 46 Wash.2d 582.—Corp 182.4(5).

#### **NORMAL AND USUAL COURSE OF BUSINESS**

C.A.7 (Ind.) 1953. Adoption of plan to modify corporation's existing liability policy with effect of making corporation its own insurer, was not a transaction of "normal and usual course of business" within meaning of stock sale agreement providing that transactions other than those within normal and usual course of business could not be conducted without express written consent of corporation's general manager, the seller of such stock, who did not sign document purportedly adopting plan; and adoption of plan was not binding upon corporation.—Citizens Cas. Co. of N. Y. v. Ready Truck Lines, 203 F.2d 391.—Corp 416.

#### **NORMAL ARREST PROCEDURE**

N.Y.City Ct. 1994. "Normal arrest procedure" involves series of steps including advising person of reason for arrest, pat down for weapons, handcuffing defendant, and escorting defendant to police car to be transported; procedure anticipates cooperation of person being taken into custody. McKinney's CPL §§ 120.80, 140.15.—People v. Bauer, 614 N.Y.S.2d 871, 161 Misc.2d 588.—Arrest 68(1).

#### **NORMAL ATTRITION**

Cal.App. 2 Dist. 1981. For purpose of requirement that normal attrition be used to offset layoffs made possible by a decline in average daily attendance, "normal attrition" or "positively assured attrition" includes retirements, resignations and deaths but does not include layoffs attributable to "PKS reductions", i. e., reductions of particular kinds of services; hence, in computing normal attrition for purpose of layoffs due to reduction in average daily attendance school district did not err in deducting the PKS layoffs from the number by which total certificated staff decreased within the computation period. West's Ann.Educ. Code, §§ 44955, 44956, 44958.—Brough v. Governing Board, 173 Cal.Rptr. 729, 118 Cal.App.3d 702.—Schools 147.10.

#### **NORMAL BUSINESS**

C.A.D.C. 1969. By doing plumbing work at job site at night and on weekends, instead of during regular working hours when general contracting was being performed, non-union employer was not engaging in his "normal business" at job site during regular work hours, so that union's activity in picketing job site during regular work hours did not constitute lawful "primary picketing," but more realistically involved secondary objectives, thereby becoming unlawful, notwithstanding fact that union had a legitimate object in publicizing its dispute with employer. National Labor Relations Act, § 8(b) (4) (i, ii) (B) as amended 29 U.S.C.A. § 158(b) (4) (i, ii) (B).—Local Union No. 519, United Ass'n of Journeymen and Apprentices of Plumbing and Pipe Fitting Industry of U. S. and

Canada, AFL-CIO v. N. L. R. B., 416 F.2d 1120, 135 U.S.App.D.C. 105.—Labor 349.

C.A.D.C. 1959. Where primary employer, which was involved in labor dispute with union, had placed vessel used by it in offshore oil drilling in secondary employer's shipyard for annual overhaul and repairs by secondary employer, and had primary employer's supervisory employees aboard in connection with the overhaul and repairs, primary employer was engaged in its "normal business" in shipyard, and picket line of union in front of shipyard's gates was legal, though primary employer had moved its nonsupervisory employees away from shipyard. National Labor Relations Act, § 8(b) (4) (A, B) as amended 29 U.S.C.A. § 158(b) (4) (A, B).—Seafarers Intern. Union of North America, Atlantic and Gulf Dist., Harbor and Inland Waterways Division, AFL-CIO v. N. L. R. B., 265 F.2d 585, 105 U.S.App.D.C. 211.—Labor 349.

Ill.App. 1 Dist. 1967. Refusal of village to issue corporate tenant a license to manufacture did not fall within "normal business" as used in lease which tenant executed with knowledge of its officers that manufacturing was not permitted on the leased premises and which provided that the lease should be null and void if tenant was prevented from carrying on its normal business by cancellation of its sales and service permit or by any action by any village governing administrative or regulatory official or body or any court of law.—Maroe v. Chemechanical, Inc., 228 N.E.2d 232, 84 Ill.App.2d 463.—Land & Ten 105.

#### **NORMAL BUSINESS PRACTICES**

D.Hawai'i 1978. Phrase "any normal business practice" as used in Federal Energy Administration regulation that requires suppliers to deal with purchasers of an allocated product according to "normal business practices" in effect during the applicable base period does not mean "any business practice in which a supplier normally or customarily engaged" so as to result in a blanket immunity from antitrust laws for any business practice in which a supplier engaged during the base period; the subsection merely mandates continuance and nonmodification of business practices to prevent circumvention of any provision of the regulatory chapter. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.—Oahu Gas Service, Inc. v. Pacific Resources, Inc., 460 F.Supp. 1359.—Monop 12(16).

#### **NORMAL CASE**

D.Kan. 1996. Under Kansas law, gasoline service station franchisor's charging of its dealer buying price in effect for gasoline sold to franchisees did not constitute breach of dealer supply agreements between franchisor and franchisees, despite contention that franchisor did not set its dealer buying price in good faith and in commercially reasonable manner as required by Uniform Commercial Code (UCC); agreements identified purchase price for gasoline as franchisor's dealer buying price "in effect," and present case was "normal case" for purposes of Uniform Commercial Code

rule that seller's price in effect satisfies good faith requirement in normal case. K.S.A. 84-2-103(1)(b), 84-2-305(2), 84-2-305 comment.—Wayman v. Amoco Oil Co., 923 F.Supp. 1322, opinion affirmed 145 F.3d 1347.—Trade Reg 873.5.

#### **NORMAL CLOTHING**

Del.Super. 1972. "Normal clothing," within meaning of statute authorizing disfigurement award if disfigurement is visible and offensive when body is clothed normally, should be considered as clothing worn by a man in his daily routine of life, and each case should be decided on its own merits; for example, what applies to a man who is a swimming instructor should not apply to man whose daily way of life includes as his normal clothing at least a shirt and trousers. 19 Del.C. § 2326(f).—Ware v. Baker Driveway, Inc., 295 A.2d 734, affirmed 303 A.2d 358.—Work Comp 594.

#### **NORMAL COMMERCIAL RATE**

Pa. 1960. As respects the interest rate for detention damages in condemnation case, "prime commercial rate" is the rate of interest charged to an individual corporation whose credit is of the highest or whose collateral is of the highest quality, and the "normal commercial rate" is the rate of interest charged by lenders to the average, normal borrower whose credit is not prime or unquestionable.—Lehigh Val. Trust Co. v. Pennsylvania Turnpike Commission, 163 A.2d 86, 401 Pa. 135.—Em Dom 148.

#### **NORMAL COMPENSATION**

Conn. 1921. Where deceased employee, who left partially dependent parents, nonresident aliens, and a partially dependent sister, a resident of this country, earned over \$36 a week, and contributed \$13 a week for the sister's support, an award allowing compensation to the parents at the rate of one-half of \$5 a week and to the sister at the rate of \$13 a week for 312 weeks was in accord with the provisions made by Gen.St.1918, § 5350 (repealed. See C.G.S.A. § 31-160), for alien dependents, and the provisions of Laws 1919, c. 142, § 6, for partial dependents; the sister's right as such dependent being in no way affected by the provisions as to alien dependents, the term "normal compensation" used in § 5350 meaning the compensation that would have been awarded such nonresident alien dependents if they had been residents.—Passini v. Aberthaw Const. Co., 115 A. 689, 97 Conn. 110.—Work Comp 911.

#### **NORMAL CONDITIONS**

Or. 1938. Under statute requiring property to be valued at "true cash value" for taxation purposes, which defined "true cash value" as amount property would sell for at voluntary sale, taking into consideration earning power and usefulness under "normal conditions," quoted words were employed to seek a constant value which would level the effects of depressions and booms and to avoid possibility of costly improvements of value only to owner and, therefore, possessing no market value,

escaping taxation or being assessed only as "tear down" propositions. Laws 1933, p. 158, ORS 308.205, 308.210, 308.235.—Appeal of Kliks, 76 P.2d 974, 158 Or. 669.—Evid 113(1); Tax 347.

Pa. 1924. In an action for breach of contract to purchase coal, making fulfillment dependent upon "normal conditions," excusing seller's failure to deliver in case of "war, \* \* \* insurrection, \* \* \* disasters, breakdowns, fires, or other accidents at the mines, \* \* \* shortage of cars, interruption of car service, strikes, labor agitations or disturbances, shortage of labor supply, or any other causes beyond the seller's control," and excusing buyer's refusal to accept deliveries "in case of strikes or other contingencies arising which are beyond the control of the buyer and which cause stoppage or partial stoppage of the plant or business of the buyer," the closing down of buyer's steel plant, because of business depression and the failure to obtain orders, did not justify buyer's refusal to accept deliveries, since the word "conditions" in the phrase "normal conditions" means physical conditions affecting the industry and not general economic conditions, and the phrase "other contingencies" did not include business depressions, in view of the *eiusdem generis* rule.—Cleveland & Western Coal Co. v. Cyclops Steel Co., 123 A. 320, 278 Pa. 346.—Sales 85(2).

## NORMAL COSTS

Ct.Cl. 1979. Under Internal Revenue Code allowing a taxpayer-employer to deduct contributions to certain employee retirement, pension and profit-sharing plans in the taxable year when paid, "normal costs" are the expenses of a retirement plan in current year, and are computed by estimating a percentage of current costs multiplied by the annual compensation of employees enrolled in the plan, and "initial unfunded liability" is the total liability of the plan for all past services. 26 U.S.C.A. (I.R.C.1954) § 404(a), (a)(6).—Raybestos Manhattan, Inc. v. U. S., 597 F.2d 1379, 220 Ct.Cl. 224.—Int Rev 3584.

## NORMAL COURSE OF BUSINESS

C.A.7 (Ill.) 1994. Motor fuel franchisor's decision to terminate all of its franchises in contiguous four-state area was made in "good faith" and in "normal course of business," within meaning of Petroleum Marketing Practices Act (PMPA); there was no allegation of discriminatory termination and franchisor presented comprehensive evidence that decision to withdraw from that area was driven by purely economic reasons. Petroleum Marketing Practices Act, § 102(b)(2)(E), 15 U.S.C.A. § 2802(b)(2)(E).—Beck Oil Co., Inc. v. Texaco Refining and Marketing, Inc., 25 F.3d 559.—Trade Reg 873.5.

N.D.Ill. 1994. Term "normal course of business" as used in provision of Petroleum Marketing Practices Act allowing termination of franchise if franchisor and franchisee failed to agree to changes or additions in provisions of franchise and if that changes result from determinations made by franchisor in good faith and in the "normal course of

business," requires that changes be result of franchisor's normal decision-making process. Petroleum Marketing Practices Act, § 102(b)(3)(A), 15 U.S.C.A. § 2802(b)(3)(A).—Duff v. Marathon Petroleum Co., 863 F.Supp. 622, affirmed 51 F.3d 741.—Trade Reg 873.5.

N.D.Ill. 1990. Petroleum Marketing Practices Act's mandate that changes or additions to franchise agreement be result of determinations made in "normal course of business" in order for nonrenewal to changes or additions to constitute ground for nonrenewal requires that determinations must have been result of franchisor's normal decision-making process. Petroleum Marketing Practices Act, § 102(b)(3)(A), 15 U.S.C.A. § 2802(b)(3)(A).—Grottemeyer v. Lake Shore Petro Corp., 749 F.Supp. 883.—Trade Reg 873.5.

D.Neb. 1994. Nonrenewal of gasoline franchise based on belief that franchise was uneconomical to franchisor occurred in "normal course of business," in view of evidence that franchisor conducted branded wholesale jobber profitability study and determined that annual sales volumes of branded products had to increase significantly in order to offset operating costs and to make branded wholesale profitable division. Petroleum Marketing Practices Act, § 102(b)(3)(D), 15 U.S.C.A. § 2802(b)(3)(D).—Van Diest v. Conoco, Inc., 851 F.Supp. 1415.—Trade Reg 873.5.

## NORMAL DAILY SURPLUS WATER

Hawai'i 1973. The phrase "normal daily surplus water," as used in judicial decision determining water rights of proprietor of land adjoining natural watercourse, contemplated an excess of water after all owners of land adjoining watercourse had their water rights determined, but since other proprietors were entitled to have flow of water in the shape and size given it by nature, no quantity of water could be deemed "normal daily surplus water," and proprietor was entitled to nothing under the decision.—McBryde Sugar Co., Ltd. v. Robinson, 504 P.2d 1330, 54 Haw. 174, adhered to on rehearing 517 P.2d 26, 55 Haw. 260, appeal dismissed, certiorari denied McBryde Sugar Co., Limited v. Hawaii, 94 S.Ct. 3164, 417 U.S. 962, 41 L.Ed.2d 1135, certiorari denied Robinson v. Hawaii, 94 S.Ct. 3183, 417 U.S. 976, 41 L.Ed.2d 1146, certiorari denied Albarado v. Hawaii, 94 S.Ct. 3183, 417 U.S. 976, 41 L.Ed.2d 1146.—Waters 49.

## NORMAL DEALINGS

E.D.N.Y. 1997. Cable television operator alleged with sufficient particularity collaboration between cable television news programmer and city to deprive operator of its free speech, due process, and Cable Communications Policy Act rights so as to state counterclaims against programmer for conspiracy in violation of § 1983, in programmer's action against operator, arising from operator's decision not to carry programmer's news program on operator's cable channels in city; operator described numerous overt acts by programmer and city in execution of claimed conspiracy designed to coerce private entity to give up its rights because of

desire of public officials to reward and ingratiate themselves with competitor, and those could not be characterized as “normal dealings” with state. U.S.C.A. Const. Amends. 1, 14; 42 U.S.C.A. § 1983; Communications Act of 1934, §§ 611, 624, as amended, 47 U.S.C.A. §§ 531, 544.—Fox News Network, L.L.C. v. Time Warner Inc., 962 F.Supp. 339.—Consp 18.

**NORMAL EXTENT**

N.J.Ch. 1940. A strike is “terminated,” so as to make picketing unlawful, where the places of the strikers have been filled with competent men, and the employer’s business is operating in a normal manner and to a “normal extent,” but the business is not operating to a “normal extent,” when it suffers seriously from loss of patronage.—Newark Intern. Baseball Club v. Theatrical Managers, Agents and Treasurers Union, 10 A.2d 274, 126 N.J.Eq. 520.—Labor 324.

**NORMAL FARMING**

W.D.Wash. 1996. Determination that landowner’s activities were “normal farming” and, thus, did not require wetlands permit under Clean Water Act (CWA), was not correctly characterized as failure to perform “nondiscretionary duty,” as required for cause of action against Administrator of Environmental Protection Agency (EPA) under CWA’s citizen suit provision; rather, allegation was that Army Corps of Engineers performed its duty erroneously. Federal Water Pollution Control Act Amendments of 1972, § 505(a)(2), as amended, 33 U.S.C.A. § 1365(a)(2).—Cascade Conservation League v. M.A. Segale, Inc., 921 F.Supp. 692.—Environ Law 146.

**NORMAL FARMING ACTIVITIES**

C.A.3 (Pa.) 1994. Factual findings of district court, indicating that farmer converted 30-acre site that was not suitable for farming into site that was suitable for farming did not justify determination that farmer’s activities on site were exempt from permit requirements of Clean Water Act (CWA) as “normal farming activities” but, rather, such findings led to opposite conclusion; farmer had “brought an area into farming use,” within meaning of regulation providing that exemption was not available for activities bringing area into farming use. Federal Water Pollution Control Act Amendments of 1972, § 404(f)(1)(A), as amended, 33 U.S.C.A. § 1344(f)(1)(A); 33 C.F.R. § 323.4(a)(1)(ii).—U.S. v. Brace, 41 F.3d 117, rehearing and rehearing denied, certiorari denied 115 S.Ct. 2610, 515 U.S. 1158, 132 L.Ed.2d 854.—Environ Law 137.

C.A.3 (Pa.) 1994. Even if pre-1975 use of site by farmer’s father for pasturing could have been considered prior “established farming operation” on site, farmer’s drainage activities showed that farmer’s subsequent activities did not fall under “normal farming activities” exemption from permit requirement of Clean Water Act (CWA) in light of regulation providing that farming operation was not “ongoing” where modifications to hydrological re-

gime were necessary to resume operations; farmer admitted that drainage of site through excavating and burying four miles of plastic tubing for drainage were necessary to grow crops on site. Federal Water Pollution Control Act Amendments of 1972, § 404(f)(1)(A), as amended, 33 U.S.C.A. § 1344(f)(1)(A); 33 C.F.R. § 323.4(a)(1)(ii); 40 C.F.R. § 232.3(c)(1)(ii)(B).—U.S. v. Brace, 41 F.3d 117, rehearing and rehearing denied, certiorari denied 115 S.Ct. 2610, 515 U.S. 1158, 132 L.Ed.2d 854.—Environ Law 137.

**NORMAL FLOW**

N.Y.Sup. 1930. In covenant to maintain “normal” and natural flow of water, exclusive of “storm water,” below point of diversion by returning from impounded storm waters, amount equal to that diverted, “storm waters” meant those flows of stream in excess of mean flow of 600 c.f.s., and flow remaining after deduction of “storm waters” was “normal flow,” which at point of diversion was 58 c.f.s.—Adirondack Power & Light Corp. v. City of Little Falls, 265 N.Y.S. 567, 148 Misc. 191.—Waters 156(2).

N.Y.Sup. 1930. In covenant to maintain “normal” and “natural” flow of water, exclusive of “storm water,” below point of diversion, by replacement from impounded storm waters above point, of amount of water equal to amount taken, “storm water” meant excess flow over mean flow during March, April, and May which could regularly be counted on. “Storm water” is water that promptly runs off the surface into a stream after storms, although all water is storm water, because, whether denominated ground water, surface water, or storm water, it comes from the heavens in rain or snow storms. Broadly speaking, “storm water” includes the freshet flows of spring months brought about through the melting of snows, spring rains, and also the flows following on heavy rains in other months so far as they suddenly and temporarily raise the flow of the stream above the normal flow. “Normal flow” means flow that is not affected by “storm water.” “Natural flow” is the flow of the stream unaffected by artificial conditions.—Adirondack Power & Light Corp. v. City of Little Falls, 265 N.Y.S. 567, 148 Misc. 191.

**NORMAL GOODS**

N.D.Ohio 1963. Mass produced presses manufactured by corporate taxpayer were “normal goods” within regulation defining “market” as used in determining inventory value for federal income tax purposes, where presses were essentially the same in design, size, and function and were offered generally at same price. 26 U.S.C.A. (I.R.C.1939) § 22(c).—E.W. Bliss Co. v. U.S., 224 F.Supp. 374, affirmed 351 F.2d 449.—Int Rev 3105.1.

**NORMAL HIGH WATER**

Me. 1996. When interpreting deeds, “normal high water” is edge of permanent vegetation.—Snyder v. Haagen, 679 A.2d 510.—Deeds 113.

## NORMAL INVESTIGATIVE PROCEDURES

### NORMAL HIGH WATER LEVEL

Idaho 1948. Where contract between protective association, composed primarily of littoral owners, and reservoir company permitted reservoir company to maintain waters in lake to "normal high water level" the contract did not mean the highest level to which water naturally raised prior to contract for a sufficient length of time to make a mark but to the normal or average height water reached at its highest stages during the years. Code 1932, § 41-208.—Payette Lakes Protective Ass'n v. Lake Reservoir Co., 189 P.2d 1009, 68 Idaho 111.—Waters 243.

### NORMAL HOME

Ariz.App. Div. 1 1986. Phrase "normal home," used in statute permitting termination of parent-child relationship if sentence of parent convicted of felony is of such length that child will be deprived of a "normal home" for a period of years, related to obligation of natural father, who was convicted of sexual assault of 60-year-old woman, to provide a normal home in which natural father had a presence and did not refer to an environment created by natural mother and child's stepfather. A.R.S. § 8-533, subd. B, par. 4.—Matter of Appeal in Maricopa County Juvenile Action No. JS-5609, 720 P.2d 548, 149 Ariz. 573.—Infants 157.

### NORMAL IMPORT DUTIES

CIT 1993. Cash deposits of estimated anti-dumping duties were not "normal import duties" and were not to be deducted by International Trade Administration (ITA) from United States price (USP) of subject merchandise. Tariff Act of 1930, § 772(d)(2)(A), as amended, 19 U.S.C.A. § 1677a(d)(2)(A).—Federal-Mogul Corp. v. U.S., 824 F.Supp. 223.—Cust Dut 21.5(3).

CIT 1993. Cash deposits of estimated anti-dumping duties were not "normal import duties" and were not to be deducted by International Trade Administration (ITA) from United States price (USP) of subject merchandise. Tariff Act of 1930, § 772(d)(2)(A), as amended, 19 U.S.C.A. § 1677a(d)(2)(A).—Federal-Mogul Corp. v. U.S., 813 F.Supp. 856, appeal after remand 834 F.Supp. 1391, opinion after remand 1994 WL 50290, reversed 63 F.3d 1572, on remand 907 F.Supp. 431, opinion after remand 1996 WL 266321, on remand 907 F.Supp. 432, appeal after remand NTN Bearing Corp. of America v. U.S., 1996 WL 91941, opinion after remand 1996 WL 266253, opinion after remand 1996 WL 266321, vacated 907 F.Supp. 431, opinion after remand 1996 WL 266321.—Cust Dut 21.5(3).

### NORMAL INCIDENT OF ARREST AND CUSTODY

E.D.N.C. 1996. It was "normal incident of arrest and custody" for police to serve new arrest warrants for first-degree murder on defendant who was incarcerated on charge of accessory after fact to murder, and thus, defendant's subsequent statement to police did not violate his previously-attached right to counsel, even if police hoped, or

perhaps even expected, that execution of second set of warrants would prompt defendant to initiate conversation that would lead to his statement; police were duty bound to seek arrest warrants upon probable cause that defendant committed crimes alleged therein, and police were also duty bound to execute those warrants upon defendant regardless of possibility that he might be prompted into making uncounseled statements. U.S.C.A. Const. Amends. 5, 6.—Bromfield v. Freeman, 923 F.Supp. 783, appeal dismissed 121 F.3d 697.—Crim Law 412.2(2), 412.2(4).

### NORMAL INCOME

N.Y.A.D. 3 Dept. 1963. Fire policy proceeds which were received upon partial destruction of building and which exceeded cost of the building, less depreciation, were not derived from "sale or exchange" and did not represent "capital gain" but constituted "normal income" within broad definition of gross income. Tax Law, §§ 350, subds. 13, 15, 359, subd. 1.—Goetz v. Murphy, 236 N.Y.S.2d 321, 18 A.D.2d 857.—Tax 995.

### NORMAL INCOME SECURITY

C.A.3 (Pa.) 1986. Cattle intended for immediate sale were "normal income security," not "basic security," under Farmers' Home Administration Regulations governing proceeds of sale of loan collateral.—U.S. v. Walter Dunlap & Sons, Inc., 800 F.2d 1232.—Sec Tran 168.

### NORMAL INCREMENTAL INCREASES

S.C.App. 1984. Statewide teachers' pay raises are not "normal incremental increases," for purposes of determining total salary under provision of Education Finance Act prohibiting salary reductions. Code 1976, §§ 59-20-10 et seq., 59-20-50(4)(a).—Price v. Watt, 313 S.E.2d 58, 280 S.C. 510.—Schools 144(4).

### NORMAL INVESTIGATIVE PROCEDURES

C.A.10 (Colo.) 1997. "Normal investigative procedures," as used in statute which provides that district judge who issues wiretap order must first be satisfied that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried, does not include electronic eavesdropping techniques. 18 U.S.C.A. § 2518(1)(c).—U.S. v. Castillo-Garcia, 117 F.3d 1179, certiorari denied Armendariz-Amaya v. U.S., 118 S.Ct. 395, 522 U.S. 962, 139 L.Ed.2d 309, certiorari denied Avila v. U.S., 118 S.Ct. 428, 522 U.S. 974, 139 L.Ed.2d 328.—Tel 516.

Or. 1991. "Normal investigative procedures" within meaning of statutory requirement that wiretap application describe whether such procedures have been tried requires that applicant set forth information, apart from conclusory statements based on general experience, demonstrating that normal investigative techniques employing normal amount of resources have failed to make case within reasonable period of time or that such techniques will fail in case at hand; although every option need not be pursued, avenues of investiga-

tion that appear both fruitful and cost effective cannot be ignored; futile, extraordinarily expensive, or unreasonably long methods of investigation need not be pursued. ORS 133.724(3)(c).—State v. Stockfleth, 804 P.2d 471, 311 Or. 40.—Tel 516.

## NORMALIZATION

U.S.Dist.Col. 1973. Under the “normalization” method of depreciation used by regulated utilities in calculating their federal income tax expense for rate-making purposes, utilities are required to compute their cost of service as if they were using straight-line depreciation; under the “flow-through” method, utilities using accelerated depreciation for tax purposes are required to use the same method for calculating their cost of service, and thus pass on any tax savings to their customers. 26 U.S.C.A. (I.R.C.1954) § 167(a, b); Natural Gas Act, § 1 et seq., 15 U.S.C.A. § 717 et seq.—Federal Power Commission v. Memphis Light, Gas and Water Division, 93 S.Ct. 1723, 411 U.S. 458, 36 L.Ed.2d 426, conformed to 500 F.2d 798, 163 U.S.App.D.C. 130.—Pub Ut 127, 128.

C.A.D.C. 1972. Gas pipeline utilities are not permitted, as to nonexpansion property, to shift from “flow-through method,” involving calculation of actual federal income tax liability produced by use of liberalized tax depreciation deductions, to “normalization” method whereby tax expense component of cost of service is calculated by assuming that for tax purposes utility uses deduction for depreciation based on straight line method although in fact utility uses liberalized tax depreciation deduction. 26 U.S.C.A. (I.R.C.1954) § 167(l)(2)(C), (3)(B, C), (4)(A); Natural Gas Act, §§ 4, 4(d), 5, 5(a), 15 U.S.C.A. §§ 717c, 717c(d), 717d, 717d(a).—Tennessee Val. Municipal Gas Ass'n v. Federal Power Commission, 470 F.2d 446, 152 U.S.App.D.C. 298, on remand TENNESSEE VALLEY MUNICIPAL GAS ASSOCIATION, ET AL. v. ALABAMA-TENNESSEE NATURAL GAS COMPANY, ALABAMA-TENNESSEE NATURAL GAS COMPANY,, 1973 WL 13287, rehearing denied 1974 WL 13309.—Gas 14.4(7).

C.A.D.C. 1972. Under the “flow-through” method of liberalized depreciation, regulated utility is allowed to recoup from its customers by means of its rates only taxes it actually pays; under “normalization” it is allowed to recoup the higher taxes it would pay, but actually does not, if it were using straight-line depreciation. 26 U.S.C.A. (I.R.C. 1954) § 167(l) (2) (C), (l) (3) (B, C), (l) (4) (A).—Memphis Light, Gas and Water Division v. Federal Power Commission, 462 F.2d 853, 149 U.S.App. D.C. 238, certiorari denied 93 S.Ct. 234, 409 U.S. 941, 34 L.Ed.2d 192, certiorari granted 93 S.Ct. 520, 409 U.S. 1037, 34 L.Ed.2d 485, reversed 93 S.Ct. 1723, 411 U.S. 458, 36 L.Ed.2d 426, conformed to 500 F.2d 798, 163 U.S.App.D.C. 130.—Pub Ut 128.

N.C.App. 1982. Flow-through and normalization are alternative rate-making policies for determining cost component of regulated utility's cost of service; under “flow-through,” ratepayers realize tax benefits of expenses at time those expenses are used as tax deductions by utility, whereas, “normali-

zation” defers tax benefit until expense is recovered through rates.—State ex rel. Utilities Com'n v. North Carolina Textile Mfrs. Ass'n, Inc., 296 S.E.2d 487, 59 N.C.App. 240, reversed 306 S.E.2d 113, 309 N.C. 238, appeal after remand State ex rel. Utilities Com'n v. Carolina Power & Light Co., 358 S.E.2d 35, 320 N.C. 1.—Pub Ut 128.

Pa.Cmwltth. 2002. For purposes of setting utility rates, “normalization” is the ratemaking process used to calculate a normal expense that occurs other than on an annual basis. 66 Pa.C.S.A. § 1308; 52 Pa.Code § 53.52(b)(2).—City of Lancaster (Sewer Fund) v. Pennsylvania Public Utility Com'n, 793 A.2d 978.—Pub Ut 128.

Pa.Cmwltth. 1996. For utility ratemaking purposes, “normalization” of expense is name given to adjustment of item of recurring expense when amount of expense incurred in test year is greater or less than that which utility may be expected to incur annually during estimated life of new rates.—Popowsky v. Pennsylvania Public Utility Com'n, 674 A.2d 1149.—Pub Ut 128.

Pa.Cmwltth. 1988. “Normalization” is rate-making concept designed to adjust utility's operating expenses in its test year by eliminating abnormal, nonannual events which are known and certain to change in regularly recurring manner.—Continental Telephone Co. of Pennsylvania v. Pennsylvania Public Utility Com'n, 548 A.2d 344, 120 Pa.Cmwltth. 25, appeal denied 557 A.2d 345, 521 Pa. 613.—Pub Ut 128.

S.D. 1978. In drafting ordinances establishing rate for investor-owned electric and gas public utility company, cities' inclusion of \$411,946, which was amount of interest expense on construction work in progress, as a tax deduction in computing allowable cost of service rather than permitting the “normalization” or capitalization of such interest expense was not arbitrary, capricious nor unreasonable; moreover cities properly rejected as being unsupported by record company's claim that 7.5 percent interest rate used as an allowance for funds used during construction work was an after tax rate. SDCL 1-24-1 et seq., 9-35-1; Laws 1975, c. 283, § 60.—Northwestern Public Service Co. v. Cities of Chamberlain, Huron, Mitchell, Redfield, Webster, and Yankton, 265 N.W.2d 867.—Electricity 11.3(1); Gas 14.4(1).

## NORMALIZATION METHOD

C.A.D.C. 1990. Under the “flowthrough method” for handling expense deductions allowed under the tax code sooner than the Federal Energy Regulatory Commission allows them, utility must pass the tax benefit on to the customers in the year received under the tax laws; under the “normalization method,” utility spreads the tax benefit over the life for the relevant asset, so that the customer, in any given year of the asset's life, will both bear the burden of depreciation applicable to that year and enjoy whatever tax benefit is associated with the depreciation; this is known as the “matching principle.”—Public Utilities Com'n of State of Cal. v. F.E.R.C., 894 F.2d 1372, 282 U.S.App.D.C. 332,

rehearing denied 902 F.2d 1006, 284 U.S.App.D.C. 180.—Gas 14.4(1).

### NORMALIZED MAINTENANCE

C.A.7 1981. For purposes of determining railroad's right to abandon track, "normalized maintenance" is amount needed for economic and efficient operation of branches over long term, and it is to be contrasted with "actual maintenance," which is minimum expenditure necessary for safe short-term operation.—International Minerals & Chemical Corp. v. I.C.C., 656 F.2d 251.—Commerce 85.6.

### NORMALIZED MAINTENANCE COSTS

C.A.7 1983. Interstate Commerce Commission, in determining unprofitability of rail line, calculates maintenance costs in two ways: "actual maintenance costs," which are actual expenditures incurred in maintaining rail line during course of particular year, and "normalized maintenance costs," which represent average annual cost of continuing economic and efficient rail operation on long-term basis.—People of State of Ill. v. I.C.C., 698 F.2d 868.—Commerce 85.6.

### NORMAL JUDICIAL FUNCTION

C.A.11 (Ala.) 1983. In context of determining whether judge was entitled to judicial immunity from liability under Civil Rights Acts for ordering involuntary sterilization as condition to favorable property settlement in divorce proceeding, where order arose from and within context of divorce case, order was clearly "normal judicial function." 42 U.S.C.A. § 1971 et seq.—Scott v. Hayes, 719 F.2d 1562.—Civil R 214(8).

### NORMAL LIVING EXPENSE

C.A.2 (N.Y.) 1987. Secretary of Agriculture could determine that New York's "restaurant allowance" was "income" for purpose of determining food stamp eligibility of recipients in welfare hotel; Secretary could define restaurant allowance as "normal living expense" within meaning of regulation defining gain or benefit for purpose of statutory definition of income; Secretary could conclude that inclusion of food eaten at home within category of gain or benefit and as income did not mean that reimbursements for meals away from home were excluded from income. Food Stamp Act of 1964, §§ 3(g)(1, 4, 5, 8, 9), (o), 5(d), (d)(5), 8(a), as amended, 7 U.S.C.A. §§ 2012(g)(1, 4, 5, 8, 9), (o), 2014(d), (d)(5), 2017(a).—State of N.Y. v. Lyng, 829 F.2d 346.—Agric 2.6(2).

### NORMAL LOAD CONDITIONS

Pa.Super. 1985. The phrase "normal load conditions," in section of motor vehicle code establishing when lift axle of triaxle truck must be in full contact with highway, must be read in terms of "weight" and not "volume". 75 Pa.C.S.A. §§ 4943, 4943(e)(1).—Com. v. Harris, 488 A.2d 346, 339 Pa.Super. 135.—Autos 327.

### NORMALLY ATTENDANT TO

#### NORMALLY

N.D.Iowa 1997. Regulation listing "highway project of four or more lanes on a new location" as example of action "normally" requiring environmental impact statement (EIS) did not require EIS regarding proposed construction of highway bypass; addendum to environmental assessment (EA) and finding of no significant impact (FONSI) regarding bypass were adequate under procedural requirements of NEPA. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332; 23 C.F.R. § 771.115; 40 C.F.R. § 1508.9(a).—Lakes Region Legal Defense Fund, Inc. v. Slater, 986 F.Supp. 1169.—Environ Law 595(7).

Fla.App. 1 Dist. 1985. Use of "normally" and "substantially" in administrative rule regarding issuance of certificates of need for health care facilities and services did not render such rule invalid as grant of unbridled discretion to Department of Health and Rehabilitative Services to determine what law should be, in derogation of West's F.S.A. Const. Art. 2, § 3, prohibiting unauthorized delegation of legislative authority. West's F.S.A. §§ 120.56(1), 381.494(7)(b)1.—Humhosco, Inc. v. Department of Health and Rehabilitative Services, 476 So.2d 258.—Health 238.

N.Y.Sup. 1984. Use of word "normally" in section of Magnuson-Moss Act defining consumer product as any tangible, personal property "normally" used for personal, family, or household purposes involves a determination of the product's common, ordinary, or usual use and focuses on the classwide use of the product; an individual's deviation from the normal use of a particular type product will not affect its classification for purposes of the Act. Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, § 101(1), 15 U.S.C.A. § 2301(1).—Business Modeling Techniques, Inc. v. General Motors Corp. (Pontiac Motor Div.), 474 N.Y.S.2d 258, 123 Misc.2d 605.—Cons Prot 6.

Or.App. 2001. "Normally," within meaning of subdivision covenants, conditions, and restrictions (CCRs) providing that property 'may be reasonably and normally used for agricultural farming, tree farming or residential use only,' referred to property being typically or usually used for farming and residential purposes, rather than to property being used only for presumably ordinary or decidedly nonexotic uses.—Turudic v. Stephens, 31 P.3d 465, 176 Or.App. 175.—Covenants 52.

Va. 1897. "Naturally," as used in an instruction authorizing the recovery of "such damages as have resulted naturally from the breach" of the warranty, is but the equivalent of "legitimately," "normally," or, in other words, embraces such damages as are the natural—that is to say, the legitimate, normal—result consequent upon the breach of the warranty.—Reese v. Bates, 26 S.E. 865, 94 Va. 321.

#### NORMALLY ATTENDANT TO ARREST AND CUSTODY

D.C. 1981. Where record established that defendant was expressly questioned by federal agents

at field office, questioning of defendant by law enforcement authorities fell squarely within definition of "custodial interrogation" and thus any statements obtained from defendant beyond those "normally attendant to arrest and custody" had to be suppressed. U.S.C.A. Const. Amend. 5.—U.S. v. Hinckley, 525 F.Supp. 1342, clarified on denial of reconsideration 529 F.Supp. 520, affirmed 672 F.2d 115, 217 U.S.App.D.C. 262.—Crim Law 412.2(2).

**NORMALLY EMPLOYED FEWER THAN 20 EMPLOYEES**

D.Colo. 1991. Saturdays could be considered in deciding whether employer "normally employed fewer than 20 employees," so as to qualify for small employer exception from notification requirements of Consolidated Omnibus Budget Reconciliation Act (COBRA); employer was open for business six days a week, although it had a reduced staff on Saturdays. Employee Retirement Income Security Act of 1974, § 601(b), as amended, 29 U.S.C.A. § 1161(b).—Martinez v. Dodge Printing Centers, Inc., 123 B.R. 77.—Pensions 28.

**NORMALLY EXPOSED TO PUBLIC VIEW**

Colo.App. 1986. Abdominal scar, which commenced six inches above naval and ran two inches below naval, constituted permanent disfigurement of body part "normally exposed to public view" within meaning of workers' compensation statute allowing compensation for permanent disfigurement. C.R.S. 8-51-105.—Twilight Jones Lounge v. Showers, 732 P.2d 1230.—Work Comp 807.

**NORMALLY LAW-ABIDING PERSONS**

N.D. 1979. "Normally law-abiding persons," as used in instruction that entrapment occurs when a law enforcement agent induces commission of offense, using persuasion or other means likely to cause normally law-abiding persons to commit offense, was crux of statutory entrapment defense, and was therefore correctly applied in prosecution for sale of methamphetamine and marijuana in which facts and inferences warranted entrapment instruction. NDCC 12.1-05-11, 19-03.1-05, Schedule I, subd. 4, par. m, 19-03.1-07, Schedule II, subd. 4, par. b.—State v. Folk, 278 N.W.2d 410.—Crim Law 772(6).

**NORMALLY PROGRESS**

Ark. 1991. Student who repeated fifth grade at request of his mother did not "normally progress" through school within meaning of grandfather clause of age rule allowing students already in school as of September 1980 to play sports until age 20, if normal progression through school has occurred since 1980.—Arkansas Activities Ass'n v. Meyer, 805 S.W.2d 58, 304 Ark. 718.—Schools 164.

**NORMAL MANNER**

N.Y.Sup. 1971. Under statute prohibiting strikes by public employees and creating presumption that one "who abstains wholly or in part from the full performance of his duties in his normal manner" has engaged in strike, college teachers

who had taught 12 classroom hours in preceding academic year under collective bargaining agreement which expired thereafter could not justify refusal to work three additional classroom hours during the current academic year on theory that working 12 classroom hours constituted working in their "normal manner"; phrase "normal manner" refers not to hours of employment but to fashion in which duty is discharged. Civil Service Law § 210, subds. 1, 2(b).—Caso v. Katz, 324 N.Y.S.2d 712, 67 Misc.2d 793, affirmed 328 N.Y.S.2d 615, 38 A.D.2d 691, appeal denied 333 N.Y.S.2d 1027, 30 N.Y.2d 485, 284 N.E.2d 164.—Labor 342.

**NORMAL MILITARY DUTIES**

Cl.Ct. 1983. Phrase "normal military duties," as used in SECNAVINST 1770.3, which governs eligibility of naval reservists for disability pay, means a reservist's military duties previously assigned. 10 U.S.C.A. § 6148; 37 U.S.C.A. § 204(i).—Laningham v. U.S., 2 Cl.Ct. 535.—Armed S 13(2).

**NORMAL MILITARY DUTY**

Cl.Ct. 1983. Phrase "normal military duty" as used in SECNAVINST 1770.3, which governs entitlement to and termination of disability pay for naval reserve officers, contemplates any duty status commensurate with the reservist's office, grade, rank or rating and not only the reservist's particular duty prior to onset of disability. 10 U.S.C.A. § 6148; 37 U.S.C.A. § 204(i).—Laningham v. U.S., 2 Cl.Ct. 535.—Armed S 13(2).

**NORMAL MIND**

Iowa 1919. A "normal mind" is one which in strength and capacity ranks reasonably well with the average of the great body of men and women who make up organized human society in general, and are by common consent recognized as sane and competent to perform the ordinary duties and assume the ordinary responsibilities of life.—State v. Haner, 173 N.W. 225, 186 Iowa 1259.—Mental H 3.1.

**NORMAL OFFICE HOURS**

Wash.App. Div. 1 1997. Phrase "normal office hours," for purposes of statute providing that summons is "served" on county when copy is delivered to deputy auditor during normal office hours, are hours that auditor's office is open to public, not the hours that any employee might be working in office outside those hours. West's RCWA 4.28.080(1).—San Juan Fidalgo Holding Co. v. Skagit County, 943 P.2d 341, 87 Wash.App. 703, as amended, and as amended, review denied 959 P.2d 127, 135 Wash.2d 1008.—Counties 219.

**NORMAL OPERATING CONDITIONS**

C.A.3 1978. Phrase "normal operating conditions" as used in Occupational Safety and Health Review Commission standard for the use of industrial overhead cranes and to effect that live parts will not be exposed to accidental contact under "normal operating conditions" does not cover maintenance work on cranes themselves.—Bethle-

hem Steel Corp. v. Occupational Safety and Health Review Com'n, 573 F.2d 157.—Labor 9.7.

#### **NORMAL OPERATING REPLACEMENT**

Utah App. 1995. State Tax Commission lacked authority to promulgate rule denying sales tax exemption for expanding operations to business which replaced equipment and machinery for express purpose of expanding its operations, rather than as replacements for equipment and machinery which had worn out or become obsolete; Commission had defined "normal operating replacement" in such a way that exemption would never be available to business in which old and new equipment and machinery produced a common product. U.C.A. 1953, 59-12-104(16) (1990); Utah Admin. R. R865-19-85S.A.6.—Newspaper Agency Corp. v. Utah State Tax Com'n, Auditing Div., 892 P.2d 17, rehearing denied, certiorari granted Newspaper Ag. v. Tax Com'n, 910 P.2d 425, reversed 938 P.2d 266, rehearing denied.—Tax 1222.

#### **NORMAL OPERATING REPLACEMENTS**

Utah 1997. "Normal operating replacements" excluded from sales and use tax exemption for machinery or equipment, as reasonably interpreted by State Tax Commission, encompassed replacements for machinery or equipment in good working order. U.C.A.1953, 59-12-104(16); Utah Admin. Code R865-19-85S(A)(6).—Newspaper Agency Corp. v. Auditing Div. of Utah State Tax Com'n, 938 P.2d 266, rehearing denied.—Tax 1244.1.

Utah 1997. Presses purchased by taxpayer that provided printing services to newspapers qualified as "normal operating replacements", outside sales and use tax exemption for machinery or equipment, though new presses were more technologically advanced, efficient, and productive than old presses, where new presses performed same function as old presses. U.C.A.1953, 59-12-104(16); Utah Admin. Code R865-19-85S(A)(6).—Newspaper Agency Corp. v. Auditing Div. of Utah State Tax Com'n, 938 P.2d 266, rehearing denied.—Tax 1244.1.

#### **NORMAL PARENTAL RELATIONSHIP**

Idaho 1975. If father felt that the insistence upon his custody and visitation rights would be detrimental to the child, in view of the mother's attitude, such an honest belief would preclude a determination that he had abandoned his child by failing to maintain a "normal parental relationship." I.C. § 16-2001.—Matter of Matthews, 540 P.2d 284, 97 Idaho 99.—Child C 68.

#### **NORMAL PAROLE**

C.A.9 (Cal.) 1977. District court judge is under no duty to advise a defendant, before accepting defendant's guilty plea of "normal parole," which is a conditional release from incarceration under supervision at a time prior to the expiration of the full term set by the sentencing court. Fed.Rules Crim. Proc. rule 11, 18 U.S.C.A.—Bunker v. Wise, 550 F.2d 1155.—Crim Law 264.

#### **NORMAL PRECAUTIONS TO MAINTAIN PRIVACY**

C.A.5 (Tex.) 2000. To take "normal precautions to maintain privacy," for Fourth Amendment purposes, simply means that a defendant must outwardly behave as a typical occupant of the space in which he claims an interest, avoiding anything that might publicly undermine his expectation of privacy. U.S.C.A. Const.Amend. 4.—U.S. v. Vega, 221 F.3d 789, rehearing denied, certiorari denied 121 S.Ct. 1105, 531 U.S. 1155, 148 L.Ed.2d 975.—Searches 26.

#### **NORMAL PUBLIC USE**

Wash. 1992. Placement of locked gates at each of three-mile stretch of abandoned railroad right-of-way did not "materially interfere with normal public use" of creek's shoreline, and thus, placement was not "substantial development" within meaning of Shoreline Management Act; even if access on right-of-way was required to preserve any "normal public use" of water and shoreline of creek, one could simply walk around gates and proceed on right of way. West's RCWA 90.58.030(3)(e).—Cowiche Canyon Conservancy v. Bosley, 828 P.2d 549, 118 Wash.2d 801, reconsideration denied.—Zoning 384.1.

#### **NORMAL, REASONABLE AND CURRENT EXPENSES OF OPERATION AND MAINTENANCE**

Mont. 1971. Construction costs of both separate and joint use facilities in city shop complex to be used by water and sewer department were "normal, reasonable and current expenses of operation and maintenance" of sewer and water system, within statute providing that city, before issuance or sale of revenue bonds, must create sinking fund and pledge revenues of operation thereof, less normal, reasonable and current expenses of operation and maintenance, to retirement of bonds; thus, water and sewer department funds derived from charges could be committed to payment of part of cost of construction of complex, especially where repayment of outstanding bonds was not in jeopardy. R.C.M.1947, § 11-2218.—Greener v. City of Great Falls, 485 P.2d 932, 157 Mont. 376.—Mun Corp 951.

#### **NORMAL REASONS**

N.Y.Sur. 1935. Under will providing for payment of income to boy during minority so long as he remains member of testator's household, temporary absences for educational or other "normal reasons" not being violation of condition, child was entitled to income during minority after testator's household was broken up, since testator's plan contemplated payment unless child himself was responsible for termination of benefit.—In re McCabe's Estate, 276 N.Y.S. 763, 154 Misc. 279.—Wills 660.

#### **NORMAL REPAIR**

Pa.Cmwth. 1984. Conversion of outdoor advertising signs from wood to metal did not constitute "normal repair" within meaning of outdoor adver-

## NORMAL REPAIR

tising control statute defining "erect" and supported finding that signs had been erected after the effective date of the Outdoor Advertising Control Act. 36 P.S. §§ 2718.101, 2718.103(2).—Park Outdoor Advertising Co. v. Com. Dept. of Transp., 485 A.2d 864, 86 Pa.Cmwlth. 506.—High 153.5.

## NORMAL RESTING HOURS

N.Y.Civ.Ct. 1984. Service of process giving notice of summary proceedings for nonpayment of rent shall not be permitted during "normal resting hours," which are between 10:30 p.m. and 6:00 a.m., for purposes of determining whether "reasonable attempt" at personal service was made so as to permit "conspicuous service." McKinney's RPAPL § 735.—Metropolitan Life Ins. Co. v. Scharpf, 478 N.Y.S.2d 567, 124 Misc.2d 1096.—Land & Ten 297(3).

## NORMAL RETIREMENT AGE

C.A.5 (La.) 1984. For purposes of ERISA provision that "employee's right to his normal retirement benefits is nonforfeitable upon attainment of his normal retirement age," "normal retirement age" referred to that established by pension plan, subject to ERISA minimums, and not to age at which employee's right to receive normal retirement benefits vests, and thus, employee was not entitled to protection afforded by ERISA nonforfeiteability provision until he reached age of 65, notwithstanding that he became eligible to receive normal retirement benefits at earlier date. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 3, 3(24), 203(a), 29 U.S.C.A. §§ 1001 et seq., 1002, 1002(24), 1053(a).—Johnson v. Franco, 727 F.2d 442.—Pensions 121.

N.D.Ohio 1988. Under insurance agent's agreement providing that agent at age 60 could receive 100% of accrued benefit under deferred compensation plan and extended earnings plan, "normal retirement age," for purposes of Employee Retirement Income Security Act nonforfeiture section providing that each pension plan shall provide that employee's right to normal retirement benefit is nonforfeitable upon attainment of normal retirement age, was age 60. Employee Retirement Income Security Act of 1974, § 203(a), 29 U.S.C.A. § 1053(a).—Plazzo v. Nationwide Mut. Ins. Co., 697 F.Supp. 1437, reversed 892 F.2d 79, certiorari denied 111 S.Ct. 370, 498 U.S. 950, 112 L.Ed.2d 332.—Pensions 63.1.

## NORMAL RETIREMENT BENEFIT

Cal. 1997. Section of ERISA defining "normal retirement benefit" as greater of early retirement benefit under plan or benefit under plan commencing at normal retirement age simply ensures that periodic payments of participant's normal retirement benefit under plan will be no smaller than payments available under plan's early retirement option, if any; "normal retirement benefit" does not include increased value of unreduced early retirement payments. Employee Retirement Income Security Act of 1974, § 3(22), 29 U.S.C.A. § 1022(22).—In re Marriage of Oddino, 939 P.2d

1266, 65 Cal.Rptr.2d 566, 16 Cal.4th 67, rehearing denied, certiorari denied Oddino v. Oddino, 118 S.Ct. 1302, 523 U.S. 1021, 140 L.Ed.2d 468, rehearing denied 118 S.Ct. 1831, 523 U.S. 1133, 140 L.Ed.2d 965.—Pensions 23.

Cal. 1997. Early retirement and normal retirement age benefits referred to in ERISA section defining "normal retirement benefit" are periodic benefits, without any actuarial adjustment. Employee Retirement Income Security Act of 1974, § 3(22), 29 U.S.C.A. § 1022(22).—In re Marriage of Oddino, 939 P.2d 1266, 65 Cal.Rptr.2d 566, 16 Cal.4th 67, rehearing denied, certiorari denied Oddino v. Oddino, 118 S.Ct. 1302, 523 U.S. 1021, 140 L.Ed.2d 468, rehearing denied 118 S.Ct. 1831, 523 U.S. 1133, 140 L.Ed.2d 965.—Pensions 121.

## NORMAL ROUTES

M.D.Pa. 1975. "Curfew ordinance exception" relating to "normal travel" in motor vehicle with parental consent was not impermissibly vague for use of quoted phrase, nor was it impermissibly vague for use of phrase "normal routes" in reference to normal routes of interstate travel. U.S.C.A. Const. Amend. 14.—Bykofsky v. Borough of Middletown, 401 F.Supp. 1242, affirmed 535 F.2d 1245, certiorari denied 97 S.Ct. 394, 429 U.S. 964, 50 L.Ed.2d 333.—Mun Corp 594(2).

## NORMAL SALE

Iowa 1975. Sale by grocery store chain corporation of land and supermarket operation to company in real estate business with a leaseback to grocery store corporation was an "abnormal transaction not reflecting market value" and not a "normal sale" as is required by provisions of property tax statute before sales price is to be considered in arriving at market value. I.C.A. § 441.21.—City of Atlantic v. County Bd. of Review of Cass County, 234 N.W.2d 880.—Tax 493.7(2).

## NORMAL SCHOOLS

Wis. 2000. For purposes of constitutional analysis of state school financing system, state constitution's references to "common schools," "normal schools," and "district schools" would be read as references to "public schools," as common schools, district schools, and normal schools were all forms of publicly funded schools. W.S.A. Const. Art. 10, §§ 2(1, 2), 3.—Vincent v. Voight, 614 N.W.2d 388, 236 Wis.2d 588, 2000 WI 93.—Schools 19(1).

## NORMAL SETTLING

Cal. 1961. Under insurance policy excluding losses occasioned by "normal settling", loss occasioned by twelve-inch drop in wall of house accompanied by open breaks in wall and breakage in heating system, was not "normal settling" when it occurred suddenly and without warning or previous visible indication that it might happen, and such loss was within coverage of policy.—Prickett v. Royal Ins. Co., 363 P.2d 907, 14 Cal.Rptr. 675, 56 Cal.2d 234, 86 A.L.R.2d 711.—Insurance 2144(3).

**NORMAL STATE AND FEDERAL TAXES**

Wis. 1958. State and federal unemployment compensation taxes, federal old age benefits taxes, and surtaxes were “normal state and federal taxes” within 1936 resolution of parent corporation’s stockholders providing that shares of common stock of subsidiary should be reserved for issuance as bonus to officers and principal employees of subsidiary in accordance with plan to be devised by subsidiary’s board of directors, but that no plan should be adopted which would result in receipt of bonus stock in excess of 150 shares for each \$50,000 of accumulated net earnings of subsidiary over and above normal state and federal taxes, and such taxes should not have been added back to net profits in computing basis for stock distribution, but excess profits tax provided for in 1940 as an emergency incident of war was not a normal tax within resolution.—Frey v. Geuder, Paeschke & Frey Co., 90 N.W.2d 765, 4 Wis.2d 257, rehearing denied 92 N.W.2d 758, 4 Wis.2d 257.—Corp 316(3).

**NORMAL TRADE, BUSINESS OR OCCUPATION**

E.D.Va. 1965. Where shipbuilding company had previously erected number of cranes using its own personnel and equipment and was capable of doing all work necessary to erect cranes without assistance from anyone, erection of cranes by contracting company was part of shipbuilding’s “normal trade, business or occupation” within purview of Virginia Workmen’s Compensation statute governing liability of owner to workman of subcontractors. Code Va.1950, § 65-26.—Evans v. Newport News Shipbuilding & Dry Dock Co., 243 F.Supp. 1017, affirmed 361 F.2d 364, certiorari denied 87 S.Ct. 397, 385 U.S. 959, 17 L.Ed.2d 304.—Work Comp 355.

**NORMAL TRAVEL**

C.A.2 (N.Y.) 1999. Department of Labor (DOL) regulation providing that “normal travel” from home to work was not worktime for purposes of overtime compensation was reasonable interpretation of Portal-to-Portal Act and thus was entitled to deference, inasmuch as “normal travel” did not represent objective standard of how far most workers commute, but subjective standard defined by what was usual within confines of a particular employment relationship. Fair Labor Standards Act of 1938, § 7(a)(1), 29 U.S.C.A. § 207(a)(1); Portal-to-Portal Act of 1947, § 4(a), 29 U.S.C.A. § 254(a); 29 C.F.R. § 785.2.—Kavanagh v. Grand Union Co., Inc., 192 F.3d 269.—Labor 1284.

M.D.Pa. 1975. “Curfew ordinance exception” relating to “normal travel” in motor vehicle with parental consent was not impermissibly vague for use of quoted phrase, nor was it impermissibly vague for use of phrase “normal routes” in reference to normal routes of interstate travel. U.S.C.A.Const. Amend. 14.—Bykofsky v. Borough of Middletown, 401 F.Supp. 1242, affirmed 535 F.2d 1245, certiorari denied 97 S.Ct. 394, 429 U.S. 964, 50 L.Ed.2d 333.—Mun Corp 594(2).

**NORMAL USE**

C.A.Fed. (Cal.) 2002. Articles that are concealed or obscured in their normal use are not proper subjects for design patents, since their appearance cannot be a matter of concern, and in this context, “normal use” extends over a period in the article’s life, beginning after completion of manufacture or assembly and ending with the ultimate destruction, loss, or disappearance of the article.—Contessa Food Products, Inc. v. Conagra, Inc., 282 F.3d 1370.—Pat 15.

C.A.5 (La.) 1996. “Defective product,” for purposes of strict liability action commenced prior to effective date of Louisiana Products Liability Act, is one that is unreasonably dangerous to normal use; “normal use” is term of art that includes all intended uses, as well as all foreseeable uses and misuses of product. LSA-R.S. 9:2800.51-9:2800.59.—Guilbeau v. W.W. Henry Co., 85 F.3d 1149, rehearing and suggestion for rehearing denied 95 F.3d 56, certiorari denied 117 S.Ct. 766, 519 U.S. 1091, 136 L.Ed.2d 713, rehearing denied 117 S.Ct. 1292, 520 U.S. 1141, 137 L.Ed.2d 367.—Prod Liab 15.

C.A.5 (La.) 1993. Under Louisiana law, defective product is one that is unreasonably dangerous to normal use; “normal use” is term of art that includes all intended uses, as well as all foreseeable uses and misuses of product.—Johnstone v. American Oil Co., 7 F.3d 1217, mandate recalled 17 F.3d 728.—Prod Liab 8, 15.

C.A.5 (La.) 1993. Liability for injury from “reasonably anticipated use” within meaning of Louisiana Products Liability Act (LPLA) referred to objective standard of liability for uses that manufacturer should reasonably have expected of ordinary consumer, rather than broader, prior standard of “normal use” which included reasonably foreseeable uses and misuses. LSA-R.S. 9:2800.51 et seq., 9:2800.53(7), 9:2800.54.—Lockart v. Kobe Steel Ltd. Const. Machinery Div., 989 F.2d 864.—Prod Liab 15.

C.A.5 (La.) 1988. Product’s manufacturer has duty to warn consumers of any dangerous propensities which may foreseeably accompany normal use of product, and “normal use” includes reasonably foreseeable misuse of product.—White v. Amoco Oil Co., 835 F.2d 1113.—Prod Liab 14, 15.

C.A.5 (La.) 1987. In admiralty cases “normal use” of product includes all reasonably foreseeable uses, including foreseeable misuse.—Vickers v. Chiles Drilling Co., 822 F.2d 535, appeal after remand 882 F.2d 158.—Prod Liab 27.

C.A.5 (La.) 1982. Under Louisiana law, strict liability may be imposed when a product is unreasonably dangerous in “normal use,” which is not limited to “intended use” but, rather, is a matter of foreseeable use.—Branch v. Chevron Intern. Oil Co., Inc., 681 F.2d 426, appeal after remand 783 F.2d 1289.—Prod Liab 15.

C.A.5 (La.) 1980. “Normal use” is a term of art in the parlance of Louisiana products liability law, delineating the scope of a manufacturer’s duty and consequent liability; it encompasses all reasonably

foreseeable uses of a product.—*LeBouef v. Good-year Tire & Rubber Co.*, 623 F.2d 985.—Prod Liab 15.

C.A.10 (N.M.) 1996. Under New Mexico law, drive-by shooting of insured pedestrian arose out of “ownership, maintenance or use” of uninsured motor vehicle for purposes of uninsured motorists (UM) coverage, whether driver or passenger was assailant; at time of shooting, assailant was using vehicle as transportation, this was part of “normal use” of vehicle, vehicle was “active accessory” to assault, there was thus sufficient causal connection between its use and injuries, intentional tort did not break causal nexus, and assailant remained in vehicle and never disassociated assault from use of vehicle.—*State Farm Mut. Auto. Ins. Co. v. Blystra*, 86 F.3d 1007, appeal after remand 125 F.3d 863.—Insurance 2679.

N.D.Fla. 1993. Under Florida law, legal inference that, if product malfunctions during normal operation, product was defective both at time of injury and at time it was within control of supplier did not apply to driver’s seat back locking device which allegedly failed, causing injuries to driver; fact that seat back may have broken in accident did not establish seat “malfunction,” and case did not involve “normal use” of automobile in that alleged malfunction was result of rear-end collision involving four automobiles.—*Humphreys v. General Motors Corp.*, 839 F.Supp. 822, affirmed 47 F.3d 430.—Prod Liab 77.5.

E.D.La. 2001. In the context of products liability claim that product was defective and unreasonably dangerous for its normal use, “normal use” includes all reasonably foreseeable uses, including foreseeable misuse. Restatement (Second) of Torts § 402A.—*In re M/V DANIELLE BOUCHARD*, 164 F.Supp.2d 794.—Prod Liab 8, 15.

E.D.La. 1990. “Normal use” within meaning of Louisiana products liability law means all reasonable foreseeable uses of product, including foreseeable misuse.—*Sullivan v. Rowan Companies, Inc.*, 736 F.Supp. 722, appeal dismissed 925 F.2d 1460, affirmed 952 F.2d 141.—Prod Liab 15.

M.D.La. 1983. In proving product defective by reason of its hazard to “normal use” under Louisiana law, “normal use” is not restricted simply to use for purpose for which product was intended, but rather that term extends to all reasonably foreseeable uses.—*Reed v. John Deere*, 569 F.Supp. 371.—Prod Liab 15.

La. 1990. For purposes of determining whether product is unreasonably dangerous in normal use, “normal use” of product includes any reasonably foreseeable misuse.—*Reilly v. Dynamic Exploration, Inc.*, 571 So.2d 140, appeal after new trial 619 So.2d 120, writ denied *Barrett v. Production Management Corp., Inc.*, 625 So.2d 1040, writ denied 625 So.2d 1043.—Prod Liab 15.

La. 1988. “Normal use” for products liability purposes is term of art which includes all intended uses, as well as all foreseeable uses and misuses, of

product.—*Ingram v. Caterpillar Machinery Corp.*, 535 So.2d 723, rehearing denied.—Prod Liab 15.

La. 1987. For products liability purposes, “normal use” of product encompasses all reasonably foreseeable uses and misuses of product.—*Bloxom v. Bloxom*, 512 So.2d 839, 72 A.L.R.4th 43.—Prod Liab 15, 27.

La.App. 1 Cir. 1994. Definition of “reasonably anticipated use” in Louisiana Products Liability Act (LPLA) is narrower in scope than its pre-LPLA counterpart, “normal use,” which included all reasonably foreseeable uses and misuses of product. LSA-R.S. 9:2800.53(7).—*Myers v. American Seating Co.*, 637 So.2d 771, 1993-1350 (La.App. 1 Cir. 5/20/94), writ denied 644 So.2d 631, 1994-1569 (La. 10/7/94), writ denied 644 So.2d 632, 1994-1633 (La. 10/7/94).—Prod Liab 15.

La.App. 1 Cir. 1993. For purposes of manufacturer’s duty to warn of danger inherent in normal use of product, “normal use” includes any reasonably foreseeable misuse.—*Johnston v. Hartford Ins. Co.*, 623 So.2d 35, writ denied 626 So.2d 1170.—Prod Liab 14.

La.App. 1 Cir. 1992. “Normal use” of product encompasses all intended or foreseeable uses and misuses of product.—*Johnson v. Chicago Pneumatic Tool Co.*, 607 So.2d 615, writ denied 608 So.2d 1009.—Prod Liab 15.

La.App. 1 Cir. 1988. “Normal use” of product encompasses all reasonably foreseeable misuses of product.—*Savoie v. Deere & Co.*, 528 So.2d 724, writ denied 532 So.2d 177.—Prod Liab 15.

La.App. 1 Cir. 1987. Individual puts product to “normal use,” so as not to be barred from recovering from manufacturer for any injuries sustained during such normal use, when he/she complies with manufacturer’s directions and warnings.—*Spurlock v. Cosmair, Inc.*, 509 So.2d 826.—Prod Liab 15.

La.App. 1 Cir. 1984. “Normal use” of a product, for products liability purposes, is its foreseeable use and may include something broader than any use exactly in accordance with manufacturer’s instructions. LSA-C.C. arts. 2438 et seq., 2474 et seq.—*Quattlebaum v. Hy-Reach Equipment Inc.*, 453 So.2d 578, writ denied *Ingram v. Hy-Reach Equipment, Inc.*, 458 So.2d 474, writ denied 458 So.2d 483.—Prod Liab 15.

La.App. 2 Cir. 1991. “Normal use” for purposes of products liability includes use in accordance with manufacturer’s instructions as well as reasonably foreseeable misuse contrary to manufacturer’s instructions.—*Hale Farms, Inc. v. American Cyanamid Co.*, 580 So.2d 684, writ denied 586 So.2d 537.—Prod Liab 14, 15.

La.App. 2 Cir. 1990. Under law in effect prior to effective date of Products Liability Act, manufacturer was required to provide adequate warning of any danger inherent in the normal use of its product which was not within the knowledge of or obvious to the ordinary user, and “normal use” included all intended uses as well as all foreseeable uses and misuses of the product. LSA-R.S.

9:2800.51 et seq.—*Cannon v. Cavalier Corp.*, 572 So.2d 299.—Prod Liab 14, 15.

La.App. 2 Cir. 1990. “Normal use” for products liability purposes encompasses not just use precisely in accordance with manufacturer’s instructions; it includes all reasonably foreseeable uses and misuses of a product.—*Berry v. Commercial Union Ins. Co.*, 565 So.2d 487, writ denied 569 So.2d 959.—Prod Liab 15, 27.

La.App. 2 Cir. 1987. “Normal use” encompasses all intended and foreseeable uses, including reasonably foreseeable misuse.—*Tide Craft, Inc. v. Red Ball Oxygen Co., Inc.*, 514 So.2d 664, writ denied 516 So.2d 135, writ denied 516 So.2d 136.—Prod Liab 15, 27.

La.App. 2 Cir. 1987. “Normal use” of product is intended foreseeable use and may include reasonable foreseeable misuse, something broader than operation exactly in accordance with manufacturer’s instructions.—*Whitacre v. Halo Optical Products, Inc.*, 501 So.2d 994, 76 A.L.R.4th 185.—Prod Liab 15.

La.App. 2 Cir. 1984. Manufacturer has duty to give adequate warning of unreasonable danger involved in normal use of its product where it knows or should have known of that danger, and product sold without such warning is defective; “normal use” includes intended use and foreseeable use.—*Williams v. Airport Appliance & Floor Covering, Inc.*, 445 So.2d 764, writ denied 447 So.2d 1070, writ denied 447 So.2d 1071.—Prod Liab 14.

La.App. 3 Cir. 1996. To recover from manufacturer, products liability plaintiff must prove that his damage resulted from condition of product that made it unreasonably dangerous to ordinary user during “normal use,” which includes all intended uses and all foreseeable uses and misuses of product. LSA-R.S. 9:2800.52.—*Mallery v. International Harvester Co.*, 690 So.2d 765, 1996-321 (La.App. 3 Cir. 11/6/96), rehearing denied, writ denied 700 So.2d 512, 1997-1323 (La. 9/5/97).—Prod Liab 15.

La.App. 3 Cir. 1993. In products liability actions plaintiff bears burden of establishing that defective thing was in “normal use”—in accordance with manufacturer’s instructions as well as foreseeable misuse contrary to instructions—at the time of injury.—*Hardie v. Bestway Grocery*, 620 So.2d 937, writ denied 626 So.2d 1164.—Prod Liab 15.

La.App. 3 Cir. 1990. It must be shown that product is unreasonably dangerous in normal use for product to be considered defective; for product to be considered in “normal use,” user must comply with directions and warnings provided by manufacturer of product.—*Leday v. Clairol, Inc.*, 571 So.2d 866.—Prod Liab 15.

La.App. 4 Cir. 1998. For purposes of determining whether product is unreasonably dangerous per se under pre-Louisiana Products Liability Act (PLA) law, “normal use” is a matter of foreseeable use and may include something broader than operation exactly in accordance with the manufacturers instructions.—*Asbestos v. Bordelon, Inc.*, 726

So.2d 926, 1996-0525 (La.App. 4 Cir. 10/21/98), decision clarified on rehearing.—Prod Liab 15.

La.App. 4 Cir. 1998. For purposes of determining whether product is unreasonably dangerous per se under pre-Louisiana Products Liability Act (PLA) law, “normal use” is a term of art that includes all intended uses, as well as all foreseeable uses and misuses of the product.—*Asbestos v. Bordelon, Inc.*, 726 So.2d 926, 1996-0525 (La.App. 4 Cir. 10/21/98), decision clarified on rehearing.—Prod Liab 15.

La.App. 4 Cir. 1998. “Normal use,” for which manufacturer has duty to warn of inherent dangers, is term of art that includes all intended uses, as well as all foreseeable uses and misuses of product.—*Ballam v. Seibels Bruce Ins. Co.*, 712 So.2d 543, 1997-1444 (La.App. 4 Cir. 4/1/98), writ denied 720 So.2d 1213.—Prod Liab 14.

La.App. 4 Cir. 1992. Occurrence of serious automobile accident is reasonably foreseeable use or misuse of vehicle and, thus, encompasses concept of “normal use” for purposes of establishing product liability under pre-Products Liability Act standard. LSA-R.S. 9:2800.54.—*Page v. Gilbert*, 598 So.2d 1110, writ denied 605 So.2d 1146, writ denied 605 So.2d 1150.—Prod Liab 35.1.

La.App. 4 Cir. 1990. Product is defective if it is unreasonably dangerous for “normal use,” a term of art which includes all intended uses as well as all reasonably foreseeable uses and misuses of product.—*Roberts v. Louisiana Coca-Cola Bottling Co.*, 566 So.2d 163, writ denied 571 So.2d 647.—Prod Liab 15.

La.App. 5 Cir. 1989. “Normal use” of product, for purposes of manufacturer’s obligation to provide adequate warnings of any dangers inherent in normal use of product, is term of art that includes all intended uses, as well as all foreseeable uses and misuses of product. LSA-C.C. arts. 2317-2322.—*Weber v. Caterpillar Machinery Corp.*, 542 So.2d 544, writ denied 548 So.2d 332, writ denied 548 So.2d 334.—Prod Liab 14.

Mich. 1948. Under liability policy providing coverage for temporary use of a substitute automobile while insured truck was withdrawn from “normal use” because of breakdown, etc., coverage provided necessitated withdrawal of insured truck from all normal use and did not cover use of automobile borrowed by insured to make a trip of some 50 miles because he considered the insured truck which was in poor mechanical condition, not in condition to make the trip.—*Erickson v. Genisot*, 33 N.W.2d 803, 322 Mich. 303.—Insurance 2658.

Mich.App. 1982. Under no-fault act, legislature did not intend phrase “normal use” of a vehicle to cover usual circumstances of an individual fleeing from the police. M.C.L.A. § 500.3101(2).—*Peck v. Auto Owners Ins. Co.*, 315 N.W.2d 586, 112 Mich. App. 329.—Insurance 2680.

Tex.Civ.App.—Fort Worth 1956. Under automobile liability policy providing that an automobile used by insured as a substitute for described automobile shall be insured while temporarily used if

described automobile is withdrawn from normal use because of breakdown, etc., the term "normal use" meant "all" normal use.—Service Mut. Ins. Co. of Tex. v. Chambers, 289 S.W.2d 949, writ refused.—Insurance 2658.

**NORMAL USE OF PRODUCT**

La.App. 4 Cir. 1996. Under law applicable prior to adoption of Louisiana Products Liability Act (LPLA) "normal use of product," for dangers inherent in which manufacturer was required to provide adequate warnings, encompassed not just use precisely in accordance with manufacturer's instructions, and included all reasonably foreseeable uses and misuses of product. LSA-R.S. 9:2800.51 et seq.—Clark v. Jesuit High School of New Orleans, 686 So.2d 998, 1996-1307 (La.App. 4 Cir. 12/27/96).—Prod Liab 14.

**NORMAL VALUE**

CIT 2001. In antidumping matters, "normal value" means the price at which the foreign like product is first sold for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade at a time reasonably corresponding to the time of the sale used to determine the export price or constructed export price. Tariff Act of 1930, §§ 772(a), 773(a)(1)(B)(i), as amended, 19 U.S.C.A. §§ 1677a(a), 1677b(a)(1)(B)(i).—Torrington Co. v. U.S., 146 F.Supp.2d 845, appeal after remand 2001 WL 1491375, appeal after remand 206 F.Supp.2d 1296.—Cust Dut 21.5(3).

**NORMAL VARIANCE**

Pa.Cmwth. 1985. Validity variance differs from normal variance in that "normal variance" is granted to adjust zoning regulation to particular property, while a "validity variance" holds that zoning regulation is restrictive to point of confiscation and requires issuance of variance permitting reasonable use of land.—Hersh v. Zoning Hearing Bd. of Marlborough Tp., 493 A.2d 807, 90 Pa.Cmwth. 15.—Zoning 481.

**NORMAL VISION**

Pa.Cmwth. 1979. Petitioner, with tunnel vision so severe as to be considered medically blind, fell below the threshold of "normal vision" in statutory definition and hence was eligible to state blind pension; consideration of visual acuity alone does not offer itself, even to lay mind, as a reasonable approach to defining blindness; and a pinhole of relatively sharp vision is not normal. 62 P.S. §§ 501–515.—Fields v. Com., Dept. of Public Welfare, 407 A.2d 155, 47 Pa.Cmwth. 172.—Social S 180.

**NORMAL VISITATION ARRANGEMENT**

Hawai'i App. 1988. Children's eight-week summer visitation period with their father was "normal visitation arrangement" with father which did not constitute exceptional circumstance warranting departure from child support guidelines during eight-week period when children visited father.—Tomas

v. Tomas, 764 P.2d 1250, 7 Haw.App. 345.—Child S 357.

**NORMAL WEAR AND TEAR**

N.D.Fla. 1967. Under lease provision that tenant would return machinery and equipment to landlord in good condition with only exception being for normal wear and tear, destructive fire did not constitute "normal wear and tear" and tenant was liable for loss of the machinery and equipment.—Atlanta & St. A. B. Ry. Co. v. Chilean Nitrate Sales Corp., 277 F.Supp. 242, reversed Atlanta & St. Andrews Bay Ry. Co. v. Chilean Nitrate Sales Corp., 415 F.2d 393.—Land & Ten 160(2).

N.Y.Sup. 1968. While state was under duty to provide guardrails, their negligent destruction by driver was not "normal wear and tear" so as to absolve driver from liability to state for such destruction. Highway Law §§ 11, subd. 5, 12, subd. 1, 30, subd. 2.—State v. Hart, 292 N.Y.S.2d 320, 57 Misc.2d 296.—Autos 15.

Okla.App. Div. 3 1992. Failure to reasonably maintain insured property does not amount to "normal wear and tear" that would come within "all-risk" policy's implied exception of nonfortuity.—Bank of Oklahoma, N.A. v. Continental Cas. Co., 849 P.2d 1091, 1992 OK CIV APP 128, certiorari denied.—Insurance 2146.

**NORMAL WORKPLACE**

C.A.3 (Pa.) 1989. Under severance pay plan, which provided benefits upon termination of employment at "normal workplace," severance pay was not only intended to cover circumstance in which employee's relationship to particular division as an "entity" was severed by employee being moved from employee's location, task, or supervisors, but could also cover sale of "entity" as going business.—Ulmer v. Harsco Corp., 884 F.2d 98.—Pensions 122.

**NORMAL WORK TEST**

C.A.D.C. 1987. Under "normal work test", used to determine whether owner is statutory employer of subcontractor's employees, court looks to activity that owner in question normally carries on through its own employees, rather than what firms do generally in industry; accordingly, under this test, it is only in abnormal situation that owner will be found to be statutory employer of worker it did not actually employ. Va.Code 1950, §§ 65.1–5, 65.1–29.—Best v. Washington Metropolitan Area Transit Authority, 822 F.2d 1198, 262 U.S.App.D.C. 136.—Work Comp 354.

**NORMAL WORK WEEK**

Md. 1991. Statute calling for state employees who worked in excess of "normal work week" to receive extra compensation for such work did not establish 35½ hours per week as normal work week such that executive order establishing 40-hour work week for executive branch employees without additional compensation violated doctrine of separation of powers; nothing in statutory language fixed nor-

mal work week of state employees at 35½ hours, and personnel regulation defined normal work week as meaning not less than 35½ hours but not more than 40 hours. Code 1957, Art. 100, § 76 (now Art. 89, § 27).—Maryland Classified Employees Ass'n, Inc. v. Schaefer, 599 A.2d 91, 325 Md. 19, 30 Wage & Hour Cas. (BNA) 693, 30 Wage & Hour Cas. (BNA) 1156, certiorari denied 112 S.Ct. 1160, 502 U.S. 1090, 30 Wage & Hour Cas. (BNA) 1256, 117 L.Ed.2d 407.—Const Law 77; States 60.2.

Minn.App. 1986. Term “normal work week,” as used in Public Employment Labor Relations Act provision for determining whether part-time employee may be included in collective bargaining unit [M.S.A. § 179A.03, subd. 14(e)], refers to the normal, predominant work week of full-time employees of the bargaining unit.—Independent School Dist. No. 721, New Prague v. School Services Employees, Local 284, Richfield, 379 N.W.2d 673, review denied.—Labor 202.1.

#### **NORMAL YEAR-END ADJUSTMENT CONSISTENT WITH PAST PRACTICES**

Del.Ch. 2001. Impairment charge of 75% by acquired corporation to assets of its subsidiary was not a “normal year-end adjustment consistent with past practices” under terms of merger agreement, for purposes of determining whether under New York law acquiring corporation had right to rescind merger agreement, where acquired corporation told Securities and Exchange Commission (SEC) that impairment review was triggered by an unprecedented and precipitous declines in fourth quarter sales.—In re IPB, Inc. Shareholders Litigation, 789 A.2d 14.—Corp 582.

#### **NORMATIVE OBJECTIVE ENTRAPMENT**

N.M.App. 2001. “Normative objective entrapment” occurs when police conduct exceeds the standards of proper investigation.—State v. Hill, 34 P.3d 139, 131 N.M. 195, 2001-NMCA-094.—Crim Law 37(2.1).

#### **NORM OF INTERNATIONAL LAW**

S.D.N.Y. 2002. A “norm of international law” must be specific, universal, and obligatory, in context of determining whether violation of international law occurred as required to support exercise of jurisdiction under Alien Tort Claims Act (ATCA); a norm is universal and obligatory if: (1) no state condones the act in question and there is a recognizable universal consensus of prohibition against it, (2) there are sufficient criteria to determine whether a given action amounts to the prohibited act and thus violates the norm, and (3) the prohibition against it is non-derogable and therefore binding at all times upon all actors. 28 U.S.C.A. § 1330.—Chiminya Tachiona v. Mugabe, 216 F.Supp.2d 262.—Intern Law 10.9.

#### **NOR MORE**

Me. 1924. Pub.Laws 1921, c. 211, § 74, punishing the offense of operating an automobile on a public highway while drunk by fine or imprisonment

for not less than 30 days “nor more than one year,” permits imprisonment for a full year under “the possibility of punishment rule,” the words “nor more” equivalent to “not more,” which means no additional or greater amount.—State v. Vashon, 123 A. 511, 123 Me. 412.—Sent & Pun 1127.

#### **NOR MORE THAN**

Ga.App. 1952. As used in statute fixing punishment for larceny of hog at not less than two “nor more than” four years, quoted phrase includes amount of exactly four years. Code, §§ 26-2609, 26-2611.—Arnold v. State, 71 S.E.2d 102, 86 Ga. App. 160.—Larc 88.

#### **NOR MORE THAN ONE-THIRD OF THE MAXIMUM TERM**

Neb. 1976. Within statute providing that court may fix the minimum and maximum limits of the sentence, but the minimum limit fixed by the court shall not be less than the minimum provided by law nor more than one-third of the maximum term, the phrase “nor more than one-third of the maximum term” refers to the maximum term provided by law for the offense, and not the maximum term by the court. R.S.Supp.1974, § 83-1,105(1).—State v. Black, 238 N.W.2d 231, 195 Neb. 366.—Sent & Pun 1058.

#### **NORTH**

Cal. 1858. Parol evidence of a custom, in contemplation of which the deed was actually made, to run the courses by the magnetic meridian, is admissible to explain the meaning of the word “north,” in the deed.—Jenny Lind Co. v. Bower & Co., 11 Cal. 194.—Cust & U 15(2).

Cal. 1858. In an action concerning a disputed boundary between two mining claims, depending on an agreement between the parties, in which the word “north” was used, parol evidence is properly admissible to show the custom of the locality to run boundary lines by the magnetic meridian, and that such was the understanding of the parties.—Jenny Lind Co. v. Bower & Co., 11 Cal. 194.—Evid 456.

Cal.App. 1 Dist. 1924. In view of Pol.Code, §§ 3903, 3904, where words “north” and “northerly” are used without qualification, course of true north is intended.—Green v. Palmer, 229 P. 876, 68 Cal.App. 393.—Bound 6.

La. 1971. “North” within drainage act amendment to State Constitution, indicated not only due north but also areas north of parallel passing through bound described, such as lines northeast or northwest of bound. LSA-Const. art. 14, § 23.13.—Petition of Sewerage and Water Bd. of New Orleans, 243 So.2d 809, 257 La. 716, appeal after remand 278 So.2d 81.—Mun Corp 270.

La. 1945. Generally, the words “north,” “south,” “east,” and “west,” when used in a land description, mean, respectively, “due north,” “due south,” “due east,” and “due west.”—Plaquemines Oil & Development Co. v. State, 23 So.2d 171, 208 La. 425.—Deeds 113.

Mo. 1972. Words "north," "south," "east," and "west," when used without words which qualify their meaning, generally refer to due north, due south, due east, due west as the case may be.—*Waldmann v. Hoechst*, 487 S.W.2d 541.—Bound 6.

Mo. 1922. Petition for improvement of the "Jefferson Highway" from specified point "north thereon" through specified townships held not to provide for the improvement of a road deviating from the established Jefferson Highway; the word, "north" being construed to mean "northerly."—State ex rel. *Melvin v. Hackmann*, 243 S.W. 337, 295 Mo. 14.—High 107(1).

Or. 1974. The words "north," "south," "east," and "west" mean "due north," "due south," "due east," and "due west" in the absence of other words in the deed qualifying their meaning.—*Andrews v. North Coast Development, Inc.*, 526 P.2d 1009, 270 Or. 24.—Bound 6.

Tex.Civ.App.—El Paso 1938. The words "east," "west," "north," or "south," used without qualification or variation in describing the boundaries of land, mean "due east," "due west," "due north," or "due south," as the case may be.—*Livingston Oil & Gas Co. v. Shasta Oil Co.*, 114 S.W.2d 378, dismissed.—Bound 6.

## NORTHEAST

Ala. 1905. The interlineation of the word "fourth" after the words "northeast" and over some other word—probably "quarter"—in the descriptive part of a deed is not such an evident mark of suspicion as to authorize the court to exclude the deed from evidence; the words "quarter" and "fourth" being synonymous, and no other words being appropriate at the place.—*Campbell v. Bates*, 39 So. 144, 143 Ala. 338.

## NORTHEASTERLY

Cal. 1871. When the term "northerly," "northwesterly," "northeasterly," etc., are employed to designate a line, if there be nothing else in the deed to fix its location, these terms will be construed as equivalent to a call to run due north, due northwest, or northeast, as the case may be.—*Irwin v. Towne*, 42 Cal. 326.—Deeds 113.

Cal. 1871. Terms "northwesterly," "northerly," "northeasterly," etc., are construed as meaning "due north," "due northwesterly," etc., only when necessary to prevent failure of deed for want of certainty, and must yield to more definite descriptions therein.—*Irwin v. Towne*, 42 Cal. 326.—Deeds 114(2).

## NORTHERLY

Cal. 1871. When the term "northerly," "northwesterly," "northeasterly," etc., are employed to designate a line, if there be nothing else in the deed to fix its location, these terms will be construed as equivalent to a call to run due north, due northwest, or northeast, as the case may be.—*Irwin v. Towne*, 42 Cal. 326.—Deeds 113.

Cal. 1871. Terms "northwesterly," "northerly," "northeasterly," etc., are construed as meaning "due north," "due northwesterly," etc., only when necessary to prevent failure of deed for want of certainty, and must yield to more definite descriptions therein.—*Irwin v. Towne*, 42 Cal. 326.—Deeds 114(2).

Cal.App. 1 Dist. 1924. In view of Pol.Code, §§ 3903, 3904, where words "north" and "northerly" are used without qualification, course of true north is intended.—*Green v. Palmer*, 229 P. 876, 68 Cal.App. 393.—Bound 6.

Md. 1905. Where a notice of the opening of a new road described it as running with a "northerly" course across the property of another, the fact that it ran 5 degrees 50 minutes west of north was immaterial.—*Riggs v. Winterode*, 59 A. 762, 100 Md. 439.

Mo. 1922. Petition for improvement of the "Jefferson Highway" from specified point "north thereon" through specified townships held not to provide for the improvement of a road deviating from the established Jefferson Highway; the word, "north" being construed to mean "northerly."—State ex rel. *Melvin v. Hackmann*, 243 S.W. 337, 295 Mo. 14.—High 107(1).

Wash. 1946. The term "northerly" used in describing boundary implies only a general direction.—*Fosburgh v. Sando*, 166 P.2d 850, 24 Wash.2d 586.—Bound 6.

## NORTHERLY SIDELINE

N.H. 1976. Under deed which provided that 275-foot right-of-way measurement that established southerly boundary of defendant's property and northerly boundary of plaintiff's property should begin at northerly sideline of highway along southerly portion of property, "northerly sideline" referred to northerly sideline of highway layout or right of way and not to edge of pavement, and thus 275-foot measurement started from highway right of way.—*Holbrook v. Robert Dow, Inc.*, 366 A.2d 476, 116 N.H. 701.—Bound 20(4).

## NORTH HALF

Mo. 1887. In ejectment it appeared that the land, as originally owned by the common grantor, was in the shape of a right angle triangle, with the base abutting on a street; that the grantor conveyed first, the property claimed by plaintiff, describing it as the "north half" of the lot, beginning in the middle of the base line, and running back parallel to the side of the triangle, and subsequently conveyed the residue of the lot, describing it as the "south half." The lots were afterwards conveyed by the description of "north half" and "south half," and were so assessed for taxes, and at a tax sale the south half passed to defendant under that description. Held, that the common grantor had fixed upon the words "north half" and "south half" a conventional meaning, and that they must be considered to have been so used in the muniments of title under which both parties claimed.—*Grandey v. Casey*, 6 S.W. 376, 93 Mo. 595.—Bound 9.

Mo. 1887. Plaintiff and defendant in ejectment claimed title from a common source. The land as originally owned by the common grantor was triangular in shape, and he conveyed first the property claimed by plaintiff, describing it as the "north half" of the lot, and subsequently conveyed the residue, describing it as the "south half." The lots were afterwards conveyed by the description of "north half" and "south half," and were so assessed for taxes, and, on failure of the owner of the "south half" to pay the taxes, it was sold at tax sale, and conveyed to defendant, under the description of "south half." *Held*, that the common grantor had fixed upon the words "north" and "south half" a conventional meaning, and they must be considered to have been so used in the muniment of title under which both parties claimed, and defendant could claim no greater portion than was designated therein.—*Grandey v. Casey*, 6 S.W. 376, 93 Mo. 595.—Deeds 113.

Wash. 1912. Conveyance of "north half" of tract of land, the east line of which is of such a shape that the north line is one-half the length of the south line, held to cover one-half of the area of the tract, and not merely one-half of its length.—*Robinson v. Taylor*, 123 P. 444, 68 Wash. 351, Am. Ann. Cas. 1913E, 1011.—Deeds 114(5).

Wash. 1912. Parole evidence held inadmissible to show that conveyance of "north half" of tract of land did not mean one-half of the area of the tract; the word having, as used, no technical meaning.—*Robinson v. Taylor*, 123 P. 444, 68 Wash. 351, Am. Ann. Cas. 1913E, 1011.—Evid 456.

#### NORTH OF THE THREAD OF THE STREAM

Ky. 1954. Under a lease from a county for dredging sand and gravel, "north of the thread of the stream" as applied to the Ohio River, the quoted phrase meant the middle line of the river, as measured from the state's northern boundary the low watermark on the northern bank or shore, and the corresponding low watermark on the southern bank or shore. KRS 56.220.—*Louisville Sand & Gravel Co. v. Ralston*, 266 S.W.2d 119.—Nav Wat 37(6).

#### NORTHWARDLY

Ky. 1942. The term "northwardly" means toward or approaching toward the north, rather than toward any of the other cardinal points.—*Martt v. McBrayer*, 166 S.W.2d 823, 292 Ky. 479.

#### NORTHWESTERLY

Cal. 1871. When the term "northerly," "northwesterly," "northeasterly," etc., are employed to designate a line, if there be nothing else in the deed to fix its location, these terms will be construed as equivalent to a call to run due north, due northwest, or northeast, as the case may be.—*Irwin v. Towne*, 42 Cal. 326.—Deeds 113.

Cal. 1871. Terms "northwesterly," "northerly," "northeasterly," etc., are construed as meaning "due north," "due northwesterly," etc., only when necessary to prevent failure of deed for want of

certainty, and must yield to more definite descriptions therein.—*Irwin v. Towne*, 42 Cal. 326.—Deeds 114(2).

Me. 2000. Boundary course call "northwesterly" does not refer to a route running toward any point falling between the compass points north and west.—*Wallingford v. Kennedy*, 753 A.2d 493, 2000 ME 112.—Bound 6.

#### NO SALE DOCTRINE

C.A.9 (Cal.) 2002. Under the "no sale doctrine," a grant of stock under an Employee Stock Ownership Plan (ESOP), or similar stock bonus program, is generally not a sale under the Securities Act of 1933. Securities Act of 1933, § 1 et seq., 15 U.S.C.A. § 77a et seq.—*Falkowski v. Imation Corp.*, 309 F.3d 1123, opinion amended 320 F.3d 905.—Sec Reg 11.11.

#### NOSCITUR A SOCIIIS

U.S. Dist. Col. 1995. Canon of statutory construction called "noscitur a sociis" holds that word is known by company it keeps; canon counsels that word gathers meaning from words around it.—*Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S.Ct. 2407, 515 U.S. 687, 132 L.Ed.2d 597.—Statut 193.

U.S. Ill. 1961. The maxim "noscitur a sociis," that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to acts of Congress.—*Jarecki v. G. D. Searle & Co.*, 81 S.Ct. 1579, 367 U.S. 303, 6 L.Ed.2d 859.—Statut 193.

C.A.1 1960. Under the statute that income is regarded as "abnormal income" and relieved from full incidence of KW excess profits tax provisions by reallocations to other tax years if it falls within the provision for income resulting from exploration, "discovery" or prospecting or a combination of the foregoing, the quoted word in the context of the act relates only to discovery of coal, oil, gas and other natural resources under the doctrine of "noscitur a sociis" and does not comprehend inventions or major "basic" inventions. 26 U.S.C.A. Excess Profits Taxes, §§ 430-474, 456(a)(2)(B, C), (3); U.S.C.A. Const. art. 1, § 8, cl. 8; 35 U.S.C.A. §§ 100(a), 101.—*Polaroid Corp. v. C.I.R.*, 278 F.2d 148, certiorari granted Polaroid Corporation v. Commissioner of Internal Revenue., 81 S.Ct. 53, 364 U.S. 813, 5 L.Ed.2d 45, affirmed *Jarecki v. G. D. Searle & Co.*, 81 S.Ct. 1579, 367 U.S. 303, 6 L.Ed.2d 859.—Int Rev 4130.

C.A.1 1960. The doctrine of "noscitur a sociis" is an appropriate and reasonable though not a determinative test in case of ambiguity in a statute, and on a proper occasion such association justifies, if it does not imperatively require, the application of a restricted meaning and it is particularly appropriate where one meaning of each of the grouped words has a readily apparent common denominator.—*Polaroid Corp. v. C.I.R.*, 278 F.2d 148, certiorari granted Polaroid Corporation v. Commissioner

of Internal Revenue., 81 S.Ct. 53, 364 U.S. 813, 5 L.Ed.2d 45, affirmed Jarecki v. G. D. Searle & Co., 81 S.Ct. 1579, 367 U.S. 303, 6 L.Ed.2d 859.—Statut 193.

C.A.6 2002. As an aid in determining the meaning of an undefined term in a statute, the maxim of “noscitur a sociis,” meaning it is known from its associates, requires the Court of Appeals to look to accompanying words to deduce the undefined word’s meaning.—Limited, Inc. v. C.I.R., 286 F.3d 324.—Statut 193.

C.A.9 (Cal.) 2002. Doctrine of “noscitur a sociis” counsels that words in statute should be understood by the company they keep.—Microsoft Corp. v. C.I.R., 311 F.3d 1178.—Statut 193.

C.A.9 (Cal.) 2001. In context of statutory interpretation, doctrine of “noscitur a sociis” stands for the proposition that a word is known by the company it keeps; that is, words are to be judged by their context and words in a series are to be understood by neighboring words in the series.—Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863, certiorari denied 122 S.Ct. 1437, 535 U.S. 971, 152 L.Ed.2d 381.—Statut 193.

C.A.2 (Conn.) 2000. Under the rule of “noscitur a sociis,” the meaning of doubtful statutory terms or phrases may be determined by reference to their relationship with other associated words or phrases.—U.S. v. Dauray, 215 F.3d 257.—Statut 193.

C.A.9 (Hawai‘i) 1956. Under the doctrine of “noscitur a sociis”, the meaning of questionable words or phrases in a statute may be ascertained by reference to the meaning of words or phrases associated with it.—Wong Kam Wo v. Dulles, 236 F.2d 622.—Statut 193.

C.A.7 (Ill.) 1996. Maxim “noscitur a sociis,” that a word is known by the company it keeps, is often wisely applied in statutory construction where word is capable of many meanings in order to avoid giving unintended breadth to acts of Congress.—Newsom v. Friedman, 76 F.3d 813.—Statut 193.

C.A.8 (Iowa) 1998. Interpretive canons “noscitur a sociis,” meaning that a term is known from its associates, and “ejusdem generis,” under which general words in an enumeration are construed as similar to more specific words in the enumeration, are employed to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words.—In re Eilbert, 162 F.3d 523.—Statut 193, 194.

C.A.9 (Or.) 1996. Under doctrine of “noscitur a sociis,” word is known by company it keeps; this rule is relied upon to avoid ascribing to one word meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to acts of Congress.—Sierra Club v. U.S. Forest Service, 93 F.3d 610.—Statut 193.

C.A.3 (Pa.) 2001. The maxim “noscitur a sociis” provides that the meaning of an ambiguous statutory term may be derived from the meaning of the

accompanying terms.—In re Gi Nam, 273 F.3d 281, as amended.—Statut 193.

C.A.3 (Pa.) 1997. Doctrine of “noscitur a sociis” permits court to treat word in statute as one which gathers its meaning from words around it.—U.S. ex rel. Dunleavy v. County of Delaware, 123 F.3d 734, on remand 1998 WL 151030.—Statut 193.

C.A.8 (S.D.) 1994. Statutory construction doctrine of “noscitur a sociis” defines word by company it keeps.—Utility Elec. Supply, Inc. v. ABB Power T & D Co., Inc., 36 F.3d 737.—Statut 193.

C.A.6 (Tenn.) 1981. Statutory maxim “noscitur a sociis” acknowledges that general and specific words are associated with and take color from each other, restricting general words to a sense analogous less general.—Owen of Georgia, Inc. v. Shelby County, 648 F.2d 1084.—Statut 193.

C.A.9 (Wash.) 1997. “Noscitur a sociis” means that word is understood by associated words.—U.S. v. Lacy, 119 F.3d 742, certiorari denied 118 S.Ct. 1571, 523 U.S. 1101, 140 L.Ed.2d 804.—Statut 193.

Cust. & Pat.App. 1976. Under rule of “noscitur a sociis,” the intent of a specific word may become clear by reference to the other words associated with it in statute.—U. S. v. Sumitomo Shoji, New York, Inc., 534 F.2d 320, 63 C.C.P.A. 79.—Statut 193.

D.D.C 1950. Doctrine “noscitur a sociis” means that significance of doubtful word may be ascertained by reference to meaning of words associated with it.—Soroka v. Beloff, 93 F.Supp. 642.—Statut 193.

N.D.Ill. 1997. In interpreting statutes, maxim “noscitur a sociis,” that word is known by the company it keeps, is often wisely applied where word is capable of many meanings, so as to avoid giving unintended breadth to acts of Congress.—Laubach v. Arrow Service Bureau, Inc., 987 F.Supp. 625.—Statut 193.

N.D.Iowa 1950. In construing a statute, meaning of doubtful words may be ascertained by reference to the meanings of words associated with them under the rule of “noscitur a sociis”.—Geer v. Birmingham, 88 F.Supp. 189, reversed 185 F.2d 82, certiorari denied 71 S.Ct. 571, 340 U.S. 951, 95 L.Ed. 686.—Statut 193.

E.D.La. 1972. The doctrine of “noscitur a sociis”, which means that meaning of doubtful words may be ascertained by reference to the meaning of words associated with it, is applicable in the area of insurance contract construction.—Parfait v. Jahncke Service, Inc., 347 F.Supp. 485, affirmed in part, reversed in part 484 F.2d 296, certiorari denied Home Indemnity Co. v. Ruppel, 94 S.Ct. 1485, 415 U.S. 957, 39 L.Ed.2d 572, certiorari denied Ruppel v. Travelers Indemnity Co., 94 S.Ct. 1485, 415 U.S. 957, 39 L.Ed.2d 572.—Insurance 1813.

D.Minn. 1995. In order to ascertain meaning of terms used in statutes, courts employ doctrine of “noscitur a sociis,” which defines term capable of several meanings by words with which term is asso-

**NOSCITUR A SOCIIS**

ciated.—*Toro Co. v. McCulloch Corp.*, 898 F.Supp. 679.—Statut 193.

D.Utah 1996. Axiom of statutory constructions of “noscitur a sociis” is that general terms of statute are to take meaning from terms of more specific language in statute and are to be associated together; this is corollary axiom to that of “ejusdem generis” which is that general terms take meaning from specific terms or class description in same statute.—*Cortez v. University Mall Shopping Center*, 941 F.Supp. 1096.—Statut 193, 194.

E.D.Va. 1992. Doctrine of “noscitur a sociis,” under Virginia law, holds that when general and specific words are grouped, general words are limited by the specific and will be construed to embrace only objects similar in nature to those things identified by the specific words.—*Sentinel Associates v. American Mfrs. Mut. Ins. Co.*, 804 F.Supp. 815, affirmed 30 F.3d 130.—Contracts 156.

W.D.Va. 1940. In statute authorizing the forfeiture of all tools, implements, instruments, and personal property whatsoever, in place or building, or within any yard or inclosure where articles or raw materials are possessed for purpose of being sold to evade taxes, the phrase “all \* \* \* personal property whatsoever” must be given a restricted meaning, since the principle of “ejusdem generis” or of “noscitur a sociis” applies. 26 U.S.C.A. (I.R.C.1954) § 7301(a-c).—*U.S. v. One Ford Coupe*, 1937 Model, Engine No. 18-3902031, Va. License No. 267-183 (1939), 33 F.Supp. 291.—Int Rev 5155.

8th Cir.BAP (Ark.) 2002. Interpretive canons “noscitur a sociis,” or a term is known from its associates, and “ejusdem generis,” or general words in an enumeration are construed as similar to more specific words in the enumeration, are employed to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words.—*In re Rousey*, 283 B.R. 265.—Statut 193, 194.

Bkrty.W.D.La. 1997. Maxim “noscitur a sociis,” that word is known by the company it keeps, while not inescapable rule, is often wisely applied where word is capable of many meanings in order to avoid giving of unintended breadth to acts of Congress.—*In re Seasons Apartments, Ltd. Partnership*, 215 B.R. 953.—Statut 193.

CIT 2000. Under doctrine of “noscitur a sociis,” or “associated words,” court may properly resort to other words with which ambiguous word or phrase is associated in statute in order to ascertain its meaning.—*Jewelpak Corp. v. U.S.*, 97 F.Supp.2d 1192.—Statut 193.

Fed.Cl. 1999. Under canon of statutory construction known as “noscitur a sociis,” the meaning of an ambiguous or undefined term in a statute or regulation may be ascertained by reference to the meaning of other terms that accompany it.—*Exxon Corp. v. U.S.*, 45 Fed.Cl. 581, affirmed in part, reversed in part 244 F.3d 1341.—Statut 193.

Cust.Ct. 1969. “Noscitur a sociis” signifies that one may ascertain meaning of an ambiguous term by determining meaning of other terms with which

it is associated.—*Nomura (America) Corp. v. U.S.*, 299 F.Supp. 535, affirmed 435 F.2d 1319, 58 C.C.P.A. 82.—Statut 194.

Cust.Ct. 1960. The rule of “noscitur a sociis” which means it is known by its associates is a rule of construction to be applied where there is doubt and ambiguity concerning the meaning of the word or expression used by legislative body in enacting a statute and it cannot be invoked where there is no doubt as to the meaning of the word or term used.—*Golding-Keene Co. v. U. S.*, 183 F.Supp. 947.—Statut 193.

Ala. 1998. “Noscitur a sociis” doctrine holds that where general and specific words which are capable of an analogous meaning are associated one with the other, they take color from each other, so that the general words are restricted to a sense analogous to that of the less general.—*Ex parte Taylor*, 728 So.2d 635, rehearing denied, on remand *Scott Paper Co. v. Taylor*, 728 So.2d 638.—Statut 193.

Ala. 1996. When legislative intent behind a statute is not clear, the meaning of doubtful words may be determined by reference to their relationship with other associated words under principle of “noscitur a sociis” that when two or more words are grouped together, and those words ordinarily have a similar meaning but are not equally comprehensive, an ambiguous word may be defined by the accompanying words; ordinarily, the coupling of words denotes an intention that they be understood in same general sense.—*Ex parte Cobb*, 703 So.2d 871, rehearing overruled, on remand *Cobb v. State*, 703 So.2d 878.—Statut 193.

Ala. 1982. “Noscitur a sociis” doctrine holds that where general and specific words which are capable of analogous meaning are associated one with the other in statutory language, they take color from each other, so that general words are restricted to sense analogous to that of less general.—*Winner v. Marion County Com'n*, 415 So.2d 1061.—Statut 194.

Ala. 1947. The maxims “ejusdem generis” and “noscitur a sociis” are sometimes beneficial in arriving at intention of the parties in contracts where specific words are followed by broader and more general terms, but where both general and specific provisions may be given reasonable effect both are to be retained, and the maxims should never be used to violate or impinge upon what otherwise would appear to be the manifest intention of contracting parties.—*Gulf, M. & O. R. R. v. Berman Bros. Iron & Metal Co.*, 30 So.2d 446, 249 Ala. 159.—Contracts 156.

Ala. 1916. Doctrine of “noscitur a sociis” means general and specific words are associated with and take color from each other, restricting general words to sense analogous to less general.—*State v. Western Union Telegraph Co.*, 72 So. 99, 196 Ala. 570.—Statut 193.

Ariz. 1954. Under maxim “noscitur a sociis”, quoted word, in statute making it a misdemeanor to practice veterinary medicine under a false or “as-

sumed" name, must be interpreted in light of words with which it is associated. A.C.A.1939, § 67-1908 (A.R.S. § 32-2244).—Olvey v. Calizona Land & Cattle Co., 265 P.2d 432, 76 Ariz. 368.—Health 192.

Ariz. 1949. If legislative intent of those enacting city charter is not clear, then meaning of doubtful words may, under doctrine of "noscitur a sociis," be determined by reference to their association with other associated words and phrases.—City of Phoenix v. Yates, 208 P.2d 1147, 69 Ariz. 68.—Mun Corp 8.

Ariz.App. Div. 2 2001. Under the maxim "noscitur a sociis," the meaning of uncertain words may be determined by referring to other associated words in the statute.—Norgord v. State ex rel. Berning, 33 P.3d 1166, 201 Ariz. 228, review denied.—Statut 193.

Ariz.App. Div. 2 2001. The maxim "noscitur a sociis" is a tool of statutory construction that courts may apply to ascertain legislative intent.—Norgord v. State ex rel. Berning, 33 P.3d 1166, 201 Ariz. 228, review denied.—Statut 193.

Ark. 1995. Doctrine of "noscitur a sociis" literally means "it is known from its associates" and as practically applied, means that term may be defined by an accompanying word.—McKinney v. Robbins, 892 S.W.2d 502, 319 Ark. 596.—Statut 193.

Ark. 1980. "Doctrine of "noscitur a sociis" means "it is known from its associates" and in practical application means that a word may be defined by an accompanying word.—Weldon v. Southwestern Bell Telephone Co., 607 S.W.2d 395, 271 Ark. 145.—Statut 193.

Cal. 1996. In accordance with principle of statutory construction known as "noscitur a sociis" (it is known by its associates), court will adopt restrictive meaning of listed item if acceptance of more expansive meaning would make other items in list unnecessary or redundant, or would otherwise make item markedly dissimilar to other items in list.—People ex rel. Lungren v. Superior Court, 926 P.2d 1042, 58 Cal.Rptr.2d 855, 14 Cal.4th 294, rehearing denied.—Statut 193.

Cal. 1895. Under the doctrine "noscitur a sociis" the word "misappropriation," within principle that Const. art. 3, § 12 was intended to make each director of a corporation severally liable for embezzlement or misappropriation of corporate funds by officers thereof, is to be construed to mean something like embezzlement, the misapplication of funds intrusted to an officer for a particular purpose by devoting them to some unauthorized purpose, and does not apply to the payment of an extravagant price for services or materials properly appertaining to the business of the corporation.—Fox v. Hale & Norcross Silver Min. Co., 41 P. 308, 108 Cal. 369.

Cal.App. 3 Dist. 2001. In accordance with the principle of statutory construction known as "noscitur a sociis," i.e. it is known from its associates, a court will adopt a restrictive meaning of a listed item in a statute if acceptance of a more expansive meaning would make other items in the list unnec-

essary or redundant, or would otherwise make the item markedly dissimilar to the other items in the list.—English v. IKON Business Solutions, Inc., 114 Cal.Rptr.2d 93, 94 Cal.App.4th 130, 94 Cal.App.4th 708C, as modified, and review denied.—Statut 193.

Cal.App. 3 Dist. 2001. Under the principle of statutory construction known as "noscitur a sociis," the court may, unless circumstances dictate otherwise, determine the meaning of a particular statutory term by reference to the characteristics that it shares with other things of the same kind, class, or nature which are catalogued with it in the enactment.—Coors Brewing Co. v. Stroh, 103 Cal.Rptr.2d 570, 86 Cal.App.4th 768, review denied.—Statut 193.

Cal.App. 3 Dist. 1942. Under the rule of "noscitur a sociis", the meaning of a word may be enlarged or restrained by reference to the object of the whole clause in which it is used.—Vilardo v. Sacramento County, 129 P.2d 165, 54 Cal.App.2d 413.—Statut 193.

Colo. 1938. The legal doctrine of "noscitur a sociis" is that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it.—Bedford v. Johnson, 78 P.2d 373, 102 Colo. 203.—Statut 193.

Conn. 1996. Under doctrine of "noscitur a sociis," if two or more words are grouped together, it is possible to ascertain meaning of particular word by reference to its relationship with other associated words and phrases.—State v. Szymkiewicz, 678 A.2d 473, 237 Conn. 613.—Statut 193.

Conn. 1994. Under doctrine of "noscitur a sociis," if two or more words are grouped together in statute, it is possible to ascertain meaning of particular word by reference to its relationship with other associated words and phrases.—State v. Ross, 646 A.2d 1318, 230 Conn. 183, certiorari denied 115 S.Ct. 1133, 513 U.S. 1165, 130 L.Ed.2d 1095, on remand 1995 WL 341516, on subsequent appeal 677 A.2d 433, 237 Conn. 332, on remand 1997 WL 297113.—Statut 193.

Conn.Super. 1994. Under the maxim of "noscitur a sociis," meaning of particular word or phrase in statute is ascertained by reference to those words or phrases with which it is associated.—Garrett's Appeal From Probate, 677 A.2d 1000, 44 Conn. Sup. 169, affirmed 676 A.2d 394, 237 Conn. 233.—Statut 193.

Fla. 1958. The maxim "noscitur a sociis" means that general and specific words capable of analogous meaning when associated together take color from each other so that the general words are restricted to a sense analogous to the less general.—State ex rel. Wedgworth Farms, Inc. v. Thompson, 101 So.2d 381.—Statut 193.

Fla. 1939. Under the doctrine of "noscitur a sociis," or "ejusdem generis," "any other person" within statute prohibiting the fraudulent conversion of property by any factor, commission merchant, warehouse keeper, wharfinger, wagoner, stage driver, or other common carrier, or "any other person" with whom any property which may be the subject

**NOSCITUR A SOCIIIS**

of larceny is intrusted, refers to one following a pursuit like unto those specifically enumerated. F.S.A. § 812.01.—Dunham v. State, 192 So. 324, 140 Fla. 754.—Embez 16.

Fla. 1939. The doctrine of “noscitur a sociis” means that general and specific words are associated with and take color from each other, restricting general words to sense analogous to less general.—Dunham v. State, 192 So. 324, 140 Fla. 754.—Statut 193.

Fla. 1927. Doctrine of “noscitur a sociis” means general and specific words are associated with and take color from each other, restricting general words to sense analogous to less general.—Ex parte Amos, 112 So. 289, 93 Fla. 5.—Statut 193.

Fla.App. 3 Dist. 1996. Under doctrine of “noscitur a sociis” meaning of statutory terms and legislative intent behind them may be discovered by referring to words associated with them in statute.—Turnberry Isle Resort and Club v. Fernandez, 666 So.2d 254.—Statut 193.

Ga. 1947. Under consent verdict for alimony requiring husband after finding a total divorce between the parties, to pay specified hospital and medical bills and monthly alimony for specified period to wife and also awarding to her an automobile and designated land and under judgment entered upon verdict granting alimony to wife as stated in verdict, husband's liability for alimony was not abated upon remarriage of divorced wife in view of applicable maxim of “noscitur a sociis”. Code, §§ 30-201, 30-210, 30-211.—Green v. Starling, 45 S.E.2d 188, 203 Ga. 10.—Divorce 247.

Ga.App. 2000. Under the rule of construction known as “noscitur a sociis,” literally, it is known by its associates, the meaning of words or phrases in a statute may be ascertained from others with which they are associated and from which they cannot be separated without impairing or destroying the evident sense they were designed to convey in the connection used.—Department of Human Resources v. Coley, 544 S.E.2d 165, 247 Ga.App. 392, reconsideration dismissed, and certiorari denied.—Statut 193.

Hawai'i 1997. Canon of statutory construction “noscitur a sociis” provides that meaning of words may be determined by reference to their relationship with other associated words and phrases.—Peterson v. Hawaii Elec. Light Co., Inc., 944 P.2d 1265, 85 Hawai'i 322.—Statut 193.

Hawai'i 1996. “Noscitur a sociis” is canon of statutory construction translatable as words of a feather flock together, that is, meaning of word is to be judged by the company it keeps.—State v. Merino, 915 P.2d 672, 81 Hawai'i 198.—Statut 193.

Hawai'i 1996. Under doctrine of “noscitur a sociis,” meaning of words or phrases in a statute may be determined by reference to the meaning of words or phrases associated with them.—State v. Crouser, 911 P.2d 725, 81 Hawai'i 5.—Statut 193.

Hawai'i 1991. Statute providing that the meaning of ambiguous words in a statute may be sought

by examining the context is a statutory rephrasing of the ancient canon of construction “noscitur a sociis,” which may be freely translated as “words of a feather flock together,” i.e., the meaning of a word is to be judged by the company it keeps. HRS § 1-15(1).—State v. Deleon, 813 P.2d 1382, 72 Haw. 241.—Statut 193, 208.

Hawai'i 1974. “Noscitur a sociis” is a doctrine of statutory construction that requires that more general and more specific words of a statute must be considered together in determining the meaning of the statute, and that the general words are restricted to a meaning that should not be inconsistent with, or alien to, the narrower meanings of the more specific words of the statute.—In re Pacific Marine & Supply Co., Ltd., 524 P.2d 890, 55 Haw. 572.—Statut 194.

Hawai'i App. 1996. Under doctrine of “noscitur a sociis,” meaning of words or phrases in statute may be determined by reference to meaning of words or phrases associated with it.—State v. Sturch, 921 P.2d 1170, 82 Hawai'i 269, as amended, certiorari denied 922 P.2d 973, 82 Hawai'i 360.—Statut 193.

Ill. 1902. The maxim “ejusdem generis” is only an illustration or specific application of the broader maxim “noscitur a sociis.” From its application is a deduced rule that, “when general words follow an enumeration of particular cases, such words apply only to cases of the same kind as those expressly mentioned”. Under the charter of the city of Chicago, authorizing the city to regulate and prescribe the compensation of hackmen, cabmen, omnibus drivers, and “all others pursuing a like occupation,” the city had power to enact Rev.Code Chicago, §§ 1723, 1725, limiting the rate of fare to be charged by street railway companies, inasmuch as the phrase “others pursuing a like occupation,” when construed *ejusdem generis*, includes street railway companies.—Chicago Union Traction Co. v. City of Chicago, 199 Ill. 484, 65 N.E. 451, 59 L.R.A. 631.

Ill.App. 4 Dist. 1972. “Noscitur a sociis” contemplates that where two or more words of analogous meaning are employed together in a statute they are understood to be used in their cognate sense, to express the same relations, and give color and expression to each other.—People v. Goldman, 287 N.E.2d 177, 7 Ill.App.3d 253, 58 A.L.R.3d 1128.—Statut 193.

Ind.App. 2000. The canon of statutory construction known as “noscitur a sociis,” which means “it is known from its associates,” provides that the meaning of a doubtful word in a statute may be ascertained by reference to the meaning of other words associated with it.—Wiggins v. State, 727 N.E.2d 1, transfer denied 735 N.E.2d 236.—Statut 193.

Ind.App. 2 Dist. 1983. “Noscitur a sociis” means that meaning of doubtful word may be ascertained by reference to meaning of other words associated with it.—Lincoln Nat. Bank v. Review Bd. of Indiana Employment Sec. Div., 446 N.E.2d 1337.—Statut 193.

Ind.App. 3 Dist. 1973. Rule of statutory construction known as "noscitur a sociis," which means that meaning of a doubtful word may be ascertained by reference to meaning of words associated with it, is the underlying authority for application of the rule of "ejusdem generis," which means that general words following an enumeration of particular cases apply only to cases of same kind as expressly mentioned.—Bertrand v. Smeekens, 298 N.E.2d 25, 156 Ind.App. 572.—Statut 193, 194.

Iowa 1977. Under the rule of "noscitur a sociis," the meaning of a word in a statute is ascertained in the light of the meaning of the words with which it is associated.—Wright v. State Bd. of Engineering Examiners, 250 N.W.2d 412.—Statut 193.

Kan. 1974. "Noscitur a sociis" is a rule of construction applicable to all written instruments meaning literally "as known from its associates," and its effect is that the meaning of the word or phrase which may be obscured or doubtful when considered in isolation may be clarified or ascertained by reference to those words or phrases with which it is associated.—Farm Bureau Mut. Ins. Co. v. Carr, 528 P.2d 134, 215 Kan. 591.—Insurance 1805.

La. 1955. Under the rule "noscitur a sociis" the meaning of a word may be known from the accompanying words, and under such rule general and specific words, capable of analogous meanings, when associated together, take color from each other, so that general words are restricted to a sense analogous to less general.—State v. Arkansas Louisiana Gas Co., 78 So.2d 825, 227 La. 179.—Statut 193.

La.App. 3 Cir. 1974. Under the doctrines of "noscitura sociis" and "ejusdem generis," general words, such as "other, etc., following an enumeration of particular or specific classes or things are to take color from the specific, so that the general words are restricted to a sense analogous to the less general; thus the general words should be applied only to such classes of things of the same general kind as those specifically mentioned.—B. W. S. Corp. v. Evangeline Parish Police Jury, 293 So.2d 233.—Statut 194.

Mich. 2002. "Noscitur a sociis" doctrine requires that a statutory term be viewed in light of the words surrounding it.—Koontz v. Ameritech Services, Inc., 645 N.W.2d 34, 466 Mich. 304.—Statut 193.

Mich. 2001. Doctrine of "noscitur a sociis" stands for the principle that a word or phrase is given meaning by its context or setting.—Brown v. Genesee County Bd. of Com'rs, 628 N.W.2d 471, 464 Mich. 430.—Statut 208.

Mich. 1994. Doctrine of "noscitur a sociis" should be applied where legislative intent is not clear, so that when two or more words are grouped together, and ordinarily have similar meaning, but are not equally comprehensive, the general word will be limited and qualified by the special word.—Michigan ex rel. Wayne County Prosecutor v. Ben-

nis, 527 N.W.2d 483, 447 Mich. 719, certiorari granted 115 S.Ct. 2275, 515 U.S. 1121, 132 L.Ed.2d 279, affirmed 116 S.Ct. 994, 516 U.S. 442, 134 L.Ed.2d 68, rehearing denied 116 S.Ct. 1560, 517 U.S. 1163, 134 L.Ed.2d 661.—Statut 193.

Minn. 1907. A beneficiary in an accident policy sought to recover the full amount of insurance for loss of life by "accident" after the insured had been shot by a burglar and had died. Under a title "Special Indemnities" the policy provided that it did not exclude indemnity for loss by accident produced by "shooting" and other enumerated causes. Some of those causes were sports involving conscious participation on the part of the assured. Others excluded such participation. The policy also provided under this title that, in case of loss covered by this title, the company should pay one-half of the ordinary accident indemnity for such loss. It is held that the policy, construed as a whole as favorably to the insured as reasonably may be without distorting the intended meaning of words, and with due reference to the rule of "noscitur a sociis," entitled the beneficiary to recover only one-half, and not the whole amount, of ordinary accident indemnity.—Bader v. New Amsterdam Cas. Co., 112 N.W. 1065, 102 Minn. 186, 120 Am.St.Rep. 613.

Minn.App. 1999. Under the doctrine of "noscitur a sociis," a phrase capable of several meanings is defined by the words with which the phrase is associated.—Wayne v. MasterShield, Inc., 597 N.W.2d 917, review denied.—Statut 193.

Miss. 1988. For purposes of statutory construction, associated words take their meaning from one another under doctrine of "noscitur a sociis," philosophy of which is that meaning of doubtful word may be ascertained by reference to words associated with it.—State Farm Ins. Co. v. Gay, 526 So.2d 534.—Statut 193.

Miss. 1947. Associated words take their meaning from one another under the doctrine of "noscitur a sociis," the philosophy of which is that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it and such doctrine is broader than the maxim "ejusdem generis".—Evans v. City of Jackson, 30 So.2d 315, 202 Miss. 9.—Statut 193.

Miss. 1941. An electric coin-operated machine in which player deposits five cents, whereupon printed questions appear which player is required to answer within 20 seconds by pressing one of several keys designating the alternative answers, one of which is correct, and if the answer given is correct player is automatically awarded a cash prize, is not a "slot machine", within prohibitory statute, in view of maxim "noscitur a sociis", but is a machine by which a game may be played or a form of diversion had within another statute. Laws 1938, c. 353; Laws 1940, c. 122.—Rouse v. Sisson, 199 So. 777, 190 Miss. 276, 132 A.L.R. 998.—Gaming 58.

Mo. 2002. Maxim of statutory construction called "noscitur a sociis" permits the meaning of a word to be ascertained by referring to other words

or phrases associated with it.—*State v. Bratina*, 73 S.W.3d 625.—Statut 193.

Mo. 1984. Maxim “noscitur a sociis,” that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where word is capable of many meanings in order to avoid the giving of unintended breadth in statutory construction.—*Pollard v. Board of Police Com’rs*, 665 S.W.2d 333, certiorari denied 105 S.Ct. 3534, 473 U.S. 907, 87 L.Ed.2d 657.—Statut 193.

Mo.App. 1940. It is very clear to us that the principle of “eiusdem generis” cannot be applied here, nor yet the doctrine of “noscitur a sociis” for the words street and field appearing in the statute are not even remotely related, and neither derives any color from association with the other, but each stands as the representative of a distinct class. The meaning, then, of the general expression “or other place” in the statute is not restricted or affected by the preceding particular words, which signify subjects greatly different from one another.—*City of Caruthersville v. Faris*, 146 S.W.2d 80, 237 Mo.App. 605.

Mo.App. 1939. Statutory provision that every able-bodied married man who shall neglect or refuse to provide for the support of his family shall be deemed a vagrant must be construed in the light of the clauses with which it is associated since maxim “noscitur a sociis” applies. R.S.1929, § 4333, p.3011 (V.A.M.S. § 563.340).—*State v. Hagen*, 130 S.W.2d 250.—Vag 1.

Mont. 1915. “Other excavation,” in an ordinance of Butte, declaring it unlawful to allow any shaft, drift, prospect hole, “or other excavation” to remain open and unguarded, under the rule of “eiusdem generis” or “noscitur a sociis,” means an excavation made in the course of prospecting or active mining, and does not include a trench for a city sewer.—*McLaughlin v. Bardsen*, 145 P. 954, 50 Mont. 177.

Neb. 1941. “Noscitur a sociis” means that the meaning of a doubtful word in a statute may be ascertained by reference to the meaning of words associated with it.—*Behrens v. State*, 1 N.W.2d 289, 140 Neb. 671.

N.J.Super.A.D. 2002. “Noscitur a sociis,” an ancient maxim of statutory construction, stands for the principle that the meaning of words may be indicated and controlled by those with which they are associated.—*Herzog v. Township of Fairfield*, 794 A.2d 230, 349 N.J.Super. 602.—Statut 193.

N.J.Super.A.D. 1959. A familiar maxim to aid in construction of contracts is “noscitur a sociis,” which, simply stated, means that a word is known from its associates, and words of general and specific import take color from each other when associated together, and thus word of general significance is modified by its associates of a restricted sense.—*Bertrand v. Jones*, 156 A.2d 161, 58 N.J.Super. 273, certification denied 158 A.2d 452, 31 N.J. 553.—Contracts 152.

N.J.Super.A.D. 1959. “Noscitur a sociis” summarizes rule of language and law that meaning of

words may be indicated or controlled by those with which they are associated.—*Mayer v. Board of Adjustment of Town of Montclair*, 152 A.2d 860, 56 N.J.Super. 296, certification granted 154 A.2d 673, 30 N.J. 601, reversed 160 A.2d 30, 32 N.J. 130.—Mun Corp 120.

N.J.Super.A.D. 1954. Under the maxim of “noscitur a sociis”, meaning of words may be indicated or controlled by those with which they are associated.—*Josefowicz v. Porter*, 108 A.2d 865, 32 N.J.Super. 585.—Statut 193.

N.J.Super.A.D. 1954. Under contract for sale of premises providing that title was subject to all existing “restrictions of record” and that there were no “restrictions in any conveyance or plans of record” prohibiting use of premises as a dwelling and poultry and egg farm, an ordinance prohibiting the use of the premises as a poultry and egg farm was not within the quoted descriptions under the maxim of “noscitur a sociis.”—*Josefowicz v. Porter*, 108 A.2d 865, 32 N.J.Super. 585.—Ven & Pur 134(4).

N.J.Super.L. 1975. Under maxim of “noscitur a sociis,” meaning of a word or particular set of words in a statute may be indicated, controlled or made clear by the words with which it is associated.—*Falcone v. Branker*, 342 A.2d 875, 135 N.J.Super. 137.—Statut 193.

N.J.Tax 1995. Under maxim of statutory construction “noscitur a sociis,” meaning of words may be indicated and controlled by those with which they are associated.—*Freehold Tp. v. Javin Partnership*, 15 N.J.Tax 88.—Statut 193.

N.J.Ch. 1920. Rule of “noscitur a sociis” in legal interpretation, means that where words of general import follow enumeration of words of specific signification, the general words are naturally and ordinarily (unless there is an indication to the contrary) limited in their meaning to things of like kind to the particular ones.—*Curtis & Hill Gravel & Sand Co. v. State Highway Commission*, 111 A. 16, 91 N.J.Eq. 421.

N.M.App. 2002. Canon of statutory construction known as “noscitur a sociis” looks to the neighboring words in a statute to construe the contextual meaning of a particular word in the statute.—*In re Gabriel M.*, 45 P.3d 64, 132 N.M. 124, 2002-NMCA-047, certiorari denied State v. Gabriel M., 46 P.3d 100, 132 N.M. 193.—Statut 193.

N.Y.Sup. 1949. Where trust indenture made wife’s participation in trust income after death of beneficiary dependent upon her not having been divorced or separated at her instance from beneficiary and, in disjunctive phrase which followed, provided for excluding her from participation if action for divorce or separation should have been instituted by her and pending at beneficiary’s death, doctrine of “noscitur a sociis” required interpretation of “separated” as meaning judicial as distinguished from mere physical separation.—*In re Rogers’ Estate*, 91 N.Y.S.2d 250.—Trusts 140(2).

N.Y.Sup. 1940. The doctrine of “noscitur a sociis” permits reference to associated words in ascer-

taining the meaning of doubtful words in a restrictive covenant.—Kew Gardens Corp. v. Ciro's Plaza, 23 N.Y.S.2d 957, 175 Misc. 475, reversed 26 N.Y.S.2d 553, 261 A.D. 576.—Covenants 49.

N.Y.Sup. 1940. A restrictive covenant against using premises for any alehouse, brewery, distillery, or other place for the manufacture or compounding of intoxicating liquors or for selling or dispensing the same in any form, or for carrying on any other noxious, dangerous, or offensive trade or business, could not be construed under the doctrine of "noscitur a sociis" as prohibiting sale of intoxicating liquors only if sales were deemed a noxious, dangerous, or offensive trade or business, since restriction against sale of intoxicating liquors was expressed in language free from ambiguity.—Kew Gardens Corp. v. Ciro's Plaza, 23 N.Y.S.2d 957, 175 Misc. 475, reversed 26 N.Y.S.2d 553, 261 A.D. 576.—Covenants 52.

N.Y.Sup. 1940. The statute providing for a fee of \$1.25 for filing, examining, and entering any instrument affecting chattels in the city of New York, construed in pari materia with the statute providing for a fee of 10 cents for filing a certificate of satisfaction of conditional sale contract under principles of "ejusdem generis" and "noscitur a sociis", refers only to instruments which create rights in chattels and not to a certificate of satisfaction which extinguishes such right, so that register of county of New York is not entitled to fee of \$1.25 for filing a certificate of satisfaction of conditional sale contract. County Law, § 177; Personal Property Law, § 72.—Rudolph Wurlitzer Co. v. Byrne, 22 N.Y.S.2d 871, 175 Misc. 81, affirmed 26 N.Y.S.2d 312, 261 A.D. 896, appeal denied 27 N.Y.S.2d 183, 261 A.D. 942, affirmed 35 N.E.2d 923, 286 N.Y. 569.—Reg of Deeds 3.

N.Y.Sur. 1943. Where amendatory statute authorizes the surrogate in his discretion to allow testamentary trustees additional compensation "if the trustee's duties have been unusually difficult or burdensome," or if for any other reason the provided commissions are inadequate, discretion can only be exercised to award additional compensation where the trustee's duties are unusually difficult or burdensome, since under "ejusdem generis" and "noscitur a sociis" doctrines the words "for any other reason" are limited to special cases within the class referred to in the quoted prior phrase. Surrogate's Court Act, § 285-a, subd. 2.—In re Hurlbut's Estate, 44 N.Y.S.2d 450, 180 Misc. 681.—Trusts 317.

N.Y.Sur. 1943. Under the "ejusdem generis" and "noscitur a sociis" doctrine, where there are general words following particular words in a statute, the general words must be confined to matters of the same kind as those specified.—In re Hurlbut's Estate, 44 N.Y.S.2d 450, 180 Misc. 681.—Statut 193, 194.

N.Y.Ct.Cl. 2002. Doctrine of "*noscitur a sociis*" is rule of statutory construction under which words employed in a statute are construed and their meaning is ascertained by reference to the words and phrases with which they are associated.—Shar-

row v. New York State Olympic Regional Development Authority, 746 N.Y.S.2d 531, 193 Misc.2d 20.—Statut 193, 208.

N.Y.Mag.Ct. 1940. Under statute penalizing persons participating in violation of statute prohibiting discharge of dense smoke in New York City either as proprietors, owners, tenants, managers, superintendents, captains, engineers, firemen, or motor vehicle operators or otherwise, if the doctrine of "noscitur a sociis" was applicable, federal receiver of corporation maintaining a power plant from which dense smoke was allegedly discharged was sufficiently associated with term "manager" so as to be included within prohibition of the statute. Sanitary Code, § 211; Jud.Code, § 65, 18 U.S.C.A. § 1911; 28 U.S.C.A. § 959.—People ex rel. Newman v. Murray, 19 N.Y.S.2d 902, 174 Misc. 251.—Environ Law 744.

N.Y.Just.Ct. 1996. Statutory definition of a word can be looked for and found in the other parts of the statute by using the doctrine of "noscitur a sociis," under which a word is known by the company it keeps.—People v. Kleber, 641 N.Y.S.2d 488, 168 Misc.2d 824.—Statut 193.

N.C. 1932. Maxim "Noscitur a sociis" means that meaning of doubtful word may be ascertained by reference to meaning of words with which it is associated.—Morecock v. Hood, 162 S.E. 730, 202 N.C. 321.—Statut 193.

N.D. 2001. "Noscitur a sociis" is a canon of construction holding that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it.—T.F. James Co. v. Vakoch, 628 N.W.2d 298, 2001 ND 112.—Contracts 152.

Ohio 1958. The rule of "noscitur a sociis" is that meaning of words in statute may be indicated or controlled by those with which they are associated.—Renfroe v. Ashley, 150 N.E.2d 50, 167 Ohio St. 472, 5 O.O.2d 154.—Statut 193.

Ohio 1907. In the interpretation of section 5971, Rev.St.1892, to prevent the lapsing of a devise or legacy when made to any child or other "relative" of the testator if such child or other relative shall have been dead at the time of the making of the will, or shall die thereafter, leaving issue surviving the testator, the phrase "other relative" should, in accordance with the maxim "noscitur a sociis," be restricted to relationships of the character indicated by the associated word "child," and regarded as including those which are consanguineous, but excluding those which are affinitive merely.—Schaefer v. Bernhardt, 81 N.E. 640, 5 Ohio Law Rep. 112, 76 Ohio St. 443, 10 Am. Ann. Cas. 919.

Ohio 1899. "Noscitur a sociis"—it is known by its associates. Thus, in 92 Ohio Laws, p. 44, Act Feb. 27, 1896, forbidding the prescribing of any drug, medicine, or other agency for the treatment of disease by a person who has not obtained from the board of medical registration and examination a certificate of qualification, the word "agency" should be limited by the associated words "drug" and "medicine," and therefore did not include the

system of healing known as "osteopathy," which consists of rubbing or kneading the body.—State v. Liffring, 55 N.E. 168, 61 Ohio St. 39, 42 W.L.B. 308, 76 Am.St.Rep. 358, 46 L.R.A. 334.

Okl. 1947. The rule of construction under "ejusdem generis" which is to effect that general words do not explain or amplify particular terms preceding them, but are themselves restricted and explained by particular terms, is, under rule of "noscitur a sociis", applicable where general words precede specific terms when it is manifest that specific terms have reference to subjects embraced within meaning of general words.—Application of Central Airlines, 185 P.2d 919, 199 Okla. 300, 1947 OK 312.—Statut 193, 194.

Okl. 1947. The rule of statutory construction known as "noscitur a sociis", which means that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it, is the underlying authority for the application of the ejusdem generis rule.—Application of Central Airlines, 185 P.2d 919, 199 Okla. 300, 1947 OK 312.—Statut 193, 194.

Or. 1935. "Noscitur a Sociis" is an old maxim which summarizes the rule both of language and of law that the meaning of words may be indicated or controlled by those with which they are associated.—Nunner v. Erickson, 51 P.2d 839, 151 Or. 575.

Pa. 1968. Ancient maxim "noscitur a sociis" summarizes rule that meaning of words may be indicated or controlled by those words with which they are associated.—Northway Village No. 3, Inc. v. Northway Properties, Inc., 244 A.2d 47, 430 Pa. 499.—Contracts 152.

R.I. 2001. Under the doctrine of "noscitur a sociis," the meaning of questionable or doubtful words or phrases in a statute may be ascertained by reference to the meaning of other words or phrases associated with it.—Wigginon v. Centracchio, 787 A.2d 1151, answer to certified question conformed to 304 F.3d 55.—Statut 193.

R.I. 2000. One of statutory aids to construction is a maxim entitled "noscitur a sociis," the literal translation of which is "it is known from its associates."—State v. DiStefano, 764 A.2d 1156.—Statut 193.

R.I. 2000. Under doctrine of "noscitur a sociis," the meaning of questionable or doubtful words or phrases in statute may be ascertained by reference to meaning of other words or phrases associated with it.—State v. DiStefano, 764 A.2d 1156.—Statut 193.

S.C. 1991. Under doctrine of "noscitur a sociis," meaning of particular terms in statute may be ascertained by reference to words associated with them in the statute.—Southern Mut. Church Ins. Co. v. South Carolina Windstorm and Hail Underwriting Ass'n, 412 S.E.2d 377, 306 S.C. 339.—Statut 193.

S.D. 1944. The doctrine of construction "noscitur a sociis", which means that when particular word is obscure or of doubtful meaning taken by

itself, its obscurity or doubt may be removed by reference to associated words and the meaning of the term may be enlarged or restrained by reference to whole clause in which it is used, is applicable in the interpretation of the meaning of statutory terms.—State v. Douglas, 16 N.W.2d 489, 70 S.D. 203.—Statut 193.

Utah 1954. Under the rule of "noscitur a sociis", where there is uncertainty about intent, meaning of doubtful words or phrases is to be determined in the light of associated words and phrases.—W.S. Hatch Co. v. Public Service Commission, 277 P.2d 809, 3 Utah 2d 7.—Statut 193.

Utah 1954. Under a certificate to operate as a common carrier by motor vehicle for commodities requiring "equipment" or service of a character not regularly furnished by regular common carriers, naming commodities, and for commodities, in connection with the transporting of which, is rendered a "special service", the certificate did not under rules of "noscitur a sociis" and "ejusdem generis", include the transportation of acid.—W.S. Hatch Co. v. Public Service Commission, 277 P.2d 809, 3 Utah 2d 7.—Autos 104.

Utah App. 1993. Doctrine of "noscitur a sociis" provides that meaning of questionable words and phrases in statute be ascertained by reference to words or phrases associated with them.—OSI Industries, Inc. v. Utah State Tax Com'n, Auditing Div., 860 P.2d 381.—Statut 193.

Utah App. 1991. Phrases "ejusdem generis" and "noscitur a sociis" mean that when general terms follow specific ones, general terms must be given meaning that is restricted to sense analogous to preceding specific terms.—State v. Vogt, 824 P.2d 455.—Statut 194.

Va. 1975. The maxim of "noscitur a sociis" means that when two or more words in a statute are grouped together, and ordinarily have a similar meaning, but are not equally comprehensive, the general word will be limited and qualified by the special word.—Hensley v. City of Norfolk, 218 S.E.2d 735, 216 Va. 369.—Statut 194.

Va. 1956. Under construction canons "noscitur a sociis" and "ejusdem generis", where there are general words following particular and specific words, general words must be confined to matters of same kind as those specified.—Sellers v. Bles, 92 S.E.2d 486, 198 Va. 49.—Statut 194.

Va.App. 2000. Under the legal maxim "noscitur a sociis," a word takes color and expression from the purport of the entire phrase of which it is a part, and must be read in harmony with its context.—Com., Dept. of Social Services, Div. of Child Support Enforcement ex rel. Gagne v. Chamberlain, 525 S.E.2d 19, 31 Va.App. 533.—Statut 193.

Va.App. 1999. The rule of "noscitur a sociis" dictates that when general and specific words are grouped, the general words are limited by the specific and will be construed to embrace only objects similar in nature to those things identified by the specific words.—O'Banion v. Com., 519 S.E.2d 817, 30 Va.App. 709, rehearing en banc granted 522

S.E.2d 414, 31 Va.App. 260, on rehearing 531 S.E.2d 599, 33 Va.App. 47.—Statut 193.

Wash.App. Div. 2 2000. Under rules of construction “ejusdem generis” and “noscitur a sociis,” the meaning of items in a list is ascertained by referring to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope.—Meresse v. Stelma, 999 P.2d 1267, 100 Wash.App. 857.—Statut 193, 194.

Wash.App. Div. 2 1998. Under the doctrine of “noscitur a sociis,” the meaning of a word may be determined by reference to its relationship to other words in the statute.—State v. Van Woerden, 967 P.2d 14, 93 Wash.App. 110, review denied 980 P.2d 1286, 137 Wash.2d 1039.—Statut 193.

W.Va. 1997. Statutory construction canon of “noscitur a sociis” holds that a word is known by the company it keeps, so fact that term has been modified by different words in separate provisions of the statute counsels in favor of term taking on a different connotation depending upon the word used to modify it.—Keatley v. Mercer County Bd. of Educ., 490 S.E.2d 306, 200 W.Va. 487.—Statut 193.

W.Va. 1996. Rule of statutory construction called “*noscitur a sociis*” provides that a word is known by the company it keeps.—Banker v. Banker, 474 S.E.2d 465, 196 W.Va. 535.—Statut 193.

Wis. 1959. Under the rule of “noscitur a sociis”, the meaning of a word takes color and expression from purport of entire statutory phrase of which it is a part, and it must be construed so as to harmonize with context as a whole.—Lewis Realty, Inc. v. Wisconsin Real Estate Brokers’ Bd., 94 N.W.2d 238, 6 Wis.2d 99.—Statut 193.

Wis. 1930. Doctrine of “noscitur a sociis” is rule of statutory construction sometimes applied to restrict general descriptive language to same class, family, or gender indicated by particular words immediately preceding or characterizing context in which general language is found.—Boardman v. State, 233 N.W. 556, 203 Wis. 173.—Statut 193.

Wis. 1899. Where a statute to be construed is too plain to admit of any other construction than that which the ordinary meaning of the words suggest, the maxim “Noscitur a sociis” cannot be adopted.—Brown v. Chicago & N.W. Ry. Co., 78 N.W. 771, 102 Wis. 137, 44 L.R.A. 579.—Statut 193.

Wis. 1889. The words “estate” and “alimony,” in Rev.St.Wis. § 2364, authorizing the court in divorce actions to adjudge to the wife alimony out of the husband’s estate, are not only associated within the rule “noscitur a sociis” and to be understood in a kindred sense, but are correlatives dependent one on the other for effect and should be understood in a corresponding sense.—Blake v. Blake, 43 N.W. 144, 75 Wis. 339.

Wis. 1884. Under Rev.St.Wis. § 1564, providing that any tavern keeper or other person selling liquor on Sunday or election day shall be guilty of a misdemeanor, the general words “other person”

must, under the familiar rule “noscitur a sociis,” be taken to mean a similar class of persons and not be extended so as to include all persons, and hence includes only persons whose business, at least in part, is to sell intoxicating liquors.—Jansen v. State, 19 N.W. 374, 60 Wis. 577.

Wis.App. 2001. Maxim of statutory construction, “noscitur a sociis,” which means that a word is known from its associates so that ordinarily the coupling of words denotes an intention that they should be understood in the same general sense.—Tele-Port, Inc. v. Ameritech Mobile Communications, Inc., 637 N.W.2d 782, 248 Wis.2d 846, 2001 WI App 261, review denied Telle-Port, Inc. v. Ameritech Mobile Communications, 643 N.W.2d 94, 250 Wis.2d 557, 2002 WI 23.—Statut 193.

### **NOSEWORTHY DOCTRINE**

N.Y.A.D. 2 Dept. 1985. Under “*Noseworthy doctrine*,” claimant who has proven by clear and convincing evidence that he is suffering from amnesia as a result of injuries sustained in accident allegedly caused by defendant’s negligence will not be held to as high a degree of proof as in case where injured party is able to testify to occurrence.—Fasano v. State, 493 N.Y.S.2d 805, 113 A.D.2d 885.—Neglig 1652.

### **NOSEWORTHY RULE**

C.A.2 (N.Y.) 1984. Even assuming error on part of trial court in not charging jury on New York’s “*Noseworthy rule*,” which permits the plaintiff in a wrongful death action to assume a lower burden of proof than in an ordinary negligence action, such error was harmless in suit by mother to recover damages for son’s death in airplane crash, as there was no evidence that mother would have received any financial support from her son other than a small annuity.—Shatkin v. McDonnell Douglas Corp., 727 F.2d 202.—Fed Cts 912.

### **NO SNAPSHOT DOCTRINE**

D.N.J. 1997. Under the “no snapshot doctrine,” courts, in determining Jones Act seaman status, evaluate worker’s connection to a vessel or fleet not as of the moment of injury, but rather on basis of his intended relationship as if he had completed his mission, tour, or voyage uninjured; thus, under the doctrine, worker who would otherwise qualify as a Jones Act seaman would not lose his status if injured in the first few moments of his employment. Jones Act, 46 App.U.S.C.A. § 688.—Foulk v. Donjon Marine Co., Inc., 961 F.Supp. 692, reversed 144 F.3d 252, on remand 182 F.R.D. 465.—Seamen 2.

### **NO SOCK RULE**

S.D.N.Y. 1990. Suspect may not use force to resist arrest simply because the arrest appears to be unlawful, but the “no sock rule” does not override justification if the police engage in an unprovoked attack or use excessive force. N.Y.McKinney’s Penal Law § 35.27.—Rinaldi v. City of New York, 756 F.Supp. 111.—Assault 67.

**NO-STACK**

Fla.App. 3 Dist. 1980. Even though insured, whose commercial vehicle was insured under policy not containing PIP coverage, whose automobile was insured under separate policy containing such coverage and whose commercial vehicle, while being driven by insured, had been struck by motor vehicle, had not been occupant of a "motor vehicle," she had been occupant of a "vehicle" within meaning of "no-stack" statute providing that policy affording PIP coverage shall provide that insured is protected only to extent of coverage he has on a vehicle involved in accident. West's F.S.A. § 627.4132.—Lauredo v. Fidelity & Cas. Co. of New York, 388 So.2d 1073, review denied 397 So.2d 778.—Insurance 2840.

**NO STANDING**

N.Y.Sup. 1964. In relation to motions to suppress evidence, term "standing" is applicable only to pretrial motions to suppress, and finding of "no standing" does not determine admissibility. Code Cr.Proc. § 813-c; Fed.Rules Crim.Proc. rule 41(e), 18 U.S.C.A.—People v. Estrada, 253 N.Y.S.2d 876, 44 Misc.2d 452, reversed 280 N.Y.S.2d 825, 28 A.D.2d 681, affirmed 296 N.Y.S.2d 364, 23 N.Y.2d 719, 244 N.E.2d 57, certiorari denied Estrada v. New York., 89 S.Ct. 1295, 394 U.S. 953, 22 L.Ed.2d 488.—Crim Law 394.5(2).

**NO STRIKE**

U.S. 1958. A "no-strike" clause prohibits employees from striking during life of contract, and a "ballot" clause, calling for a prestrike secret vote of employees (union and nonunion) as to employer's last offer, was not a partial "no-strike" clause, regulating relations between employer and employees, but was rather one dealing only with relations between employees and their unions and substantially modifying collective-bargaining system provided for in statute by weakening independence of "representative" chosen by employees, because, in effect, it permitted employer to deal with employees rather than with their statutory representative.—N. L. R. B. v. Wooster Div. of Borg-Warner Corp., 78 S.Ct. 718, 356 U.S. 342, 2 L.Ed.2d 823, on remand National Labor Relations Board v. Wooster Division of Borg-Warner Corporation., 259 F.2d 270.—Labor 257.1.

C.A.D.C. 1968. Plant operation suspensions resulting from refusals to report for work across picket lines were included within "no strike" clause of contract.—News Union of Baltimore v. N. L. R. B., 393 F.2d 673, 129 U.S.App.D.C. 272.—Labor 257.1.

**NO STRINGS TO IT**

Cal. 1923. Where a witness stated that an escrow deed was delivered to him unconditionally and "without any strings to it," and no objection was made to the use of the term "unconditionally," the failure to strike the expression "no strings to it" was not harmful, the expressions being used synonymously, and unconditionally being permitted to re-

main.—De Cou v. Howell, 214 P. 444, 190 Cal. 741.—App & E 1047(3).

**NO STRUCTURE SHALL BE ERECTED**

La.App. 3 Cir. 1974. A wide hard-surface boulevard used to provide ingress and egress to an apartment complex on adjacent property was a "structure" within provision of building restriction that "no structure shall be erected" on lots in subdivision except one or two story family dwellings.—Beyt v. Woodvale Place Apartments, 297 So.2d 448, writ denied 300 So.2d 840.—Covenants 51(2).

**NOSTRUM**

N.Y.Sup. 1914. A "nostrum" is a quack, patent, or proprietary medicine recommended by its proprietor, or one the ingredients of which are kept secret for the purpose of restricting the profits of sale to the inventor or proprietor.—World's Dispensary Medical Ass'n v. Collier, 148 N.Y.S. 405, 86 Misc. 217.

**NO SUBSTANTIAL EVIDENCE**

C.A.5 (Tex.) 1983. To make finding of "no substantial evidence" in social security matter, Court of Appeals is required to conclude that there is conspicuous absence of credible choices or no contrary medical evidence. Social Security Act, § 205(g), as amended, 42 U.S.C.A. § 405(g).—Dellolio v. Heckler, 705 F.2d 123.—Social S 148.5.

**NO SUBSTANTIAL EVIDENCE TO SUPPORT THE VERDICT**

Mo. 1927. Assignment of error in motion for new trial, that there is "no substantial evidence to support the verdict," held sufficiently specific.—State v. Miller, 300 S.W. 765, 318 Mo. 581.—Crim Law 1064(5).

**NO SUCH ACTION**

N.Y.A.D. 2 Dept. 1972. Words "no such action," in statute providing that an action to enforce a trust arising out of improvement of realty may be brought provided no such action is pending at time of commencement thereof, mean no such action involving the same defendant and the same plaintiff or a new plaintiff who could be said to be member of the class which the plaintiff bringing the first action intended to benefit. Lien Law § 77, subds. 1, 2.—Premier Elec. Const. Corp. v. Security Nat. Bank of Long Island, 334 N.Y.S.2d 199, 39 A.D.2d 967.—Abate & R 9.

**NO SUCH ADDRESS**

Wyo. 1965. Instrument stating that last known address of defendant was a specified place but that notice mailed to that address had been returned with "no such address" was not construable as stating address of defendant as "then known" within rule providing that where defendant is served by publication and there has been no delivery of notice mailed, plaintiff or his agent or attorney shall make affidavit stating address of defendant as then

known. Rules of Civil Procedure, rule 4(f).—Emery v. Emery, 404 P.2d 745.—Proc 96(4).

**NO SUCH ORDINANCE**

Ohio 1936. Use of phrase “no such ordinance,” within constitutional provision that any municipality proceeding to acquire or construct a public utility shall act by ordinance and no such ordinance shall take effect until after 30 days from its passage, and, if within 30 days petition demanding referendum shall be filed, ordinance shall not take effect until submitted to electors and approved by majority of those voting, *held* to imply that an ordinance initiating acquirement or construction of utility and not successive ordinances in furtherance of that purpose is subject to referendum (Const. art. 18, § 5).—State ex rel. Didelius v. City Commission of City of Sandusky, 2 N.E.2d 862, 131 Ohio St. 356, 6 O.O. 64.—Mun Corp 108.10.

**NO SUCH RATE OR PREMIUM CHARGE SHALL BE APPROVED**

S.C. 1976. Statutory provisions that for a period of six months following effective date of no-fault law, “no such rate or premium charge shall be approved” if rate or charge exceeds 90 percentum of closest comparable rate or premium charge for applicable class and territory in accordance with rate plan and system in use on effective date of law does not require all insurers to file new rates by automatically disapproving rates previously approved as adequate and not excessive, but applies prospectively to rates which insurers seek to have approved during initial period. Code 1962, § 37-591.2.—Insurance Services Office v. South Carolina Ins. Commission, 226 S.E.2d 33, 267 S.C. 54.—Insurance 1541.

**NO-SURPLUS SALE**

Miss.App. 2000. Legitimate “no-surplus sale” of homestead property occurs where the reasonable price paid for the homestead provides no surplus above the amount of the homestead exemption and prior encumbrances. West’s A.M.C. §§ 85-3-21, 85-3-49.—McMillan v. Aru, 773 So.2d 355, rehearing denied, and certiorari denied.—Home 112.

**NO SYMPATHY**

C.A.10 (Okla.) 1989. Statements by homicide defendant’s wife and sister-in-law, while testifying during guilt stage of trial, that they loved defendant, were not “relevant mitigating evidence” within meaning of *Lockett* and thus submission of disapproved “no sympathy” instruction was not in violation of defendant’s Eighth Amendment rights, where defendant presented no mitigating evidence. U.S.C.A. Const.Amend. 8.—Coleman v. Saffle, 869 F.2d 1377, certiorari denied 110 S.Ct. 1835, 494 U.S. 1090, 108 L.Ed.2d 964, rehearing denied 110 S.Ct. 2606, 496 U.S. 913, 110 L.Ed.2d 285.—Sent & Pun 1646, 1717, 1780(3).

**NOT**

La. 1915. “Un” is a preposition used indiscriminately, and may mean simply “not,” and “unlawful”

means “not authorized by law.”—State v. Sanders, 68 So. 125, 136 La. 1059, Am. Ann.Cas. 1916E,105.

**NOT ABANDONED**

La.App. 1 Cir. 1976. Ordinarily, husband, who returns to matrimonial domicile and in good faith offers to resume marital relation, had “not abandoned” his wife.—Russell v. Russell, 333 So.2d 277.—Divorce 37(8).

**NOT ABLE**

Wash. 1914. An interstate carrier’s published tariff relating to the transportation of sheep provided for shipment in double deck cars, declaring that when so loaded the rate should be 170 per cent. of that provided for shipment in single deck cars of the same length, and if the company “cannot” furnish double deck equipment and shipments move in single deck cars, the rates provided for the latter will be charged. Held, that the word “cannot” as so used meant “not able,” so that where double cars were ordered by a shipper and could have been furnished, but the carrier for its own convenience supplied single deck cars, it was not precluded by such provision from readjusting the freight on the basis of shipment in double deck cars.—Southern Pac. Co. v. Frye & Bruhn, 143 P. 163, 82 Wash. 9.

**NOT ABSENT FROM FULL TIME WORK**

Ill.App. 5 Dist. 1979. Phrase “ceases active work,” within supplemental accidental death and dismemberment policy terminating employment for insurance purposes when employee ceased active work, did not operate to preclude widow from recovering benefits under policy for accidental death of employee in an automobile accident on day of his retirement, where “ceases after work” clause was modified by clause defining active work as “not absent from full time work” because of illness or personal injury, neither of which was applicable, and payments had not only been made for a full five-day week, but full payroll deductions had been taken for group life insurance and accidental death and dismemberment insurance.—Lichtenberger v. Superior Oil Co., 29 Ill.Dec. 873, 392 N.E.2d 430, 73 Ill.App.3d 805.—Insurance 2583.

**NOT ACCEPTABLE TO THE TRADE**

C.A.7 (Wis.) 1953. In contract providing that, if soy bean oil and meal which were to be processed from plaintiff’s soy beans by defendant were found not acceptable to the trade, plaintiff would be notified in order that a decision might be arrived at as to what future action would be to the parties’ mutual benefit, words “not acceptable to the trade” would have to be applied in light of what parties understood to be the normal trade, as shown by the record.—Greenley v. Janesville Mills, 204 F.2d 526.—Contracts 159.

**NOT ACCEPTED**

Md. 1902. As used in the constitution of a benefit society, providing that a member may be transferred to another lodge, but, if the transfer card is not accepted, the member retains his mem-

bership in the lodge issuing it, "not accepted" means "if rejected."—Schlosser v. Grand Lodge of Broth. of Railroad Trainmen, 50 A. 1048, 94 Md. 362.

### NOT ACCESSIBLE

C.A.4 (Va.) 1988. Minor child's property was not resource which was "not accessible" to child's household such that it could not be considered in determining food stamp eligibility; under state law, head of household could initiate court proceeding to attempt to sell child's property, even though it was possible that, upon taking such action, property could become not accessible because sale was denied or because proceeds were placed in trust for child. Food Stamp Act of 1977, § 5(g), 7 U.S.C.A. § 2014(g).—Jackson v. Jackson, 857 F.2d 951.—Agric 2.6(2).

### NOT A COMMUNITY WORK AND TRAINING PROGRAM

Or.App. 1976. Job search requirement, which was a part of Public Welfare Division's procedure for determining an individual's eligibility for ADC benefits was "not A Community Work and Training Program" as those words were statutorily defined. ORS 411.855(1).—Schofield v. Public Welfare Division, Dept. of Human Resources, 554 P.2d 552, 26 Or.App. 709.—Social S 194.3(3).

### NOT ACT AS AN EXTENSION OF CREDIT

Ill.App. 2 Dist. 1976. Once debtor distributor, who has not been extended credit for more than statutory 15-day period by creditor brewery, breaches his obligation by not paying brewery for orders of beer within 15 days, any delay in collection, at least in the usual instance, will "not act as an extension of credit" for purposes of Dram Shop Act provision to effect that all beer sold by an importing distributor shall be paid for by distributor within 15 days after delivery and that no right of action shall exist for collection of any claim based on credit extended to an importing distributor contrary to such 15-day requirement. S.H.A. ch. 43, § 122.—Carling Brewing Co., Inc. v. George F. Doyle Distributing Co., Inc., 353 N.E.2d 222, 41 Ill.App.3d 116.—Int Liq 329(2).

### NOT ACTUALLY OR NOTORIOUSLY INSOLVENT

Tex.Civ.App.—Beaumont 1976. Corporation, which alleged, in its petition for an "arrangement" under Bankruptcy Act, that it was unable to pay its debts as they matured, which was a "debtor in possession" entitled to run its business as usual under court supervision and which had assets of \$4,600,147.13 and liabilities of \$2,029,400.69, was "not actually or notoriously insolvent" within meaning of statute providing that guarantor may be sued without suing the maker, acceptor or other principal obligor when he is actually or notoriously insolvent. Vernon's Ann.Civ.St. art. 1987.—Cook v. Citizens National Bank of Beaumont, 538 S.W.2d 460.—Guar 82(2).

### NOT A DIRECT CONTEMPT

Md.App. 1976. Fact that spectator, who observed criminal trial of his friend and who used respectful and forthright language in all his communications with trial court, slammed his hands down when he was cited for constructive contempt and ordered held without bond, in regard to disorder allegedly occurring out of presence of trial court, was "not a direct contempt."—Jones v. State, 362 A.2d 660, 32 Md.App. 490.—Contempt 6.

### NOT A DISCHARGE FOR MISCONDUCT

Or.App. 1976. Discharge of claimant from his employment due to fact that he was absent from work for two-day period in which he cared for his sick children while his wife worked was "not a discharge for misconduct" so as to disqualify him from receiving unemployment benefits. ORS 657.176(2)(a).—Scevers v. Employment Division, 554 P.2d 575, 26 Or.App. 659.—Social S 390.

### NOT A DISCLAIMER

N.Y.Sur. 1976. Testator's son's death more than nine months after testator's death and filing of federal estate tax return by executor was "not a disclaimer" of son's interest in trust created by will which provided that trustees were to pay net income from one-half of residuary estate to testator's wife for life and then to son and that, on death of son, \$2,000 was to be paid to a friend and balance of corpus was to be paid to certain church. 26 U.S.C.A. (I.R.C.1954) § 2055(e)(2)(A).—In re Otto's Will, 381 N.Y.S.2d 617, 86 Misc.2d 824, opinion supplemented Will of Otto, 392 N.Y.S.2d 371, 89 Misc.2d 672.—Wills 717.

### NOT ADMINISTERED

Conn. 1898. The phrase "not administered," as used in the statement of the common-law rule that an administrator de bonis non succeeded to goods, chattels, and credits of a decedent which had not been administered, meant chattels, goods, and credits which had been property of the decedent at his death, and remained in specie, unchanged and unconverted, when such administrator was appointed. Thus money received by the former executor or administrator in his representative capacity, and kept by himself separate from his own money, was regarded as not administered; but, if mixed and mingled with his own money, so that it had lost its identity, it was regarded as converted, and hence, so far as the administrator de bonis non was concerned, administered. The administrator de bonis non was regarded as taking the specific property of the decedent as his immediate successor, and not as succeeding to a prior executor or administrator. These rules of the common law have been changed or modified in most of the states. "They are here regarded as mere agents or trustees for those beneficially entitled to the property as creditors, legatees, heirs, or distributees," and hence an administrator de bonis non was entitled to recover and administer as assets of the estate undistributed personal property which was in fact intestate, though decedent's debts had all been paid, and the

property delivered by the executor to the testamentary trustee.—*In re Chapman's Estate*, 39 A. 734, 70 Conn. 363, 41 L.R.A. 204.

**NOT ADMISSIBLE**

Tex.Civ.App. 1897. There is no material difference between "incompetent" and "not admissible," under the rules of evidence.—*Texas Brewing Co. v. Dickey*, 43 S.W. 577.

**NOT AFFECTING SUBSTANTIAL RIGHTS OF PARTIES**

Cal.App. 2 Dist. 1976. Although city redevelopment agency amended city redevelopment plan, rather than performing procedures set forth in community redevelopment law for formulation of new redevelopment plan, such procedure did not deprive interested persons affected thereby of constitutional due process, and thus constituted an excusable irregularity or omission "not affecting substantial rights of parties," so that such procedure was validated by Third Validating Act of 1973. West's Ann.Health & Safety Code, § 33120; St.1973, p. 829, § 1 et seq.; West's Ann.Code Civ.Proc. § 866.—*Card v. Community Redevelopment Agency*, 131 Cal.Rptr. 153, 61 Cal.App.3d 570.—Const Law 289; Mun Corp 320.

**NOT A FINAL ORDER**

Pa.Cmwth. 1976. Common pleas court order, which refers board of viewers' report in condemnation proceeding "back to the same or other viewers," is "not a final order" and, thus, is not an appealable order. 26 P.S. § 1-517; 17 P.S. § 211.402.—*Kellman Trust Fund v. Com., Dept. of Transp.*, 354 A.2d 583, 24 Pa.Cmwth. 102.—Em Dom 253(1).

**NOT A HANDLER**

C.A.2 (N.Y.) 1949. In regulation classifying milk at III-D for purposes of producer-settlement fund, if delivered as cream to a purchaser, not a handler, outside New York and outside county which is "approved" in the sense of containing a plant approved by health authority, phrase "not a handler" must be construed as "not a handler anywhere" rather than as a mere redundant interpolation that would add nothing to regulation defining "handler" as one handling milk or cream received at approved plant; the phrase not being necessary to meet such cases as that of dealer buying cream in "unapproved" county and taking it to sell in New York.—*Dairymen's League Co-op. Ass'n v. Brannan*, 173 F.2d 57, certiorari denied *Dairymen's League Co-Operative Association, Inc. v. Brannan*, 70 S.Ct. 73, 338 U.S. 825, 94 L.Ed. 501.—Food 4.5(4).

**NOT A MATTER OF COMMON USAGE**

Cal.App. 4 Dist. 1991. For purpose of determining whether activity is ultrahazardous such that strict liability can be imposed, "not a matter of common usage" as used in Restatement (Second) of Torts is intended to be applied for purpose of exclusion of activity from classification as ultrahazardous rather than inclusion.—*Edwards v. Post*

Transportation Co.

279 Cal.Rptr. 231, 228 Cal.App.3d 980, rehearing denied, and review denied.—*Neglig 305.*

**NOT AMENABLE TO REHABILITATION OR TREATMENT**

N.D.Ga. 1975. Term "not amenable to rehabilitation or treatment," within Georgia statute authorizing a juvenile court judge to commit a delinquent or unruly child to custody of Department of Corrections/Offender Rehabilitation (DCOR) in event child is not amenable to rehabilitation or treatment, is not so vague as to deny due process or equal protection inasmuch as Georgia Supreme Court has interpreted term as meaning that child is not amenable to rehabilitation or treatment in a facility operated by Department of Human Resources or in a facility operated under direction of court or other public local authority. Code Ga. §§ 24A-401(c), 24A-2304; U.S.C.A.Const. Amend. 14.—*Long v. Powell*, 388 F.Supp. 422, vacated 96 S.Ct. 18, 423 U.S. 808, 46 L.Ed.2d 28.—Const Law 242.1(4), 255(4); Infants 132.

**NOT AN ACCOMMODATION PARTY**

Tex.Civ.App.-Tyler 1976. Where, though church may have executed deed of trust note as an accommodation to contractor, who contracted to construct church building and parking lot, church did not sign note as a surety and there was no indication that there was a conditional delivery of note or delivery for a special purpose, church was "not an accommodation party" as defined by UCC. Rules of Civil Procedure, rule 93(g); V.T.C.A., Bus. & C. §§ 3.306, 3.415.—*McPherson v. Longview United Pentecostal Church, Inc.*, 540 S.W.2d 424, 90 A.L.R.3d 329, ref. n.r.e.—Bills & N 122.

**NOT AN AGENT**

Ariz.App. Div. 2 1976. Contrary to defaulting debtor's contention that an agency relationship existed between him and persons, who purchased mortgaged real property, with a value of \$45,000, for \$20,501.54 at a sheriff's sale conducted after default judgment was entered in mortgage foreclosure proceeding, such purchasers' employer, which had entered into mortgage with debtor's predecessor in title, which had assigned mortgage and which acted as collection agent for assignee, was "not an agent" of debtor.—*Wiesel v. Ashcraft*, 549 P.2d 585, 26 Ariz.App. 490.—Princ & A 14(2).

**NOT AN AGRICULTURAL COMMODITY**

Or.App. 1976. Fish were "not an agricultural commodity" for purposes of employment division law provision which states that employment does not include agricultural labor and that agricultural labor includes all services performed, inter alia, in connection with the production of any commodity defined as an agricultural commodity in section of Federal Agricultural Marketing Act. ORS 657.045, 657.045(2)(c).—*M/V Dare II Co. v. Employment Div.*, 552 P.2d 846, 26 Or.App. 397, review denied 276 Or. 555.—Tax 111.21(2).

**NOT AN APPEALABLE ORDER**

Pa.Cmwlth. 1976. Common pleas court order, which on appeal from board of viewers' report in condemnation proceedings, refused property owner's motion opposing Commonwealth's request for consolidation of claims of owners as lessees, was "not an appealable order." 17 P.S. § 211.402; 26 P.S. §§ 1-501 et seq., 1-507, 1-511(7), 1-515 to 1-517, 1-516(a)(4); 1 Pa.C.S.A. § 1924.—Kellman Trust Fund v. Com., Dept. of Transp., 354 A.2d 583, 24 Pa.Cmwlth. 102.—Em Dom 253(1).

**NOT A NECESSARY PARTY**

Mo. 1903. The term "not a necessary party" means that the suit can proceed just as well without him and in that event, if his presence has the effect to hinder or burden the case, he may be dropped.—Jones v. Kansas City, Ft. S. & M.R. Co., 77 S.W. 890, 178 Mo. 528, 101 Am.St.Rep. 434.

**NOT AN ENEMY OR ALLY OF AN ENEMY**

Ct.Cl. 1950. Under the Trading With the Enemy Act granting the privilege of suit to any person "not an enemy or ally of an enemy" to establish any interest in property seized or conveyed to the Alien Property Custodian, quoted phrase includes both citizens and noncitizens. Trading With the Enemy Act, § 9(a), 50 U.S.C.A.Appendix, § 9(a).—Duisberg v. U.S., 89 F.Supp. 1019, 116 Ct.Cl. 861, certiorari denied 71 S.Ct. 205, 340 U.S. 890, 95 L.Ed. 645.—War 12.

**NOT AN EXTENSION OF CREDIT**

Ill.App. 2 Dist. 1976. Failure of importing distributor to pay brewery for orders of beer within 15 days, coupled with brewery's failure to file suit against distributor for payment for the orders until more than eight months after delivery of orders, was "not an extension of credit" within Dram Shop Act provision to effect that all beer sold by an importing distributor shall be paid for by distributor within 15 days after delivery and that no right of action shall exist for collection of any claim based on credit extended to an importing distributor contrary to such 15-day requirement. S.H.A. ch. 43, § 122.—Carling Brewing Co., Inc. v. George F. Doyle Distributing Co., Inc., 353 N.E.2d 222, 41 Ill.App.3d 116.—Int Liq 329(2).

**NOT AN INHERENTLY PERSONAL FUNDAMENTAL RIGHT**

Ga. 1976. Accused's right not to have evidence of recidivism disclosed during first phase of trial was "not an inherently personal fundamental right" which could only be waived by accused; he was bound by his attorney's waiver of such right, though accused was not shown to have personally participated in the decision. Code, § 26-1813(b).—Bostick v. Ricketts, 223 S.E.2d 686, 236 Ga. 304.—Atty & C 92.

**NOT AN OCCUPANT OF A MOTOR VEHICLE**

Mich.App. 1976. Under no-fault statutes, operator of a motorcycle who was involved in an acci-

dent with an automobile was included within the phrase "not an occupant of a motor vehicle" and therefore was entitled to personal protection insurance benefits from the insurer of the automobile involved in the accident. M.C.L.A. §§ 500.3101(1, 2), 500.3113, 500.3115, 500.3115(1).—Underhill v. Safeco Ins. Co., 255 N.W.2d 349, 76 Mich.App. 13, affirmed 284 N.W.2d 463, 407 Mich. 175, on remand Porter v. Michigan Mut. Liability Co., 293 N.W.2d 799, 97 Mich.App. 281.—Insurance 2826.

**NOT A NONRESIDENT**

Vt. 1989. One who is "not a nonresident," within meaning of statute stating that person while engaged in any manner in carrying on in state any employment, trade, business or profession, not entirely in interstate or foreign commerce, shall not be deemed a nonresident with respect to use in state of property in that employment, trade, business or profession, is "resident," within meaning of compensating use tax statute. 32 V.S.A. §§ 9744(b), 9774(b).—In re R.S. Audley, Inc., 562 A.2d 1046, 151 Vt. 513.—Tax 1270.

**NOT AN OPTOMETRIST**

Nev. 1986. Ophthalmologist was within definition of "a person not licensed to practice optometry" and "not an optometrist" for purpose of statute which prohibits optometrists from accepting employment from person not licensed to practice optometry and which prohibits division of fees by an optometrist with person who is not an optometrist. N.R.S. 636.300, subds. 2, 5 (St. 1981).—Natchez v. State, 721 P.2d 361, 102 Nev. 247.—Health 192.

**NOT ANY**

Pa.Super. 1936. "Any" when used in affirmative and negative sentences has different meanings; the corresponding opposite or affirmative of "not any" is not "any," or "every," or "all," but "some." "Any," as used in affirmative sentences, being indeterminate in application, in effect has reference to every unit of the sort mentioned, and thus may be nearly equivalent to "every," as "any" schoolboy would know that; "any" attempt to evade the law will be resisted.—Com. v. Wiswesser, 188 A. 604, 124 Pa.Super. 251.

**NOT APPARENT**

Ala. 1997. Danger caused by condition, use, structure, or activity on outdoor public recreational land used for noncommercial recreational purposes is "not apparent", so that property owner who has actual notice of condition may be liable for injuries caused by condition under recreational use statutes, if person could not avoid condition, use, structure, or activity by use of reasonable care and skill. Code 1975, § 35-15-24.—Ex parte City of Geneva, 707 So.2d 626, on remand City of Geneva v. Yarbrough, 707 So.2d 631.—Negligil 1193.

**NOT ARBITRARY**

Ct.Cl. 1951. The expression "substantial evidence" has been judicially construed as meaning

everything from “warrant in the record”, “rational basis”, “not arbitrary”, “some evidence”, “reasonable”, to what is commonly understood as being the preponderance of the evidence, and Congress intended Court of Claims to follow a course somewhere between those extremes in determining whether findings of Indian Claims Commission are supported by substantial evidence. 25 U.S.C.A. § 70s(b).—Osage Nation of Indians v. U.S., 97 F.Supp. 381, 119 Ct.Cl. 592, certiorari denied 72 S.Ct. 230, 342 U.S. 896, 96 L.Ed. 672.—Admin Law 791; U.S. 113.

**NOT ARBITRARY AND CAPRICIOUS**

D.N.H. 1993. “Jeopardy assessment” is “reasonable” so long as decision to impose it falls between something more than “not arbitrary and capricious” and something less than “supported by substantial evidence”. 26 U.S.C.A. §§ 6861, 6862, 7429(b).—Olbrs v. I.R.S., 837 F.Supp. 20.—Int Rev 4548.1.

**NOT ARBITRARY OR CAPRICIOUS**

E.D.Pa. 1982. For a termination assessment to be “reasonable under the circumstances,” it must be something more than “not arbitrary or capricious” and something less than “supported by substantial evidence.” 26 U.S.C.A. § 7429(b)(2)(A), (g)(1).—Barry v. U.S., 534 F.Supp. 304.—Int Rev 4638.

**NOT A RESIDENT OF THE STATE**

Neb. 1891. Where a statute requires an affidavit for an attachment to show that defendant is “a nonresident of the state” an affidavit that he is “not a resident of the state,” is sufficient.—Nagel v. Loomis, 50 N.W. 441, 33 Neb. 499.—Attach 112.

Neb. 1891. As used in Code, § 926, providing that when the ground of attachment is that the defendant is a foreign corporation, or a “nonresident of the state,” the order of attachment may be issued without an undertaking, “nonresident” is synonymous with “not a resident of the state,” as used in an affidavit for the attachment reciting that the defendant is not a resident of the state.—Nagel v. Loomis, 50 N.W. 441, 33 Neb. 499.

**NOTARIAL ACT**

La. 1932. Deed reciting that it was passed in presence of notary and two competent witnesses who signed it with vendor and vendee and notary held “notarial act,” entitled to record without certificate of acknowledgment, notwithstanding it began as private act and omitted usual notarial formula.—Miller v. Brugier, 145 So. 282, 176 La. 106.—Ack 53.

La.App. 2 Cir. 1942. Under statute relating to chattel mortgages and liens created thereby, mortgage must be in writing and in form of a “notarial act” by being signed by mortgagor before notary public and two competent attesting witnesses, or by a “private act” by being signed by mortgagor and thereafter acknowledged before a notary public by mortgagor or by one of the attesting witnesses, if

any, and must be recorded. LSA-R.S. 9:5351; LSA-C.C. art. 2234.—Smith v. Bratsos, 12 So.2d 241, reversed 12 So.2d 245, 202 La. 493.—Chat Mtg 41, 61, 84.

**NOTARIAL SERVICES**

La.App.Orleans 1936. As regards limitations, advice and service rendered by attorney in preparation of notarial charter of corporation constitute “legal services” rather than “notarial services”. LSA-Civ.Code, art. 3534.—David v. Southern Import Wine Co., 171 So. 180.—Lim of Act 21(3).

**NOT ARISING FROM CONTRACT**

Cal.App. 2 Dist. 1963. Liability of stockholder’s creditor and another, who took unauthorized action to appear as management of corporation with result that corporation was sued, for payment of \$1500 cost of defending action was obligation “not arising from contract”, and award of exemplary damages against creditor and the other in sum of \$500 was not abuse of discretion. West’s Ann.Civ.Code, § 3294.—Beraksa v. Stardust Records, Inc., 30 Cal. Rptr. 504, 215 Cal.App.2d 708.—Corp 306.

**NOT ARISING OUT OF**

S.D.N.Y. 1957. The words “not arising out of” as used in statute providing for deportation of an alien convicted of two crimes not arising out of a single scheme of criminal misconduct, mean not occurring in the course of the performance of a single scheme. Immigration and Nationality Act, § 241(a) (4), 8 U.S.C.A. § 1251(a) (4).—Jeronimo v. Murff, 157 F.Supp. 808.—Aliens 53.2(3).

**NOT ARISING OUT OF THE EMPLOYMENT**

Cal.App. 2 Dist. 1974. Determination that activity resulting in injury was personal to employee is not determinative as compensability; term “personal” may mean “entirely personal” and therefore “not arising out of the employment” or it can mean “individual” or even “uniquely individual” without eliminating coverage.—Lizama v. Workmen’s Comp. Appeals Bd., 115 Cal.Rptr. 267, 40 Cal. App.3d 363.—Work Comp 652, 665.

**NOTARIZATION**

Ga. 1999. “Notarization” occurs only when the affiant or person acknowledging execution personally appears before the notary. O.C.G.A. § 45-17-8.—Sambor v. Kelley, 518 S.E.2d 120, 271 Ga. 133, reconsideration denied.—Ack 24.

**NOTARY**

La. 1906. A “notary” is a public officer whose duty it is to attest the genuineness of any deeds or writings in order to render them available as evidence of the facts therein contained. He is a public functionary, authorized to receive all acts and contracts to which parties wish to give the character of authenticity, attached to the act of public authority, to secure their date, their preservation, and the delivery of copies. The functions and authority of a notary are defined by law, and he cannot act as the

mandatory of a vendor for whom he draws up and passes a deed of sale, since that is not one of the functions conferred upon him by law, and hence the purchaser cannot make a valid payment of the price to him.—*Nolan v. Labatut*, 41 So. 713, 117 La. 431.

### **NOTARY DE FACTO**

Ill.App. 1 Dist. 1942. A regularly appointed notary public who had not filed a memorandum of her appointment in the office of the county clerk as required by statute was nevertheless a “notary de facto”. S.H.A. ch. 99, § 5.—*Keller v. Anton*, 43 N.E.2d 690, 316 Ill.App. 114.—Notaries 2.

### **NOTARY JURAT**

Ind. 1993. “Notary jurat” is a certificate of due administration of oath, purpose of which is to evidence fact that affidavit has been duly sworn to by officer authorized to administer oath.—*Jordan v. Deery*, 609 N.E.2d 1104, appeal after remand 742 N.E.2d 45, transfer granted, opinion vacated, IN RAP 58(A) 753 N.E.2d 18, opinion vacated 778 N.E.2d 1264.—Aftt 12.

### **NOTARY LIVING NEAREST THE PLACE OF FIRE**

N.Y.Sup. 1893. A policy of fire insurance requiring that the insured should, if required, furnish a certificate of the “notary living nearest the place of fire,” stating that he had examined the circumstances, and believed the insured had honestly sustained loss to a certain amount, means the notary whose place of business was nearest to the fire, and who could be found during business hours, though there were other notaries who lived nearer, but who were not housekeepers, and did not have signs out at the houses where they lived, and did not transact business there.—*Paltrovitch v. Phoenix Ins. Co. of Hartford*, 52 N.Y.St.Rep. 277, 23 N.Y.S. 38, 68 Hun 304, affirmed 37 N.E. 639, 143 N.Y. 73.

### **NOTARY PUBLIC**

Ill.App. 2 Dist. 1998. “Notary public” is an official who is authorized by the state or federal government to administer oaths and to attest to the authenticity of signatures.—*In re Estate of Alfaro*, 234 Ill.Dec. 759, 703 N.E.2d 620, 301 Ill.App.3d 500.—Notaries 1.

Neb. 1902. Section 1750, Rev.St.U.S., 22 U.S.C.A. § 131, confers on consular officers the power “to perform any notarial act which any notary public is required or authorized by law to do within the United States.” Held, that such consular officer is a “notary public,” within the meaning of our statute, and authorized to take and certify affidavits of depositions for use in the courts of the state.—*Browne v. Palmer*, 92 N.W. 315, 66 Neb. 287.

N.J. 1967. A “notary public” is a public officer whose function it is to attest and certify, by his hand and official seal, certain classes of documents, in order to give them credit and authenticity in foreign jurisdictions, to take acknowledgments of deeds and other conveyances and certify them, and to perform

certain official acts, chiefly in commercial matters, such as protesting of notes and bills, the noting of foreign drafts, and marine protests in cases of loss or damage.—*Commercial Union Ins. Co. of New York v. Burt Thomas-Aitken Const. Co.*, 230 A.2d 498, 49 N.J. 389, appeal after remand 253 A.2d 469, 54 N.J. 76.—Notaries 4.

N.J.Err. & App. 1933. A notary or “notary public” is a public officer whose function it is to attest and certify, by his hand and official seal, certain classes of documents, in order to give them credit and authenticity in foreign jurisdictions; to take acknowledgments of deeds and other conveyances, and certify the same; and to perform certain official acts, chiefly in commercial matters, such as the protesting of notes and bills, the noting of foreign drafts, and marine protests in cases of loss or damage.—*Kip v. People’s Bank & Trust Co.*, 164 A. 253, 110 N.J.L. 178.

N.M.App. 1983. “Notary public” is one who is authorized by state or federal government to administer oaths, and to attest to authenticity of signatures.—*Matter of Martinez’ Estate*, 664 P.2d 1007, 99 N.M. 809, certiorari denied *Martinez v. Martinez*, 663 P.2d 1197, 99 N.M. 740, certiorari denied *In Matter of Estate of Martinez*, 663 P.2d 1197, 99 N.M. 740.—Notaries 1.

### **NOTARY PUBLIC, DE FACTO**

La. 1906. One who has been commissioned as notary, and has taken the oath of office, and has been acting as notary for many years, and has the reputation of being such in the community in which he lives, but who has failed to file his oath of office in the offices of the Secretary of State and of the clerk of court, and has also failed to renew his bond every five years, as required by law, is a notary “de facto”; and acts passed before him have the same validity as acts passed before a notary de jure. The position of a notary public is an “office,” and, where a person holds a commission as a notary and acts as one and has the reputation of being a notary public, he is a “notary public, de facto.”—*Davenport v. Davenport*, 41 So. 240, 116 La. 1009, 114 Am.St.Rep. 575.

### **NOT A SPECIAL ELECTION**

Ga. 1976. Election of members of DeKalb County board of education was “not a special election,” within meaning of 1964 Election Code provision that candidate may qualify for an election by virtue of, *inter alia*, nomination in a primary conducted by political party or by being a candidate in special election; thus, 1963 DeKalb County Board of Education Act provision permitting nonpartisan election of board members was inconsistent with and repealed by Election Code. Laws 1963, p. 3424, § 3; Code, §§ 34-102, 34-103(h, ab), 34-1001, 34-1002(c), 34-2001, 34-2005.—*League of Women Voters of DeKalb County v. Board of Elections of DeKalb County*, 227 S.E.2d 225, 237 Ga. 40.—Elections 120.

**NOTATION**

Ga. 1944. Action of solicitor general during examination of witness who had testified at previous trial of accused but did not recall date thereof in exhibiting paper to witness pointing out date thereon and asking whether date mentioned was not jury's notation, did not require mistrial as tantamount to statement to jury that a previous jury had found accused guilty of crime charged; "notation" not being synonymous with "verdict" and could not necessarily be so construed by jury.—*Bryant v. State*, 30 S.E.2d 259, 197 Ga. 641.—Crim Law 867.

N.Y.A.D. 3 Dept. 1995. Provision of Medicaid Management Information System Provider Manual (MMIS) requiring physician to record interpretation and report of results electrocardiogram (EKG) was valid interpretation of regulatory requirement that "notation" be made and was "official directive of the department" binding on provider, and, thus, stapling EKG strips to patient's record did not satisfy "notation" requirement. N.Y. Comp. Codes R. & Regs. title 18, §§ 504.3(i), 540.7(a)(10)(viii).—*Lock v. New York Dept. of Social Services*, 632 N.Y.S.2d 300, 220 A.D.2d 825.—Health 465.

**NOTATION CREDIT**

W.D.Wis. 1987. Requirement in letter of credit that draft drawn thereunder include a reference to the letter of credit was not a "notation credit" such that, in the absence of such reference, issuing bank would not even have to consider the draft and thus would have no obligation to notify beneficiary of dishonor. W.S.A. 405.108(1).—*Datapoint Corp. v. M & I Bank of Hilldale*, 665 F.Supp. 722.—Banks 191.20.

**NOTATION OF REFUSAL**

N.Y.Sup. 1980. For purposes of statute which provides for effective service if registered letter was returned to post office "unclaimed," word "unclaimed" was intended to cover that situation where defendant was notified that he had letter at the post office and did not claim it and "notation of refusal" to cover both the "unclaimed" letter and situation wherein letter itself is actually refused by defendant or his agent; in either case defendant has had notice of the letter. Vehicle and Traffic Law §§ 253, 253, subd. 2.—*La Vallee v. Peer*, 429 N.Y.S.2d 383, 104 Misc.2d 943, affirmed 441 N.Y.S.2d 435, 80 A.D.2d 992, appeal denied 442 N.Y.S.2d 1026, 53 N.Y.2d 609, 425 N.E.2d 900.—Autos 235(4).

**NOTATION OF TRANSFER, LEASE OR MEMORIAL**

N.Y.Sup. 1926. Notation of release of registered land from lien of blanket mortgage made in 1913, on original certificate of title in registration book, held not a "notation of transfer, lease or memorial," within registration statute, and owner was entitled to withdraw his land from registration, under Real Property Law, § 404, as it existed before its amendment by Laws 1916, c. 547.—People

ex rel. *Beckford v. Cheshire*, 217 N.Y.S. 215, 128 Misc. 10.—Records 11.

**NOTATION RULE**

D.Or. 1986. "Notation rule" is that when Bureau of Land Management records have been noted to reflect use of land exclusive of another conflicting use, no rights of entry incompatible with noted use may attach through subsequent entry, application or use, until records have been changed to show that land is once again available for use and notation removed from records. Mineral Lands Leasing Act, § 1 et seq., 30 U.S.C.A. § 181 et seq.—*Shiny Rock Min. Corp. v. U.S.*, 629 F.Supp. 877, affirmed in part, reversed in part 825 F.2d 216, appeal after remand 906 F.2d 1362.—Mines 9.

**NOTATIONS**

Ohio App. 6 Dist. 1985. Handwritten "notations" by a municipal judge on case file envelope did not rise to dignity and finality of a "judgment" from which an appeal would lie, in absence of evidence that it had been filed with clerk of trial court. Rules Civ.Proc., Rule 58.—*William Cherry Trust v. Hofmann*, 489 N.E.2d 832, 22 Ohio App.3d 100, 22 O.B.R. 288, appeal after remand 1986 WL 2332.—Courts 190(2).

**NOT AT THE TRADE**

D.Mass. 1979. In action by union member against union alleging that reclassification of member from "at the trade" status to "not at the trade" status constituted discipline without statutorily required notice and hearing, it appeared that union fairly applied reasonable union regulation controlling dues and priority of all members and that there was no evidence that reclassification was in any way connected with member's failure to perform duty which he owed as union member; thus, reclassification of member was not "discipline" within meaning of provision of Labor-Management Reporting and Disclosure Act governing safeguards against improper disciplinary action. Labor-Management Reporting and Disclosure Act of 1959, § 101(a)(5), 29 U.S.C.A. § 411(a)(5).—*Macaulay v. Boston Typographical Union No. 13*, 474 F.Supp. 344, affirmed 692 F.2d 201.—Labor 119.

**NOT AUTHORIZED**

W.D.Pa. 1991. Chapter 7 trustee failed to establish that corporate debtor's repayments of loan, which arose in context of leveraged buyout transaction, should be set aside under provision permitting trustee to avoid postpetition transfer of property of estate that is not authorized under Bankruptcy Code or by bankruptcy court, where conveyances involved in leveraged buyout transaction were not fraudulent, and thus trustee could not prove that repayments of secured loan were "not authorized." Bankr.Code, 11 U.S.C.A. § 549(a)(1)(B).—*Moody v. Security Pacific Business Credit, Inc.*, 127 B.R. 958, affirmed 971 F.2d 1056.—Bankr 2588.

Bkrcty.N.D.Ala. 1994. Court could not find that bank willfully violated automatic stay by debiting debtor's bank account for credit card chargebacks

**NOT AVAILABLE TO**

due to debtor's customer's failure to pay for equipment purchased from debtor on credit or that transfers of funds from debtor's bank account to pay charges were "not authorized" under Bankruptcy Code prohibition against unauthorized postpetition transfers, where it appeared that debtor knowingly acquiesced in transfers by performing under credit card merchant agreement postpetition and allowing bank to do likewise. *Bankr.Code*, 11 U.S.C.A. §§ 362, 549(a)(2).—*In re Health Science Products, Inc.*, 181 B.R. 121.—*Bankr* 2461, 2588.

**NOT AUTHORIZED BY LAW**

Fla. 1978. Under statute providing that any person who knowingly uses, transfers, acquires, traffics, alters, forges, or possesses food stamp in any manner "not authorized by law" is guilty of a crime, the legislature, by the use of the language "not authorized by law" meant not authorized by state and federal food stamp law. *West's F.S.A.* § 409.325(2)(a).—*State v. Rodriguez*, 365 So.2d 157.—*Agric* 2.6(5).

Ill.App. 1 Dist. 1987. Despite defendants' assertions that, as private attorneys, they were not unauthorized by law to accept or solicit money from client, conduct of defendants in soliciting and receiving money for their clients, in amounts ranging from \$300 to approximately \$3,000, with understanding defendants would tender money to judge to influence him in order to obtain favorable ruling for client in criminal case standing before that judge, would fall within "not authorized by law" clause of bribery statute. *S.H.A. ch. 38, ¶ 33-1(d, e)*.—*People v. Freedman*, 108 Ill.Dec. 165, 508 N.E.2d 326, 155 Ill.App.3d 469.—*Brib* 3.

La. 1915. "Un" is a preposition used indiscriminately, and may mean simply "not," and "unlawful" means "not authorized by law."—*State v. Sanders*, 68 So. 125, 136 La. 1059, Am. Ann. Cas. 1916E, 105.

**NOT AVAILABLE**

U.S.Dist.Col. 1963. Under regulation of Department of Interior providing that no offer for a noncompetitive oil and gas lease may be made for less than 640 acres except where land is surrounded by lands "not available" for leasing under the Mineral Leasing Act, the quoted phrase means lands not available for leasing to anyone, and lands covered only by outstanding application for a lease are considered available and are subject to the 640-acre requirement. *Mineral Lands Leasing Act*, § 17 as amended 30 U.S.C.A. § 226.—*Boesche v. Udall*, 83 S.Ct. 1373, 373 U.S. 472, 10 L.Ed.2d 491.—*Mines* 5.1(3).

AFCMR 1982. A witness who appears at an Art. 32 and asserts his right against self-incrimination is "not available," and a previously executed sworn statement by such witness may be considered by the investigating officer and the convening authority. *UCMJ*, Arts. 32, 32(b), 10 U.S.C.A. §§ 832, 832(b); *MCM* 1969, par. 34, subd. d.; *U.S.C.A. Const. Amend. 5*.—*U.S. v. Capel*, 15 M.J. 537.—*Mil Jus* 924.

C.C.A.9 (Wash.) 1948. Testimony of government engineer in charge of contractor's operations in construction of Alaska highway that he could not then accurately break down payroll figures of contracts did not establish that remuneration of contractor's employees was "not available" to insurer within meaning of provision of public liability and property damage policy issued to contractor so as to authorize use of an alternative method in computing premiums under the policy.—*Hansen & Rowland v. C. F. Lytle Co.*, 167 F.2d 998.—*Insurance* 2005.

La.App. 4 Cir. 1996. Statute authorizing court to determine use and management of property held in indivision upon petition by co-owner authorized court to give executor of estate control over access to decedent's residence and limit access by co-owners; partition was "not available" as a practical matter given that all co-owners had agreed to list residence for sale and any sale would render partition unnecessary. *LSA-C.C. art. 803.—Succession of Miller*, 674 So.2d 441, 1995-1272 (La.App. 4 Cir. 5/8/96), rehearing denied, writ denied 679 So.2d 1390, 1996-1717 (La. 10/4/96).—Ten in C 38(13).

**NOT AVAILABLE FOR CROSS-EXAMINATION**

Kan. 1983. Where witness claims his privilege against self-incrimination, he is "not available for cross-examination" within meaning of statute providing for use of prior testimony in trial if there was right and opportunity to cross-examine witness at previous hearing. *Rules of Evid.*, K.S.A. 60-460(c).—*State v. Lashley*, 664 P.2d 1358, 233 Kan. 620.—*Crim Law* 543(1).

**NOT AVAILABLE FOR NAMED INSURED'S REGULAR USE**

Mo.App. W.D. 1981. Under automobile liability policy providing coverage for named insured for nonowned automobile operated by named insured with owner's permission, provided nonowned vehicle was not furnished or available for regular use of named insured, nonowned automobile which named insured had only used once before accident due to fact that car was unlicensed and therefore could not be driven lawfully was "not available for named insured's regular use" and, thus, nonowned automobile was covered.—*MFA Mut. Ins. Co. v. Home Mut. Ins. Co.*, 629 S.W.2d 447.—*Insurance* 2657.

**NOT AVAILABLE FOR WORK**

Miss. 1981. Employee's refusal to work for employer for lower salary, or anywhere for less than \$10 per hour, did not justify his refusal to return to work and, therefore, employee was "not available for work" and thus was disqualified from receiving unemployment insurance benefits. *Code 1972, § 71-5-511.—Mississippi Employment Sec. Commission v. Swilley*, 408 So.2d 61.—*Social S* 475, 500.

**NOT AVAILABLE TO THE PUBLIC**

E.D.Cal. 1999. Under California law, term "not available to the public," appearing in non-disclosure agreement meant information not confidential in the first place, or which lost its confidentiality by

virtue of dissemination to the general public.—*Berkla v. Corel Corp.*, 66 F.Supp.2d 1129.—Contracts 202(2).

**NOT A VOLUNTARY RESCISSION OF THE SALE**

La.App. 3 Cir. 1976. Fact that seller, who sold business subject to right to reenter premises in event of buyers' default and who leased premises to buyers and granted them an option to purchase, reentered premises after they were abandoned by buyers when lease and option to purchase expired was "not a voluntary rescission of the sale." LSA-C.C. arts. 2541, 2543.—*Nugent v. Stanley*, 336 So.2d 1058.—Sales 108.

**NOT A WARD OF ANOTHER COURT**

Ohio Juv. 1962. Under statute conferring upon juvenile court exclusive original jurisdiction to determine the custody of "any child" not a ward of another court, since legislature did not see fit to impose any express residential or domiciliary limitation on jurisdiction of juvenile court, the court will not imply one, and hence physical presence of child within geography of the court empowers the juvenile court to determine its custody, provided it is "not a ward of another court". R.C. § 2151.23(A) (2).—*In re Wolfe*, 187 N.E.2d 658, 26 O.O.2d 274, 91 Ohio Law Abs. 167.—Child C 732.

**NO TAX**

Tex.Civ.App.—San Antonio 1918. Cities incorporated under Vernon's Ann.Civ.St. arts. 1086-1096, 1104, 1105, cannot levy a special tax for local improvements evidenced by paving certificates unless the ordinance levying the tax be consented to by two-thirds of the aldermen elected; the words "no tax," as used in article 1033, providing that no tax shall be levied unless by consent of two-thirds of aldermen elected, not being limited to tax for general revenue.—*Celaya v. City of Brownsville*, 203 S.W. 153, writ refused.

**NOT BEING**

Ind.App. 2 Div. 1909. The term "without," as used in an averment that building material was suffered to remain in a street after night "without" being guarded, is a direct averment that no guards or lights were placed around the obstruction, and the pleading did not merely recite such facts; the word "without" being synonymous with "not being."—*City of Laporte v. Osborn*, 86 N.E. 995, 43 Ind.App. 100.—Plead 17.

Me. 1926. "Not being" may be used to denote exception or proviso in enacting clause of criminal statute, requiring, in some cases, indictment founded thereon to allege enough to show that accused was not within exception.—*State v. Webber*, 133 A. 738, 125 Me. 319.

Mass. 1939. The words "unless," "other than," "not being," "not having" and similar words create an exception within rule that if there is exception in enacting clause of statute or general clause descriptive of duty or obligation or crime defined by

statute, the party pleading must allege and prove that his adversary is not within exception, but if exception is in subsequent, separate or distinct clause or statute, party relying on exception must allege and prove it.—*Sullivan v. Ward*, 24 N.E.2d 672, 304 Mass. 614, 130 A.L.R. 437.—Ind & Inf 111(2); Plead 63.

**NOT BE LIVING AT THE TIME OF MY DEATH**

Iowa 1969. Where testator in his will used phrases "survive me" and "not be living at the time of my death", both phrases referring to his wife, the word "survive" should not be interpreted to mean meaningful survival, so that where wife of testator survived him by 105 minutes after automobile accident she would take under the will and estate of her husband would pass to her heirs.—*Wagg v. Mickelwait*, 165 N.W.2d 829.—Wills 543.

**NOT BEYOND**

Tex.Com.App. 1927. Provision in deed for delivery of possession "not later than 90 days from this date" means "within" or "not beyond" that time, since, when time is spoken of, any act is within time named that does not extend beyond it.—*Hansen v. Bacher*, 299 S.W. 225.

**NOT CAPABLE OF BEING ANTICIPATED**

M.D.Ga. 1997. Chapter 11 debtor's failure to make payments required under fee agreement with special counsel did not constitute a circumstance which was "not capable of being anticipated" at time the agreement was approved by bankruptcy court, and did not permit modification of fee agreement to increase special counsel's fee. Bankr. Code, 11 U.S.C.A. § 328(a).—*Unsecured Creditors Committee v. Webb & Daniel*, 204 B.R. 830.—Bankr 3200.

**NOT CAPABLE OF BEING USED UP OR EXTINGUISHED WHEN USED FOR ITS INTENDED PURPOSE**

Fla.App. 4 Dist. 1982. Statute providing that government property of a nonconsumable nature and of a value of \$200 or more must be sold only to highest responsible bidder after publication of notice, or sold at public auction, was not unconstitutionally vague where reasonable meaning ascribed to term "nonconsumable" in context in which it appears, "not capable of being used up or extinguished when used for its intended purpose," would apprise average person of type of property covered by statute. West's F.S.A. § 274.06.—*State v. Brown*, 412 So.2d 426.—States 89.

**NOT CAUSED BY ACCIDENT**

N.D.Miss. 1962. If injuries were unintentional result of condition created by insured not caused by accident, then injuries themselves would be "not caused by accident" within meaning of policy.—*Aerial Agr. Service of Mont., Inc. v. Till*, 207 F.Supp. 50.—Insurance 2330.

**NOT COMPETENT TO****NOT CAUSED NOR AGGRAVATED TO ANY PERCEPTEBLE DEGREE**

Me. 1980. Words "not caused nor aggravated to any perceptible degree" as used by commissioner in denying benefits for emphysema and chronic bronchitis meant that conditions at claimant's place of employment neither caused nor aggravated claimant's disabling respiratory condition. 39 M.R.S.A. §§ 183, 185.—McKenzie v. C. F. Hathaway Co., 415 A.2d 252.—Work Comp 1761.

**NOT CHARGED WITH CRIME**

Ill.App. 5 Dist. 1965. Where conviction judgment against prisoner was reversed without remandment by Supreme Court, two days after that reversal, when allegedly reputable citizen brought petition to have prisoner confined as mentally ill person, he was not a person "not charged with crime" within statute determining Circuit Court's special jurisdiction in matter, by reason of fact that final process could not issue in his case, and Circuit Court had jurisdiction over neither prisoner nor subject matter. Supreme Court Rules, rules 44, 45, S.H.A. ch. 110, §§ 101.44, 101.45; S.H.A. ch. 91½, §§ 1-8, 2-1, 2-2, 5-1 et seq.—People v. Nunes, 207 N.E.2d 143, 58 Ill.App.2d 55.—Mental H 436.1.

**NOT CLEAR**

Ga.App. 1941. When one motorist is meeting another it is his duty to sound his horn, or give other like warning, when traveling along a highway "not clear" or along a "descent or other dangerous place" on highway, as defined by statute, and a failure to comply with such requirement would be "negligence per se". Code, § 68-303, subd. j; § 68-306.—Whatley v. Henry, 16 S.E.2d 214, 65 Ga.App. 668.—Autos 170(7).

Ga.App. 1941. The duty of a motorist when meeting another to sound his horn or give other like warning when traveling along a highway "not clear" or along a "descent or other dangerous place" on highway as defined by statute is unrelated and independent of any other duty required of motorist by common law or by statute and is not relaxed by reason of fact that motorist is currently complying, day or nighttime, fully with such other duties, and it would still remain, in such an instance, whether failure to give warning were proximate cause or, with other negligence, had causal connection, in proximately causing injuries arising out of a collision. Code, § 68-303, subd. j; § 68-306.—Whatley v. Henry, 16 S.E.2d 214, 65 Ga.App. 668.—Autos 170(7), 201(1).

Ga.App. 1941. In action for injuries sustained in automobile collision which occurred at night, whether highway was "not clear" and whether defendant was approaching along a "descent or other dangerous place" along highway, within meaning of statute, when it would be defendant's duty to give warning by blowing horn, as required by statute, and whether such failure, if any, by defendant to blow horn was negligence proximately causing collision, were for jury. Code, § 68-303, subd. j; § 68-306.—Whatley v. Henry, 16 S.E.2d 214, 65 Ga.App. 668.—Autos 245(13), 245(60).

**NOT COGNIZABLE BY JUSTICE**

W.Va. 1928. Limitations put upon legislature by Const. art. 3, § 4 requiring presentment or indictment for crimes "not cognizable by justice," extends only to instances where law making body endeavors by enactment of laws to give justices power to try offenses falling within purview of those of treason, felony or other crimes of like nature.—Tomlinson v. Cunningham, 144 S.E. 570, 106 W.Va. 1.

**NOT COMMITTED AT ALL**

Cal.App. 3 Dist. 1978. Phrase "not committed at all," within provisions of the Penal Code authorizing a claimant to present a claim for monetary indemnity against the State to the State Board of Control if "the crime with which he was charged was either not committed at all or, if committed, was not committed by him, or who, being innocent of the crime with which he was charged for either of the foregoing reasons, shall have served the term or any part thereof for which he was imprisoned," means that the claimant must show the Board that he was "innocent" in the sense that he did not do the acts which characterize the crime. West's Ann. Pen.Code, §§ 4900-4904.—Ebberts v. State Board of Control, 148 Cal.Rptr. 543, 84 Cal.App.3d 329.—States 111.

**NOT COMPENSATION FOR ACTUAL PECUNIARY LOSS**

C.A.4 (Va.) 1995. "Not compensation for actual pecuniary loss" phrase in exception from discharge for fine, penalty, or forfeiture payable to and for benefit of governmental unit refers to government's pecuniary loss; so long as government's interest in enforcing debt is penal, it makes no difference that injured persons may thereby receive compensation for pecuniary loss. Bankr.Code, 11 U.S.C.A. § 523(a)(7).—U.S. Dept. of Housing & Urban Development v. Cost Control Marketing & Sales Management of Virginia, Inc., 64 F.3d 920, certiorari denied Cost Control Marketing & Sales Management of Virginia, Inc. v. Cisneros, 116 S.Ct. 1673, 517 U.S. 1187, 134 L.Ed.2d 777.—Bankr 3358.

Bkrtey.E.D.Va. 1992. Because prosecution costs are imposed under Virginia law only when criminal defendant is found guilty, such costs are in nature of "fine, penalty, or forfeiture" contemplated by nondischARGEability provision of Bankruptcy Code and "not compensation for actual pecuniary loss." Bankr.Code, 11 U.S.C.A. § 523(a)(7); Va.Code 1950, § 19.2-336.—In re Thompson, 145 B.R. 848.—Bankr 3358.

**NOT COMPETENT TO STAND TRIAL**

Miss. 1987. Defendant is "not competent to stand trial" if he does not have sufficient present ability to consult with his lawyer with reasonable degree of rational understanding, or does not have rational as well as factual understanding of proceedings against him.—Gammage v. State, 510 So.2d 802.—Mental H 432.

**NOT COMPLETED**

Kan. 1929. As used in Laws 1927, c. 255, § 9, making reimbursement of taxpayers from road fund merely optional in any county where proceedings are under way for construction of a state road, and in section 8, which excludes counties where such roads are not completed, the words "not completed" refer to construction, and imply that such construction has been started but not finished, whereas "proceedings under way" may apply to proceedings which have not progressed as far as actual construction.—*Thompson v. Board of Com'rs of Reno County*, 275 P. 205, 127 Kan. 863.

Ohio App. 10 Dist. 1989. "Pending," within meaning of amendatory bill providing that all appeals "pending" before Certificate of Need Review Board on which hearing has been completed and any litigation pending in Court of Common Pleas of Franklin County that pertains of reviewability of project on effective date of statute shall be conducted and decided based on statutory provisions that were in effect on prior date, means "in suspense" or "not completed." R.C. § 3702.58 (Repealed).—*John Ken Alzheimer's Ctr. v. Ohio Cert. of Need Review Bd.*, 583 N.E.2d 337, 65 Ohio App.3d 134.—Asyl 3.

**NOT CONDUCTED FOR PROFIT**

Ind.App. 3 Dist. 1979. Where, though hospitals realized excess revenues from their operations, none of the hospitals had any shares outstanding and all such excess revenue was credited to capital improvement funds and where hospitals had been incorporated as not-for-profit corporations, the hospitals were "not conducted for profit" within meaning of statute which provided that county departments of public welfare were empowered to commit to certain public hospitals any indigent appearing to be suffering from a disease, defect, or deformity and which defined "public hospitals" as "county and city hospitals or hospitals which are not conducted for profit \* \* \*." IC 12-5-1-1, 12-5-1-11 (1976 Ed.)—*Lutheran Hospital of Ft. Wayne, Inc. v. Department of Public Welfare of Allen County*, 397 N.E.2d 638.—Health 487(4).

**NOT CONNECTED WITH THE FARM**

Neb. 1928. Where 573 head of 2 year old steers are driven some 30 miles from the owner's home ranch and into an adjoining county in December and there kept by hired men and fed hay until April 15 following, such steers are "not connected with the farm," as set out in section 5917, Comp.St.1922, but should be taxed in the county in which they are being fed on April 1.—*Delatour v. Smith*, 218 N.W. 731, 116 Neb. 695.

**NOT CONTINGENT AS TO LIABILITY**

C.A.5 (Ga.) 1971. Words "not contingent as to liability", as used in provision of Bankruptcy Act that three or more creditors, who have provable claims not contingent as to liability against any person, may file a petition to have them adjudged bankrupt, are not restricted to sense of fixed liability, as evidenced by a judgment or an instrument in

writing, and contemplate that creditors, whose claims are not based on instruments in writing or upon judgments, may petition in involuntary bankruptcy, e. g., creditors whose claims are based on unwritten agreements or other transactions not yet reduced to judgment, provided only that claims be "not contingent as to liability" in some other sense of that term. Bankr.Act, § 59, sub. b, 11 U.S.C.A. § 95(b).—*Denham v. Shellman Grain Elevator, Inc.*, 444 F.2d 1376.—Bankr 2283.1.

Bkrcty.E.D.Tenn. 1996. Claim of petitioning creditor against involuntary debtor is "not contingent as to liability" if, when all the events have occurred which allow court to adjudicate claim and determine whether or not payment should be made, there is no contingency concerning the claim itself, unless it is apparent, to a legal certainty, that petitioning creditor would be unable to obtain judgment against debtor upon adjudication of its claim. Bankr.Code, 11 U.S.C.A. § 303(b).—*In re Taylor & Associates, L.P.*, 193 B.R. 465, vacated 249 B.R. 431.—Bankr 2286.

**NOT CONTINGENT AS TO LIABILITY OR THE SUBJECT OF A BONA FIDE DISPUTE**

Bkrcty.S.D.Ohio 2000. By requiring that creditors who join in filing involuntary petition must have claims that are "not contingent as to liability or the subject of a bona fide dispute," Congress intended to disqualify creditor from joining in involuntary petition whenever there is any legitimate basis for debtor's not paying his/her debt to creditor, whether that basis is factual or legal. Bankr. Code, 11 U.S.C.A. § 303(b)(1).—*In re Troutman Enterprises, Inc.*, 244 B.R. 106, vacated 253 B.R. 8, 2000 Fed.App. 7P.—Bankr 2286.

**NOT CONTRIBUTED**

Tex.Civ.App.-Tyler 1966. Remarried father whose mailed post office money orders for children's support were returned and who placed that money in savings account for them was not guilty of having "not contributed" to their support commensurate with financial ability within statute permitting adoption without consent of parent who has not contributed substantially to support of child for two years, and father was thus entitled to pay into court the child support for the two-year period and thereby defeat adoption. Vernon's Ann.Civ.St. art. 46a, § 6.—*Whitehead v. Lout*, 408 S.W.2d 569, writ granted, reversed 415 S.W.2d 403.—Adop 7.4(6).

**NOT COVERED**

D.Puerto Rico 2002. Under provision in excess liability policy indicating that excess insurer's duty to defend was triggered when damages were sought against insured tugboat owner for property damage "not covered" by underlying or other insurance, excess insurer was required to drop down and provide horizontal coverage only when no coverage existed under primary policy for type of occurrence at issue; thus, under Puerto Rico law, because owner was covered for property under its commercial general liability (CGL) policy, excess insurer was not obligated, until all available other insurance

was exhausted, to drop down and provide defense in litigation that arose after barge being towed by tugboat broke loose and collided with reef, despite CGL insurer's denial of coverage.—Metlife Capital Corp. v. Westchester Fire Ins. Co., 224 F.Supp.2d 374.—Insurance 2917.

#### **NOT DEFERRED BY ANY PERIOD OF TIME**

Cal.App. 4 Dist. 1967. Word "immediately" when used in contract is usually construed to mean "within a reasonable time" having due regard to the nature of the circumstances of the case, although strictly, it means "not deferred by any period of time".—Integrated, Inc. v. Alec Fergusson Elec. Contractors, 58 Cal.Rptr. 503, 250 Cal.App.2d 287.—Contracts 212(1).

#### **NOT DISABLED**

W.D.Mo. 1992. If social security disability claimant is capable of performing work he has done in past, finding of "not disabled" must be made.—Schroder v. Sullivan, 796 F.Supp. 1265.—Social S 140.50.

#### **NOT DISPOSED OF BY THE WILL**

Cal. 1942. The community property to which testator's widow succeeded because of her statutory one-half interest by operation of law on testator's death "belonged" to her as surviving wife, and testator's unsuccessful attempt to dispose of her community interest therein did not render such property "not disposed of by the will" so that it should be first resorted to for payment of family allowance and expenses of administration under statute. Prob.Code, §§ 201, 750.—In re King's Estate, 121 P.2d 716, 19 Cal.2d 354.—Ex & Ad 181.

Cal. 1942. Where will devised certain ranch which was community property, to testator's widow, and widow made renunciation of will, contention that one-half of the ranch, which because of widow's renunciation became ineffective as devise, should be regarded as property "not disposed of by the will" so as to be subject at first to payment for family allowance or any other expenses of administration, could not be sustained, in view of statute providing that legacy should be paid first from property expressly appropriated therefor by will and secondly from property not disposed of by will. Prob.Code, §§ 201, 750, 751.—In re King's Estate, 121 P.2d 716, 19 Cal.2d 354.—Ex & Ad 181.

#### **NOT 'DISQUALIFIED,'**

Ill. 1905. The words "otherwise 'disqualified'" and "not 'disqualified,'" employed in Administration Act, § 5, S.H.A. ch. 3, §§ 227, 228, provided that where two executors are appointed by the same will, and one or more of them dies, refuses to qualify or is otherwise disqualified, letters testamentary shall be granted to the other person, not renouncing and not disqualified, plainly mean not otherwise legally incompetent, or not legally competent under the statute.—Clark v. Patterson, 73 N.E. 806, 105 Am.St.Rep. 127, 214 Ill. 533.

#### **NOT DISTANT FROM**

N.Y. 1916. Under Laws 1886, c. 572, § 1, providing for filing notice of an action for damages against a city of over 50,000 population, notice that an accident happened at a "hole in the pavement on the public highway at about Washington street, near Vestry street," was insufficient; "near" meaning "not distant from," and being wholly relative, and locating nothing with precision.—Casey v. City of New York, 111 N.E. 764, 217 N.Y. 192.—Mun Corp 812(7).

#### **NOT DOING**

La. 1937. Under statute providing that contract may be violated actively by "doing" something inconsistent with obligation it has proposed, or passively by "not doing" what was covenanted to be done or not doing it at time or in manner stipulated or implied, "doing" signifies activity, and "not doing" signifies inactivity or failure to do something. LSA-C.C. art. 1931.—Noel Estate v. Louisiana Oil Refining Corp., 175 So. 744, 188 La. 45.—Contracts 312(1).

#### **NOT DOING BUSINESS**

N.Y. City Ct. 1929. National bank having its principal place of business in California, and whose main business under 12 U.S.C.A. § 24, subd. 7, was discounting and negotiating of commercial paper, receiving deposits, buying and selling of exchange, coin, and bullion, loaning money on personal security, and obtaining, issuing, and circulating of notes, none of which functions were performed by it in New York, where it maintained office, solicited business, and gathered information, held "not doing business" in New York so as to be subject to service of process on its vice president in charge of New York office nor subject to suit by nonresident under General Corporation Law, § 47.—Raiola v. Los Angeles First Nat. Trust & Savings Bank, 233 N.Y.S. 301, 133 Misc. 630.

#### **NOT DOMICILED**

C.A.1 (Puerto Rico) 1966. Under statute extending jurisdiction of the United States District Court for the District of Puerto Rico to "all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign State or States, or citizens of a State, Territory, or District of the United States not domiciled in Puerto Rico", the qualification "not domiciled" applies to all listed categories. Jones Act, § 41, 48 U.S.C.A. § 863.—Compagnie Nationale Air France v. Castano, 358 F.2d 203.—Fed Cts 1024.

#### **NOT DOUBTING**

N.H. 1910. The words "desire," "request," "recommend," "hope," "not doubting" used by testator in a will to express his desire that the executor will conduct a fund in a specified manner, testator having power to command, will not be construed as precatory only, but as commands clothed in the language of civility, and to impose on the executor an enforceable duty, sufficient to create a trust.—Trustees of Pembroke Academy v. Epsom School

Dist., 75 A. 100, 75 N.H. 408, 37 L.R.A.N.S. 646.—Wills 675.

#### NOTE

U.S.Ark. 1990. Demand promissory notes sold by farmer's cooperative to members and nonmembers fell under "note" category of instruments that are "securities" under the Securities Act and the Securities Exchange Act, considering that cooperative sold notes to raise capital, and they were bought to earn a profit in the form of interest; that there was "common trading" of the notes, which were offered and sold to a broad segment of the public; that the public reasonably perceived from advertisements that the notes were investments; and that there was no risk-reducing factor that would make application of the securities laws unnecessary, since the notes were uncollateralized and uninsured and would escape federal regulation entirely if such laws were held not to apply Securities Exchange Act of 1934, § 3(a)(10), as amended, 15 U.S.C.A. § 78c(a)(10).—Reves v. Ernst & Young, 110 S.Ct. 945, 494 U.S. 56, 108 L.Ed.2d 47, rehearing denied 110 S.Ct. 1840, 494 U.S. 1092, 108 L.Ed.2d 968, on remand Arthur Young & Co. v. Reves, 937 F.2d 1310, rehearing denied, certiorari granted 112 S.Ct. 1159, 502 U.S. 1090, 117 L.Ed.2d 407, certiorari denied 112 S.Ct. 1165, 502 U.S. 1092, 117 L.Ed.2d 411, affirmed 113 S.Ct. 1163, 507 U.S. 170, 122 L.Ed.2d 525, appeal after remand Robertson v. White, 81 F.3d 752, on remand 937 F.Supp. 834.—Sec Reg 5.13.

C.A.9 (Cal.) 1968. "Note" is written obligation to pay money without reference therein to security of a mortgage; it includes an agreement of guaranty and it is equivalent to California note unsecured or a California guaranty.—Developers Small Business Inv. Corp. v. Hoeckle, 395 F.2d 80.—Bills & N 28.

C.A.9 (Cal.) 1963. Fixed amount which corporate taxpayer was obligated to pay under modifying agreements purporting to convert patent licensing agreement into sales of patents to taxpayer was not an obligation represented by a "note" and could not be treated as "borrowed capital" within meaning of excess profits tax credit statute. 26 U.S.C.A. (I.R.C.1939) § 272; 26 U.S.C.A. (I.R.C.1954) § 7482; 26 U.S.C.A. Excess Profits Taxes, § 439.—McCullough Tool Co. v. C.I.R., 318 F.2d 790.—Int Rev 4133.

C.A.5 (Tex.) 1973. Word "note" as used in exemption from coverage under Securities Act, of any note arising out of a current transaction means that type of commercial paper available for discount at a Federal Reserve Bank, not generally sold to the public or advertised for public sale; it applies only to such notes, usually high quality commercial paper, as arise out of current transactions and are covered by assets readily convertible into cash; exemption does not apply to common capital stock or an instrument which has the characteristics of stock generally, regardless of what other characteristics it may have. Securities Act of 1933, § 3(3), 15 U.S.C.A. § 77c(3).—U.S. v. Rachal, 473 F.2d 1338, certiorari denied 93 S.Ct. 2750, 412 U.S. 927, 37

L.Ed.2d 154, certiorari denied Hunnicutt v. U.S., 93 S.Ct. 2757, 412 U.S. 927, 37 L.Ed.2d 154.—Sec Reg 14.13.

C.A.7 (Wis.) 1951. Where Congress, in enactment of Internal Revenue Code provision that borrowed invested capital for any day of taxable year shall include amount of outstanding indebtedness of taxpayer which is evidenced by a note or mortgage, did not define terms "note" and 'mortgage', Congress intended that those terms should be considered according to their ordinary legal acceptation. 26 U.S.C.A. 719(a)(1).—Bernard Realty Co. v. U.S., 188 F.2d 861, certiorari denied 72 S.Ct. 53, 342 U.S. 829, 96 L.Ed. 627.—Int Rev 4133.

C.A.7 (Wis.) 1951. A note does not necessarily have to assume any particular form as long as it embodies, without more, the essential characteristics of a note within term "note" in Internal Revenue Code provision that borrowed invested capital for any day of taxable year shall include amount of outstanding indebtedness of taxpayer which is evidenced by a note. 26 U.S.C.A. 719(a)(1), (b).—Bernard Realty Co. v. U.S., 188 F.2d 861, certiorari denied 72 S.Ct. 53, 342 U.S. 829, 96 L.Ed. 627.—Int Rev 4133.

C.A.7 (Wis.) 1951. Land contract under which taxpayer was purchaser and under which vendor had obligation to satisfy outstanding mortgage on property, and to pay taxes out of sums received from taxpayer for that purpose, and to convey a free and clear title, did not constitute a "note" within Internal Revenue Code provision that borrowed invested capital for any day of taxable year shall include amount of outstanding indebtedness of taxpayer which is evidenced by a note. 26 U.S.C.A. 719(a)(1).—Bernard Realty Co. v. U.S., 188 F.2d 861, certiorari denied 72 S.Ct. 53, 342 U.S. 829, 96 L.Ed. 627.—Int Rev 4133.

C.C.A.2 1948. A taxpayer's monetary obligations under contract with storekeeper for operation of beauty parlor in store providing for reimbursement by taxpayer of storekeeper's expenditures for alterations not exceeding \$75,000 did not constitute a "note" within provision of Revenue Act defining borrowed capital for purpose of computing excess profits tax, in view of conditions in contract rendering uncertain amount taxpayer might be required to pay. Internal Revenue Code, § 719 as amended in 1942, 26 U.S.C.A. Excess Profits Taxes, § 719.—Frankel & Smith Beauty Departments, Inc. v. C.I.R., 167 F.2d 94.—Int Rev 4133.

C.C.A.7 1942. The characteristics of a "note" are a definite obligor, a definite obligee (either by name or designation), a definitely ascertainable obligation, and a time of maturity, either definite or that will become definite.—Commissioner of Internal Revenue v. Meridian & Thirteenth Realty Co., 132 F.2d 182.

C.C.A.10 1947. Contract obligating taxpayer to pay monthly installments contingent upon amount of ore milled at plant installed by creditor on taxpayer's property was not a "note" within tax statute allowing credit against excess corporate

profits in amount of outstanding indebtedness evidenced by "note". Int.Rev.Code, § 719(a)(1), as added by Second Revenue Act 1940, § 201 as amended 26 U.S.C.A. Excess Profits Taxes, § 719(a)(1).—Consolidated Goldacres Co. v. C.I.R., 165 F.2d 542, certiorari denied Consolidated Goldacres Company v. Commissioner of Internal Revenue., 68 S.Ct. 1086, 334 U.S. 820, 92 L.Ed. 1750.—Int Rev 4133.

C.C.A.10 1947. "Note" within statute allowing credit against excess corporate profits in amount of outstanding indebtedness evidenced by "note" would be construed according to its ordinary legal acceptation. Int.Rev.Code, § 719(a)(1), as added by Second Revenue Act 1940, § 201 as amended 26 U.S.C.A. Excess Profits Taxes, § 719(a)(1).—Consolidated Goldacres Co. v. C.I.R., 165 F.2d 542, certiorari denied Consolidated Goldacres Company v. Commissioner of Internal Revenue., 68 S.Ct. 1086, 334 U.S. 820, 92 L.Ed. 1750.—Int Rev 4133.

C.C.A.6 (Ohio) 1935. A "note" is an agreement to pay, and not "cash" within life policy providing that premium shall be paid in "cash".—Travelers Ins. Co. v. Wolfe, 78 F.2d 78, certiorari denied 56 S.Ct. 158, 296 U.S. 635, 80 L.Ed. 452.—Insurance 2027.

N.D.Ga. 1984. A "note" is a contract; specifically, it is a unilateral form of contract in which the borrower, in exchange for bank's act of lending money, makes a promise to repay the loan at a certain time and at a certain interest.—Kleiner v. First Nat. Bank of Atlanta, 581 F.Supp. 955.—Bills & N 28.

E.D.Ky. 1974. Promise of organizers and directors of corporation to deliver shares of stock and notes at stated time constituted "note" or "evidence of indebtedness" such as to be a "security" within meaning of Securities Act of 1933. Securities Act of 1933, §§ 2(1), 15 U.S.C.A. § 77b(1).—Smith v. Manausa, 385 F.Supp. 443, modified 535 F.2d 353.—Sec Reg 5.13.

W.D.Ky. 1944. The essential elements of a "note" are the written unconditional promise to pay another a certain sum of money at a certain time, or at a time which must certainly arrive and no particular form is necessary so long as the instrument embodies the essential characteristics. KRS 356.001, 356.005, 356.006.—Aetna Oil Co. v. Glenn, 53 F.Supp. 961.—Bills & N 28.

W.D.Ky. 1944. Where agreement licensing use of cracking patents required payment of gallonage royalties and by supplemental agreement future royalties for 200,000 barrels of gasoline were commuted to sum of \$120,000 payable in six equal semiannual installments, the supplemental agreement constituted "note" within Revenue Act provision authorizing corporation dividends paid credit. Revenue Act 1938, Sec. 27(a)(4), as amended by Revenue Act 1939, Sec. 222(c), 26 U.S.C.A.Int.Rev. Acts, page 1021; KRS 356.001, 356.005, 356.006.—Aetna Oil Co. v. Glenn, 53 F.Supp. 961.—Int Rev 3631.

E.D.Mich. 1954. Where theater corporation which had been a customer of bank for 16 years, borrowed \$1,125,000 from bank to secure funds for corporate purposes, and, as evidence of such indebtedness, a single instrument, which was captioned a "note," was executed on plain white paper, and instrument did not carry interest coupons, was not in registered form, and was payable in two years, instrument was a "note" and not a "debenture" subject to documentary stamp tax, though instrument was subject to terms of letter of understanding restricting corporate and financial activities of corporation. 26 U.S.C.A. §§ 1800, 1801.—Bijou Theatrical Enterprise Co. v. Menninger, 127 F.Supp. 16.—Int Rev 4399.

S.D.N.Y. 2001. Synthetic trading arrangement between financial institution and customer, under which customer was deemed to have acquired stock of specified value, with institution liable for increases in value and customer liable for decreases, without any stock actually being purchased, was not a "note" or evidence of indebtedness covered by § 10(b); while customer paid institution interest on amount equal to specified value of stock, no principal amount was ever loaned or repaid. Securities Exchange Act of 1934, §§ 3(a)(10), 10(b), 15 U.S.C.A. §§ 78c(a)(10), 78j(b); 17 C.F.R. § 240.10b-5.—Caiola v. Citibank, N.A., 137 F.Supp.2d 362, reversed 295 F.3d 312.—Sec Reg 5.13.

S.D.Tex. 1999. "Note" is unconditional promise to pay and is obligation of borrower to lender.—U.S. v. Durbin, 64 F.Supp.2d 635.—Bills & N 28.

W.D.Tex. 1985. "Note" is written unconditional promise to pay another certain sum of money at certain time, or at time which must certainly arrive.—Federal Deposit Ins. Corp. v. Eagle Properties, Ltd., 664 F.Supp. 1027.—Bills & N 28.

Bkrty.D.Kan. 1994. Indemnity agreements do not meet definition of "note" in Kansas' Uniform Commercial Code (UCC) as unconditional promise to pay fixed amount of money, which is payable on demand or at definite time to bearer of promise or to order. K.S.A. 84-3-104.—In re Dvorak, 176 B.R. 929.—Bills & N 148.1.

Ala.App. 1917. A complaint alleging a cause of action on "notes" therein described was not supported by written instruments whereby the maker promised to pay a specified amount on a certain date providing a building was completed and turned over to him by the payee within 30 days from date, since a "note" under commercial law is a written agreement by one person to pay another person therein named absolutely and unconditionally a certain sum of money at a time specified therein, and the instrument in question, being a conditional promise to pay, was a "specialty."—Cairns v. Daniel, 77 So. 56, 16 Ala.App. 218.

Ark. 1922. In commercial, as well as common, parlance, the word "note," evidencing indebtedness in a business transaction means a negotiable note.—Road Imp. Dist. No. 4 of Cleveland County v. Southern Trust Co., 239 S.W. 8, 152 Ark. 422.—Bills & N 144.

Ark. 1922. A resolution of the board of a road improvement district authorizing its president and secretary to borrow money and to execute a "note" therefor authorized the issuance of a negotiable note.—Road Imp. Dist. No. 4 of Cleveland County v. Southern Trust Co., 239 S.W. 8, 152 Ark. 422.—High 95(2).

Ark. 1921. Where a life insurance application provided that the insurance should not be in effect until the premium had been paid in full in cash and the policy delivered, and that if the premium was paid with the application the payment was to be subject to the conditions in an attached receipt, and the receipt contained blanks for acknowledgment of the receipt of cash or notes, and provided that, if a full cash settlement had been made with the application, the insurance would be in force from the date of the approval of the application by the medical director, an agent had no authority to accept part cash and a note for the balance as a full cash settlement required to make the insurance effective from the approval of the application as the words "cash" and "note" have entirely different meanings, and are not used synonymously in insurance terminology; "cash" meaning current money in hand, or money paid down, and "note" a written promise to pay money.—Jenkins v. International Life Ins. Co., 232 S.W. 3, 149 Ark. 257.—Insurance 1764(2).

Ark.App. 1986. Contract for construction was not promissory "note" authorizing attorney's fees where promise to pay was conditioned by contractor's reciprocal promise to construct metal building. Ark. Stats. §§ 85-3-104, 85-3-105.—Pack v. Hill, 710 S.W.2d 847, 18 Ark.App. 104.—Bills & N 28.

Cal. 1935. In action to recover possession of real property which had been purchased by plaintiff at sale under trust deed, word "note" in allegation of complaint that defendant had executed and delivered to plaintiff certain note and trust deed held equivalent of "promissory note" as regards sufficiency of complaint. Code Civ.Proc. §§ 16, 1161a, 1162; Civ.Code, § 3266.—Quinn v. Mathiassen, 49 P.2d 284, 4 Cal.2d 329.—Plead 34(1).

Cal.App. 2 Dist. 1998. Instrument is a "note" if it is a promise and is a "draft" if it is an order.—Spencer v. Sterling Bank, 74 Cal.Rptr.2d 576, 63 Cal.App.4th 1055.—Bills & N 1, 28.

Cal.App. 3 Dist. 1912. An instrument directed to a bank, in which the signer had money on deposit, authorizing it to pay out of the signer's funds, for a valuable consideration, \$500 to N., on presentation prior to the signer's death, if countersigned by him across the back, or, on notification of the signer's death, without such countersignature, did not contain a promise by the signer to "pay a specified sum of money," and was not therefore a "note" within West's Ann.Civ.Code, § 3244.—Nasano v. Tuolumne County Bank, 130 P. 29, 20 Cal.App. 603.

Conn. 1931. Right to recover on "note" held not defeated by loss thereof.—Goslee v. Rowe, 157 A. 267, 114 Conn. 1.—Lost Inst 16.

Fla. 1937. Tax on promissory note and each renewal thereof is on a written or printed obligation covered by statute, and to be "note" or "obligation" within statute it must be signed by maker or other obligor. Acts 1931, Ex.Sess., c. 15787, § 1, and § 1, Schedule A.—Lee v. Quincy State Bank, 173 So. 909, 127 Fla. 765.—Tax 74.

Fla. 1934. Return of old note by payee to maker and moral obligation of maker to pay debt after his discharge in bankruptcy held sufficient consideration for new promise of maker to thereafter pay debt evidenced by his execution of new "note," which is a written promise to pay a definite sum of money at a time certain.—Silva v. Robinson, 156 So. 280, 115 Fla. 830.—Bankr 3415.1.

Ga.App. 1977. An "agreement" on behalf of corporate academy, concededly being "evidence of indebtedness" and also "certificate of indebtedness" was "security" within definition of state Securities Act, whether as "note" or as an "evidence of indebtedness." (Per Webb, J., with three Judges concurring and two Judges concurring in result.) Code, § 97-108(i); Securities Act of 1933, § 1 et seq., 15 U.S.C.A. § 77a et seq.—Blau v. Redmond, 240 S.E.2d 273, 143 Ga.App. 897, appeal after remand 265 S.E.2d 329, 153 Ga.App. 395.—Sec Reg 250.

Idaho App. 1986. Generally, "note" is instrument containing express promise to pay specified sum of money at definite time or on demand to named party, to order, or to bearer.—Spidell v. Jenkins, 727 P.2d 1285, 111 Idaho 857.—Bills & N 28.

Ill.App. 4 Dist. 1980. A "note" is a unilateral instrument containing an express and absolute promise of signer to pay a specific person or order, or bearer, a definite sum of money at a specified time.—Farmers State Bank v. Doering, 36 Ill.Dec. 285, 400 N.E.2d 705, 80 Ill.App.3d 959.—Bills & N 28.

Ind. 1994. Provision of chronological case summary (CCS) indicating date followed by word "noice" and "y" for yes was "note" within meaning of trial rule permitting extension of time for appeal when mailing of copy of entry by clerk is not evidenced by note made by clerk upon CCS. Trial Procedure Rule 72(E).—Collins v. Covenant Mut. Ins. Co., 644 N.E.2d 116.—App & E 348(2).

Kan. 1942. Under statute expressly requiring that policy, other than life policy, shall provide for payment of premium and premium deposit in "cash", a mutual insurance company, other than life insurance company, has no authority to accept a note in payment of premium or as a premium deposit on policies issued by it since a "note" is not "payment" but only a "promise to pay". Gen.St. Supp.1941, 40-1207.—Fidelity Savings State Bank v. Grimes, 131 P.2d 894, 156 Kan. 55.—Insurance 2027.

Kan. 1927. "Note," as ordinarily used, means one negotiable in form. Rev.St. 52-102.—American Nat. Bank v. Marshall, 253 P. 214, 122 Kan. 793.—Bills & N 31.

Kan. 1927. "Note," referred to in banking laws, is unconditional written promise, signed by maker, to pay on demand, or at some future fixed or determinable date, certain sum in money to bearer or person named, or to such person or order. Laws 1925, c. 85.—First State Bank of Kansas City v. Bone, 252 P. 250, 122 Kan. 493.—Banks 94.

Ky. 1946. A "note" must contain one person's written promise to pay to bearer or to another therein named or his order a fixed sum of money at specified time or at time which must certainly arrive and usually at designated place.—Fidelity & Columbia Trust Co. v. Lyons, 196 S.W.2d 605, 302 Ky. 839.—Bills & N 28.

Ky. 1945. A writing which referred only to a street and number but bore jurat of a notary public of Jefferson County showing that it was executed there, was sufficient as a written "memorandum" or "note" to take the oral contract to convey the property mentioned out of statute of frauds. KRS 371.010.—Montgomery v. Graves, 191 S.W.2d 399, 301 Ky. 260.—Frds St of 110(3).

Ky. 1940. Records of bank were competent to overcome statutory presumption that instrument executed by borrower to bank cashier individually who indorsed to bank was a "bill of exchange" as appeared from its face, and to prove that, in fact, the instrument was a "note" evidencing a direct loan from bank to borrower. Ky.St. § 3720b-1 et seq.—Farmers Nat. Bank of Glasgow v. Guthrie, 145 S.W.2d 518, 284 Ky. 583.—Bills & N 495.

Ky. 1940. In action by bank on alleged note wherein whether action was barred by limitations depended upon whether instrument sued upon was a bill of exchange, subject to five-year limitation, or a note, subject to 15-year limitation, records of bank established that the instrument executed by borrower to bank cashier individually who indorsed to bank was in fact a "note" evidencing a direct loan from bank to borrower and was not a "bill of exchange" as appeared from its face. Ky.St. §§ 2514, 2515, 3720b-1 et seq.—Farmers Nat. Bank of Glasgow v. Guthrie, 145 S.W.2d 518, 284 Ky. 583.—Lim of Act 197(1).

Ky. 1931. Employer's scrip is not "note" nor "bond" so as to prevent recovery where not assessed for taxation. Ky.St. § 4019a-13.—Elkhorn Piney Coal Mining Co. v. Elvove, 36 S.W.2d 3, 237 Ky. 570.—Tax 533.

La.App. 1 Cir. 1942. Where note had not passed into hands of a third party, it was permissible for payee or maker to show the nature of consideration for the "note", which is merely the evidence of existence of the obligation.—Magnolia Petroleum Co. v. Police Jury of Vermilion Parish, 11 So.2d 36.—Bills & N 452(3).

La.App. 2 Cir. 1935. Instrument reciting that maker promised to pay designated person specified amount with interest six months after date held a "note" as against contention that instrument was mere receipt for money borrowed.—Steele v. Strickland, 163 So. 757.—Bills & N 30.

La.App. 2 Cir. 1932. "Note" is written engagement to pay certain sum of money at specified time, and evidences obligation to pay.—Bates-Crumley Chevrolet Co. v. Brown, 141 So. 436.—Bills & N 28.

Mass. 1941. Where on date of execution in 1923 of note payable in three years, intestate wrote below maker's signature that "I guarantee and promise to pay the above note" and that no "extension or indulgence or partial release shall prevent my remaining fully liable", the notation had the effect of a "guarantee" rather than the effect of a "note", there being no "unconditional promise or order to pay" within the meaning of the Negotiable Instruments Act, and hence action against intestate's administrators in 1940 was barred by six-year limitation statute, and 20-year limitation statute was not applicable. G.L.(Ter.Ed.) c. 107, § 23; c. 260, § 1, cl. 3, and § 2.—Charlestown Five Cents Sav. Bank v. Wolf, 36 N.E.2d 390, 309 Mass. 547.—Guar 4; Lim of Act 21(1).

Miss. 1905. An instrument signed by E., reciting that on or before a certain day "I promise to pay to the order of H. \$360 rent for 90 acres of land at \$4 per acre of L. plantation, for the year 1901, value received," is not only a "note," but a contract embracing all the terms of the contract between the parties so as to exclude evidence of an agreement by H. to put a fence around the place to keep cattle out.—Hightower v. Henry, 37 So. 745, 85 Miss. 476.

Mo.App. S.D. 1983. Because instrument in question was written promise to pay money, was signed by makers and payable to order of payees, and was for specific sum, it was properly called a "note," even though it lacked quality of negotiability. V.A.M.S. § 431.020.—Rotert v. Faulkner, 660 S.W.2d 463.—Bills & N 1.

Mo.App. 1922. A promise to subscribe for a certain amount of stock of corporation to be organized, to be paid for in installments, *held* valid, under Rev.St.1919, § 9739, Mo.R.S.A. § 5017, notwithstanding section 10155, Mo.R.S.A. § 5349, prohibiting the payment for stock in corporation by notes of the incorporators; such subscription not being a "note," within such statute.—Drake Hotel Co. v. Crane, 240 S.W. 859, 210 Mo.App. 452.—Corp 88.

N.J.Co. 1950. The normal distinction between a corporate "bond" and a corporate "debenture" or "note" is that the former is usually secured by a mortgage while the latter usually is not.—Fine v. H. Klein, Inc., 77 A.2d 295, 10 N.J.Super. 295.—Bills & N 1; Corp 463.1, 470; Mtg 5.

N.M.App. 1980. In state securities statute, there was no ambiguity in statutory words "note" and "evidence of indebtedness," and their usual, ordinary meanings were to apply, there being no legislative intent to contrary, and where documents issued by defendant were notes and evidence of indebtedness, they were "securities" as defined by security statute. NMSA 1978, §§ 58-13-2, subd. H, 58-13-29, subd. H; Securities Act of 1933, §§ 1 et seq., 2, 2(1), 15 U.S.C.A. §§ 77a et seq., 77b, 77b(1); Securities Exchange Act of 1934, §§ 1 et

seq., 3, 3(a)(10), 15 U.S.C.A. §§ 78a et seq., 78c, 78c(a)(10).—State v. Sheets, 610 P.2d 760, 94 N.M. 356, certiorari denied 615 P.2d 992, 94 N.M. 675.—Sec Reg 250.

N.D. 1969. Term “note” in provision of Securities Act defining securities subject thereto is not limited to a negotiable note, notwithstanding definition of note in Commercial Code as meaning negotiable promissory note. NDCC 10-04-01 et seq., 10-04-02, subd. 12, 41-01-02.—State v. Weigel, 165 N.W.2d 695.—Sec Reg 250.

N.D. 1968. “Note” is a “security” within meaning of Securities Act and every person who for all or part of his time engages in selling notes issued by such person is a “dealer”. NDCC 10-04-01 et seq., 10-04-02, 10-04-02, subd. 2, 10-04-10, 10-04-18.—State v. Weisser, 161 N.W.2d 360.—Sec Reg 250, 260.

N.D. 1968. Personal promissory note is a “note” and also an “evidence of indebtedness” and is governed by provisions of Securities Act of 1951 forbidding selling of securities without being registered as a securities dealer or salesman. NDCC 10-04-02, subds. 6, 12.—State v. Weisser, 161 N.W.2d 360.—Sec Reg 250.

S.C. 1905. The first requisite to the “negotiability” of a paper is that it should be a “note,” and, as a “note” must be an obligation for the payment of a certain sum of money, a provision that if collection is made through an attorney, or by legal process, the maker will pay all costs and expenses including 10 per cent. of the amount collected as attorney’s fees, renders the note nonnegotiable.—Green v. Spires, 50 S.E. 554, 71 S.C. 107.

Tex.App.—San Antonio 1987. Written agreement providing for payment of balance due on sale of equipment that contained unconditional promise to pay seller at least certain sum of money each month was in form of “note.”—Mauricio v. Menendez, 723 S.W.2d 296.—Bills & N 30.

Tex.App.—Dallas 1992. “Note” is written unconditional promise to pay another certain sum of money at certain time. V.T.C.A., Bus. & C. § 3.104(a, b).—Edlund v. Bounds, 842 S.W.2d 719, rehearing denied, and writ denied.—Bills & N 28.

Tex.App.—Amarillo 1997. “Note” is an unconditional promise to pay another a certain sum of money at a certain time.—May v. Walter, 956 S.W.2d 138, rehearing overruled, and review denied.—Bills & N 28.

Tex.Civ.App.—Fort Worth 1929. Unconditional promise to pay definite sum of money at fixed time, is essential requisite of “note.”—Kelsay Lumber Co. v. Crowell, 19 S.W.2d 368, writ dismissed w.o.j.—Bills & N 28.

Tex.Civ.App.—Fort Worth 1929. Instrument made subject to terms and provisions of contract and trust deed held not a “note,” negotiable or otherwise.—Kelsay Lumber Co. v. Crowell, 19 S.W.2d 368, writ dismissed w.o.j.—Bills & N 47.

Utah 1935. Instrument providing that, if it was not paid on or before date it became due, it should

automatically cease to be a claim against insured, and all rights under policy should be the same as if agreement had not been made, *held* not a “note” given for delinquent premium the nonpayment of which caused accident policy to lapse, since instrument contained no unconditional promise to pay.—Parker v. California State Life Ins. Co., 40 P.2d 175, 85 Utah 595.—Insurance 2027.

Va. 1948. A “note” is a written acknowledgement of a debt and a promise to pay, and a “debt” is that which is due from one person to another.—Almond v. Gilmer, 49 S.E.2d 431, 188 Va. 1.—Bills & N 28.

Wis. 1937. Instrument, although signed by buyer alone on which was indorsed, “Conditional Sales Note,” and which recited payee’s obligation to hold for buyer residue remaining from sale of repossessed property, held not a “note” within statute authorizing cognovit judgment on “note.” St.1935, § 270.69 (W.S.A.)—Wisconsin Sales Corp. v. McDougal, 271 N.W. 25, 223 Wis. 485.—Judgm 52.

Wis. 1934. “Note” is a unilateral instrument containing an express and absolute promise of signer to pay to a specified person or order, or bearer, a definite sum of money at a specified time.—Shawano Finance Corp. v. Julius, 254 N.W. 355, 214 Wis. 637.—Bills & N 28.

Wis. 1934. Unconditional written promise of one person to pay to order of another a specific sum in monthly installments of certain amounts beginning one month after date, with interest at rate of 10 per cent. per annum after maturity, and containing acceleration clause and provision for judgment by cognovit, held a “note” within statute and subject to judgment by cognovit. St.1933, § 270.69 (W.S.A.)—Shawano Finance Corp. v. Julius, 254 N.W. 355, 214 Wis. 637.—Judgm 52.

Wis. 1932. Statute authorizing judgment on cognovit on a “note” or “bond” held not to authorize judgment on automobile conditional sales contract. St.1929, § 270.69 (W.S.A.)—United Finance Corp. v. Peterson, 241 N.W. 337, 208 Wis. 104, 89 A.L.R. 1104.—Judgm 52.

#### NOTED

Tex.Civ.App. 1896. Charging a man as having a “notorious reputation” is not defamatory in itself, and an innuendo is necessary in pleading the publication of such a charge in order to make out a case of libel. The word “notorious” would become libelous in itself only when qualifying some other word. It may be properly used in an innocent, and even in a laudatory sense, as being synonymous with “distinguished,” “remarkable,” “conspicuous,” “noted,” “celebrated,” “renowned.” The word being capable of a harmless meaning as well as an injurious one, it would be a question for the jury to decide which meaning was intended.—George Knapp & Co. v. Campbell, 36 S.W. 765, 14 Tex.Civ.App. 199.

#### NOTED ON THE DOCKET AND ENTERED OF RECORD

Tex.Civ.App.—Waco 1940. The words “noted on the docket and entered of record”, in statute pro-

viding that an appeal may be taken by giving notice within two days after judgment overruling motion for new trial, which shall be “noted on the docket and entered of record”, referred to notice of appeal and not to order overruling motion for new trial. Vernon’s Ann.Civ.St. art. 2253.—Boren v. Cerf’s Trust Estate, 145 S.W.2d 627.—App & E 345.1.

#### **NOTE, DRAFT, BILL OF EXCHANGE OR BANKER'S ACCEPTANCE**

D.R.I. 1973. Certificates of beneficial interests in various trusts created for purpose of financing development of real estate, bearing interest at rate of 9%, payable every three months, with a maturity of nine months, and a minimum purchase price of \$5,000, were not classifiable as a “note, draft, bill of exchange or banker’s acceptance” so as to qualify for exemption from registration under Securities Act where they were issued for sale to general public and were offered for sale to general public in newspaper advertisements. Securities Act of 1933, §§ 3(a)(3), 5(a, c) as amended 15 U.S.C.A. §§ 77c(a)(3), 77e(a, c).—Securities and Exchange Commission v. M. A. Lundy Associates, 362 F.Supp. 226.—Sec Reg 14.10.

#### **NOT ELIGIBLE**

Pa.Cmwltb. 1984. “Eligible” as used in Emergency Unemployment Compensation Act denotes one whose work and pay history is such that he is otherwise covered for unemployment compensation, and “not eligible” does not mean disqualified, that is, as denoting one who although financially eligible may not receive compensation by reason of the nature of the separation from his employment. Emergency Unemployment Compensation Act of 1974, §§ 201, 203(a), (a)(1), 26 U.S.C.A. § 3304 note.—Pataki v. Com., Unemployment Compensation Bd. of Review, 483 A.2d 581, 85 Pa.Cmwltb. 560.—Social S 381.

#### **NOT ELIGIBLE FOR EDUCATIONAL SERVICES**

N.Y.Fam.Ct. 1979. Phrase “not eligible for educational services,” within statute extending jurisdiction of family court to handicapped children who are not eligible for educational services, refers to lack of free instructional facilities for a period of two months each year. Family Ct. Act, § 236.—Matter of Dwella P., 414 N.Y.S.2d 878, 98 Misc.2d 869.—Infants 151.

#### **NOT ELIGIBLE FOR PAROLE**

N.J.Super.A.D. 1995. Use of phrase “not eligible for parole” in sentencing statute unquestionably denotes mandatory minimum sentence.—Merola v. Department of Corrections, 667 A.2d 702, 285 N.J.Super. 501, certification denied 673 A.2d 277, 143 N.J. 519.—Pardon 50.

#### **NOT EMPLOYED**

Mo. 1942. In policy insuring against liability for injuries sustained on premises of insured by anyone “not employed” by insured, the quoted words introduced an “ambiguity” permitting construction of the clause, particularly where policy further provid-

ed coverage while within or upon the premises and elsewhere, if injuries were caused in the course of employment by employees of insured engaged as such at such premises but required in the discharge of their duties to be from time to time at other places.—State ex rel. Maryland Cas. Co. v. Hughes, 164 S.W.2d 274, 349 Mo. 1142.—Insurance 2295.

Mo. 1942. Under policy insuring against liability for injuries sustained on premises of insured by a person or persons “not employed” by insured, one could be employed by the insured and still be within the coverage of the policy, since one may be “employed” without being a “servant”.—State ex rel. Maryland Cas. Co. v. Hughes, 164 S.W.2d 274, 349 Mo. 1142.—Insurance 2295.

Mo. 1942. St. Louis Court of Appeals decision that minor son of insured’s housekeeper who was given odd tasks around the house such as raking leaves, although paid therefor, was not excluded from coverage of policy insuring against liability for injuries sustained on premises of insured by one “not employed” by insured was not subject to being quashed as being in conflict with the rule of Supreme Court decisions that common words in unambiguous policy must be given their natural meaning and policy enforced as written, since the words “not employed” introduced an ambiguity permitting construction.—State ex rel. Maryland Cas. Co. v. Hughes, 164 S.W.2d 274, 349 Mo. 1142.—Courts 231(4).

Mo. 1942. St. Louis Court of Appeals decision that a casual employee was not excluded from coverage under policy insuring against liability for injuries sustained on premises of insured by one “not employed” by insured, notwithstanding judgment in prior action against insured necessarily involved finding that relation of master and servant or employer and employee existed between insured and injured person, was not subject to being quashed on certiorari as being in conflict with Supreme Court decisions.—State ex rel. Maryland Cas. Co. v. Hughes, 164 S.W.2d 274, 349 Mo. 1142.—Courts 231(4).

Mo.App. 1941. The words “any person or persons” within policy insuring against liability for injuries sustained on premises of insured by “any person or persons” “not employed” by insured are comprehensive and unambiguous, but the restrictive words “not employed” are susceptible of many meanings, and introduce an ambiguity which permits construction of the clause.—Daub v. Maryland Cas. Co., 148 S.W.2d 58, certiorari quashed State ex rel. Maryland Cas. Co. v. Hughes, 164 S.W.2d 274, 349 Mo. 1142.—Insurance 2295.

Mo.App. 1941. The words “not employed” within policy insuring against liability for injuries sustained on premises of insured by one “not employed” by them, are intended to exclude from coverage any person regularly employed, but not a mere occasional, incidental, or casual employee.—Daub v. Maryland Cas. Co., 148 S.W.2d 58, certiorari quashed State ex rel. Maryland Cas. Co. v. Hughes, 164 S.W.2d 274, 349 Mo. 1142.—Insurance 2278(11).

## NOT EMPLOYED

Mo.App. 1941. Where housekeeper was employed by insured to do general housework on Saturdays, and minor son of housekeeper was given odd tasks around the house such as raking leaves for purpose of keeping him out of mischief, though he was paid therefor, the minor was not excluded from coverage of policy insuring against liability for injuries sustained on premises of insured by one "not employed" by them.—*Daub v. Maryland Cas. Co.*, 148 S.W.2d 58, certiorari quashed State ex rel. Maryland Cas. Co. v. Hughes, 164 S.W.2d 274, 349 Mo. 1142.—Insurance 2278(11).

Mo.App. 1941. A recovery from insured on theory that injured minor was their employee did not "estop" insured from seeking recovery from insurer on theory that minor was "not employed" within policy insuring against liability for injuries sustained on premises of insured by one "not employed" by them.—*Daub v. Maryland Cas. Co.*, 148 S.W.2d 58, certiorari quashed State ex rel. Maryland Cas. Co. v. Hughes, 164 S.W.2d 274, 349 Mo. 1142.—Judgm 715(3).

### NOT EMPLOYED ON A FULL-TIME BASIS

N.C.App. 1976. Employee, whose work schedule was limited to eight hours per day for two days each week for purpose of allowing him to qualify for full social security benefits and who actually worked less than was allowed under such limited schedule, was "not employed on a full-time basis" within meaning of group policy which was issued to employer and which provided that persons eligible for insurance under policy were persons directly employed on a full-time basis.—*Self v. Life Assur. Co. of Carolina*, 227 S.E.2d 636, 30 N.C.App. 558, review denied 229 S.E.2d 690, 291 N.C. 176.—Insurance 2100.

### NOT ENGAGED IN FOR PROFIT

C.A.11 1984. Partnership which purchased movie was one "not engaged in for profit" as defined in internal revenue code subsection, and therefore partnership was entitled to take deductions claimed, which were attributable to cash paid for movie, only to extent of gross income derived from activity in year in question, and accordingly, taxpayer, a limited partner, was entitled to deduct only a pro rata share of the partnership's income. 26 U.S.C.A. §§ 162, 162(a).—*Brannen v. C.I.R.*, 722 F.2d 695.—Int Rev 3922.

### NOT ENOUGH

Mont. 1905. Under a statute providing that no appeal shall be dismissed for insufficiency of the undertaking, if a good and sufficient undertaking be filed before the hearing on motion to dismiss, the term "insufficient," as applied to an undertaking on appeal, must be construed as meaning such a one as has some efficiency, but "not enough" to meet the necessary requirements, and bears the ordinary meaning of "not enough"; that is, importing degree in quantity or quality, and not total absence.—*Pirrie v. Moule*, 81 P. 390, 33 Mont. 1.

## NOT ENTITLED TO ENTER

C.A.2 (N.Y.) 1951. Alien seaman who was ineligible for citizenship and without immigration visa, who was inspected and granted shore leave by immigrant inspector, deserted ship and remained in the United States, and who stated, upon being taken into custody, that he had intended to remain permanently in the United States at time of taking leave was deportable because he had "remained longer" than shore leave permitted and not because he entered the United States as an immigrant "not entitled to enter," and hence deportation was at expense of United States, not vessel owner. Immigration Act of 1917, §§ 3(n), 20, 34, 8 U.S.C.A. §§ 1182(a), 1251–1254, 1282(b), 1287; Immigration Act of 1924, §§ 3, 13(a, c), 14, 16, 20, 214, 8 U.S.C.A. §§ 1101(a), 1181, 1182, 1251, 1252, 1284, 1323.—*United States v. Prince Line, Ltd.*, 189 F.2d 386.—Aliens 54.4.

C.C.A.2 (N.Y.) 1938. An alien who enters under a passport and visa fraudulently obtained by pretending to be a different person entitled to a preference quota visa is "not entitled to enter" within the statute providing for the deportation of aliens found to have been not entitled to enter, though he has an unexpired immigration visa as required by another statute. Quota Act of 1924, §§ 13(a) (1), 14, 8 U.S.C.A. §§ 213(a) (1), 214.—U.S. ex rel. *Fink v. Reimer*, 96 F.2d 217, certiorari denied 59 S.Ct. 78, 305 U.S. 618, 83 L.Ed. 395.—Aliens 53.4.

### NOT ENTITLED TO VOTE

Mass. 1953. In statute requiring newly consolidated corporation to appraise and pay for stock owned by stockholder in merged corporation if stockholder "not entitled to vote" has registered disapproval of proposed consolidation at or before stockholder's meeting approving consolidation, quoted phrase does not include class of stock entitled to vote but unable to vote because of disqualification of stockholder as to particular shares, and, hence, stockholder who bought stock before the meeting, but after date fixed by board as record date for determination of stockholders entitled to vote was not entitled to appraisal and payment. G.L.(Ter.Ed.) c. 155, § 50; c. 156, § 3; §§ 46B, 46D, 46E, as added by St.1941, c. 514, § 2.—*Booma v. Bigelow-Sanford Carpet Co.*, 111 N.E.2d 742, 330 Mass. 79.—Corp 584.

### NOTE OF ISSUE

S.D.N.Y. 1994. Under New York law, jury is demanded in "note of issue," which is filed at conclusion of pretrial proceedings. N.Y.McKinney's CPLR 4102(a).—*Figueroa v. Pratt Hotel Corp.*, 158 F.R.D. 306.—Jury 25(8).

### NOTE OF OVER EIGHT MONTHS DURATION

Oklahoma. 1937. A note, which was a demand note on its face, was not "note of over eight months duration" within statute precluding admission in evidence of notes on which tax had not been paid, notwithstanding alleged verbal agreement that notes should extend more than eight months. 68

**NOTE OR MEMORANDUM**

Okl.St.Ann. § 516, St.1931, § 12368.—Hanes v. Baker, 73 P.2d 143, 181 Okla. 146, 1937 OK 626.—Tax 533.

**NOTE OF SUBMISSION**

Idaho 1930. Clerk's entry in register of note of submission with names of parties, etc., constituted "note of submission."—Idaho Gold Dredging Corporation v. Boise Payette Lumber Co., 288 P. 641, 49 Idaho 303.—Arbit 12.1.

**NOTE OR MEMORANDUM**

Cal. 1927. Provision in landowner's escrow offer to sell *held* "note or memorandum" sufficient to bind her for broker's commission. Civ.Code, § 1624; Code Civ.Proc. § 1973.—Coulter v. Howard, 262 P. 751, 203 Cal. 17.—Brok 43(3).

Cal.App. 2 Dist. 1948. Execution of will in accordance with oral agreement without express reference to agreement does not constitute a "note or memorandum" sufficient to satisfy statute of frauds. West's Ann.Code Civ.Proc. § 1973; West's Ann.Civ.Code, § 1624.—Shive v. Barrow, 199 P.2d 693, 88 Cal.App.2d 838.—Frds St of 103(1).

Cal.App. 4 Dist. 1931. Landowner's escrow instruction authorizing escrow agent to pay broker commission *held* "note or memorandum" sufficient to bind landowner for broker's commission. Civ. Code, § 1624; Code Civ.Proc. § 1973.—Coulter v. Howard, 298 P. 140, 113 Cal.App. 208.—Brok 43(3).

Fla.App. 5 Dist. 1988. "Note or memorandum" required by statute of frauds may consist of several written instruments signed by party to be charged. West's F.S.A. § 725.01.—Rohlfing v. Tomorrow Realty & Auction Co., Inc., 528 So.2d 463.—Frds St of 118(1).

Ill. 1936. Will containing no intimation that it was executed pursuant to alleged contract to devise and bequeath property, held insufficient "note or memorandum" thereof within Statute of Frauds. S.H.A. ch. 59, § 1.—Holsz v. Stephen, 200 N.E. 601, 362 Ill. 527, 106 A.L.R. 737.—Frds St of 106(1).

Ill. 1936. Deed executed pursuant to oral contract, if making no reference to terms thereof, is insufficient "note or memorandum" to escape Statute of Frauds. S.H.A. ch. 59, § 1.—Holsz v. Stephen, 200 N.E. 601, 362 Ill. 527, 106 A.L.R. 737.—Frds St of 113(3).

Ky. 1909. The "note or memorandum" required by the statute of frauds is such a written declaration of the parties to the agreement as will relieve the court from relying on parol evidence to ascertain the subject of the contract. It need not state the terms of the contract as to the consideration, which may be proved by parol even if to do so involves a contradiction of the memorandum. It may consist of two or more writings signed by the party to be charged shown to refer to the same subject-matter and describing the subject of the contract so that it may be identified.—Campbell v. Preece, 118 S.W. 373, 133 Ky. 572.

Me. 1952. Where contract to give, bequeath and devise property in consideration of marriage was not referred to in will executed by testator on day prior to his marriage and there was nothing in will from which either existence of agreement or terms thereof could be inferred, will was not a "note or memorandum" of agreement sufficient to satisfy requirement of statute of frauds. R.S.1944, c. 106, § 1, as amended by Laws 1947, c. 185.—Busque v. Marcou, 86 A.2d 873, 147 Me. 289, 30 A.L.R.2d 1411.—Frds St of 103(1).

Mont. 1954. An ordinary bank check, filled in, signed and endorsed, with the additional words "payment land" written on it, was not sufficient to constitute the written "note or memorandum" required by statute, and agreement was, therefore, unenforceable. R.C.M.1947, 13-606, 74-203, 93-1401-7.—Lewis v. Starlin, 267 P.2d 127, 127 Mont. 474.—Frds St of 103(1).

Mont. 1947. A receipt stating that owner received \$5,000 from broker for payment on property sold to designated purchaser and that commission was to be paid, taken in conjunction with letter from broker to owner containing a statement of broker's claim and owner's reply not denying the indebtedness and failing to question its accuracy but amounting to tacit admission of indebtedness, constituted sufficient "note or memorandum" of agreement by owner to pay broker's commission to meet requirements of statute of frauds. Rev.Codes 1935, § 7519, subd. 6.—Johnson v. Ogle, 181 P.2d 789, 120 Mont. 176.—Frds St of 118(4).

Nev. 1941. A "note or memorandum" within meaning of the provision of the statute of frauds that every agreement shall be void, unless such agreement, or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party charged therewith, if the agreement, by the terms, is not to be performed within one year from the making thereof, must contain all the essential elements of the contract, and the substantial parts of the contract must be embodied in the writing with such a degree of certainty as to make clear the intention of the parties without resort to oral evidence. Comp.Laws, § 1533.—Stanley v. A. Levy & J. Zentner Co., 112 P.2d 1047, 60 Nev. 432, 158 A.L.R. 76.—Frds St of 106(1).

Nev. 1941. A letter written by manager of farm produce company to dealer in trucks, that in reference to purchase of a truck by trucker, produce company could assure dealer that trucker would have the hauling of 600 tons of wine grapes for company, that proceeds of hauling, less allowance of \$700 to trucker for operating expenses, would be paid to dealer, and that trucker was to be paid \$6 a ton was not a sufficient "note or memorandum" within the statute of frauds, to prevent alleged oral agreement between company and trucker for hauling grapes, which was not to be performed within one year from the making thereof, from being void under the statute of frauds. Comp.Laws, § 1533.—Stanley v. A. Levy & J. Zentner Co., 112 P.2d 1047, 60 Nev. 432, 158 A.L.R. 76.—Frds St of 106(1).

N.Y.Sup. 1947. A memorandum of lease agreement in tenant's handwriting, but not signed by landlord, and receipt, signed by landlord, for part payment of rent, but omitting term of letting, were insufficient to constitute "note or memorandum" of lease, subscribed by party to be charged, as required by statute of frauds. Real Property Law, § 259.—Berlin v. Himmelstein, 71 N.Y.S.2d 626.—Frds St of 118(1).

N.Y.Sup. 1947. A receipt for money containing entire agreement of parties is sufficient "note or memorandum" of contract for sale of realty under statute of frauds. Real Property Law, § 259.—Lichtman v. Mazzeo, 68 N.Y.S.2d 876, 188 Misc. 559.—Frds St of 103(1).

N.Y.Sup. 1947. A receipt for money was insufficient "note or memorandum" of contract for sale of realty under statute of frauds, where purchase and sale was conditioned on vendor's finding other housing accommodations and such essential element of contract was not contained in receipt. Real Property Law, § 259.—Lichtman v. Mazzeo, 68 N.Y.S.2d 876, 188 Misc. 559.—Frds St of 113(3).

N.Y.Sup. 1946. Buyer's letter to seller, directing seller to "cancel our orders for woolen frames until further notice", did not sufficiently identify contract, and hence was not a "note or memorandum" of the contract sufficient to take sales contract out of statute of frauds.—Invincible Parlor Frame Co. v. Elegant Leather Goods, 62 N.Y.S.2d 398, 187 Misc. 454, affirmed 71 N.Y.S.2d 924, 272 A.D. 795.—Frds St of 118(2).

N.Y.Sup. 1945. Plaintiff could not specifically enforce alleged five year oral lease of real property unless he could establish a "note or memorandum" of the lease and in addition expressing the consideration, in writing, and subscribed by defendant, or by its lawful agent "thereunto authorized by writing". Real Property Law, § 259.—Thomas v. McCurdy & Co., 58 N.Y.S.2d 552, affirmed 59 N.Y.S.2d 527, 269 A.D. 1012.—Spec Perf 39.

N.Y.Sup. 1945. A one year written lease of premises by defendant to plaintiff did not constitute a "note or memorandum" of alleged oral agreement to lease property for five year term, taking it out of statute of frauds, where there was no reference in written lease to oral agreement claimed by plaintiff. Real Property Law, § 259.—Thomas v. McCurdy & Co., 58 N.Y.S.2d 552, affirmed 59 N.Y.S.2d 527, 269 A.D. 1012.—Frds St of 113(3).

N.Y.Sup. 1930. Vendor's contract authorizing broker to sell real property, with covenant of warranty in warranty deed, was sufficient "note or memorandum" within Statute of Frauds, Real Property Law, § 259, to show vendor's intent to convey free from all incumbrances.—Van Decar v. Streeter, 240 N.Y.S. 492, 136 Misc. 206.

N.Y.Sup.App.Term 1907. There was a sufficient "note or memorandum" of a contract of sale to charge the buyers under the statute of frauds, where they wrote: "We have examined the corduroys thoroughly and find we cannot possibly use them. Those goods were sold to us as first." "We

do not mean to cancel our order on" them, etc. "If you have perfect goods on hand to deliver to us, we are ready to accept same at prices sold"—though the letters were written after the sale and in terms repudiate the buyers' liability for an alleged breach of warranty.—J. Spencer Turner Co. v. Robinson, 105 N.Y.S. 98, 55 Misc. 280.—Frds St of 104.

Wis. 1926. Receipt signed by wife as joint owner, pursuant to sale by agent describing real estate to be sold, expressing price and commission to be paid, was "note or memorandum" within St.1925, § 240.10 (W.S.A.), entitling agent to recover commission of wife.—Genske v. Leutner, 210 N.W. 369, 191 Wis. 125.—Brok 43(2).

### **NOTE OR MEMORANDUM IN WRITING**

N.D.Ill. 1936. Correspondence between employer and employee containing employee's offer to sell stock to employer at certain price, but not containing acceptance of such offer, and receipt showing that stock had been left with employer, held not "note or memorandum in writing" which would lift alleged oral agreement for sale of stock out of operation of Wisconsin statute of frauds. St.Wis. 1929, § 121.04.—Stewart v. Wisconsin Bridge & Iron Co., 17 F.Supp. 953.—Frds St of 103(1).

### **NOTE OR MEMORANDUM THEREOF**

N.Y.Sup. 1959. Under the statute providing that a contract for sale of real property is void unless the contract or some "note or memorandum thereof" is in writing, the "note or memorandum thereof" must be such that when it is produced in evidence it will inform the court or jury of the essential facts set forth in the pleading and which go to make a valid contract. Real Property Law, § 259.—Bambace v. Bachrach, 194 N.Y.S.2d 608, 20 Misc.2d 173.—Frds St of 106(1).

### **NOTE OR NEGOTIABLE INSTRUMENT**

Conn.Super. 1980. Contract, under which person agreed to perform construction repair work on a residence and which did not include a contractual obligation to pay in the future for a consideration presently received, was not a "note or negotiable instrument" as defined by Uniform Commercial Code. C.G.S.A. § 42a-3-104(1).—Enterprises, Inc. v. Becker, 416 A.2d 183, 36 Conn.Sup. 213.—Bills & N 148.1.

### **NOTE OR OTHER EVIDENCE OF DEBT**

N.Y.Sup. 1939. A certificate of interest issued in connection with reorganization of investment and loan corporation was not a "note or other evidence of debt," within statute prohibiting officers of an industrial bank from purchasing any promissory notes or other evidences of debt issued by it for less than face value, where certificate yielded 3 per cent. interest if, as, and when earned, did not represent a fixed liability, and was subject and subordinate to investment certificates and claims of all other creditors. Banking Law, § 61, subd. 2(e), § 301, subd. 2, § 609, subd. 3.—Newman v. Scheer, 11 N.Y.S.2d 649, 170 Misc. 1027, affirmed 14 N.Y.S.2d 493, 257

A.D. 1036, appeal denied 22 N.E.2d 874, 281 N.Y. 888.—Banks 314.

#### **NOTE OR OTHER EVIDENCE OF INDEBTEDNESS**

Conn.Super. 1980. Contract, under which person agreed to perform construction repair work on a residence and which did not include contractual obligation to pay in future for consideration presently received, was not a "note or other evidence of indebtedness" within meaning of Home Solicitation Sales Act's provision requiring that any note or other evidence of indebtedness given in connection with a home solicitation sale state on its face that the sale was subject to the Act and that the instrument was not negotiable. C.G.S.A. § 42-136(b).—Enterprises, Inc. v. Becker, 416 A.2d 183, 36 Conn. Sup. 213.—Cons Cred 16.

Ga.App. 1985. Exclusive listing contract for sale of business in which vendor agreed to pay attorney fees should broker be required to bring action to enforce contract was not a "note or other evidence of indebtedness" within the meaning of O.C.G.A. § 13-1-11 requiring notice of intention to seek attorney fees.—O'Brien's Irish Pub, Inc. v. Gerlew Holdings, Inc., 332 S.E.2d 920, 175 Ga.App. 162.—Costs 201.

#### **NOTE PAYABLE IN INSTALLMENTS**

Tex.Civ.App.—Amarillo 1939. A "note payable in installments," within statute providing that where note is made payable in installments, limitation shall not begin to run until date of last note or until date of last installment, is a note given for total amount of money to be paid within certain time in sums less than the whole on fixed dates. Vernon's Ann.Civ.St. art. 5520.—Hughes v. Stovall, 135 S.W.2d 603, writ dismissed, correct.—Lim of Act 51(2).

#### **NOTE PAYABLE ON DEMAND**

Mo.App. 1937. Note containing promise to pay "on demand, and if no demand be made, then on the first day of February, 1933," held not "note payable on demand" within Negotiable Instruments Law, but one not maturing, as required to authorize action thereon without demand for payment, until date stated (Mo.St.Ann. § 2636, p. 647).—Brown v. Maguire's Real Estate Agency, 101 S.W.2d 41, reversed 121 S.W.2d 754, 343 Mo. 336.—Bills & N 129(3).

Neb. 1996. "Note payable on demand" is due the day after it is executed and delivered, and it may then be subject of action to enforce indebtedness evidenced by it.—Solar Motors, Inc. v. First Nat. Bank of Chadron, 545 N.W.2d 714, 249 Neb. 758.—Bills & N 129(3).

#### **NOTE PAYABLE TO BEARER**

Miss. 1936. Indorsee of note held entitled to make required affidavit to probate note, rather than payee, since "note payable to bearer" is a contract between maker and whoever becomes legal holder in due course for value received.—Bankston v. First

Nat. Bank & Trust Co. of Vicksburg, 171 So. 18, 177 Miss. 719.—Ex & Ad 227(3).

#### **NOT EQUIVALLY AVAILABLE TO THE STATE**

Fla.App. 4 Dist. 1997. Witness is "not equally available to the state" when there is special relationship between defendant and witness, for purposes of doctrine that state may comment on defendant's failure to produce evidence to refute element of crime when defendant voluntarily assumes some burden of proof by asserting certain defenses, and when defendant relies on facts that could be elicited only from witness who is not equally available to state. U.S.C.A. Const.Amend. 14.—Jackson v. State, 690 So.2d 714.—Crim Law 721.5(1).

#### **NO TERM LEASE**

Tex. 1966. "No term lease" is one which does not impose an obligation on lessee to drill well or to produce oil or gas or other minerals as condition to continued life of lease indefinitely.—Fox v. Thoreson, 398 S.W.2d 88.—Mines 73.5.

Tex.Civ.App.—Amarillo 1965. Oil and gas lease which contained no shut-in royalty clause, no provision for payment of delay rentals to defer date of drilling nor any other constructive production clause was not a "no-term lease".—Thoreson v. Fox, 390 S.W.2d 308, writ granted, reversed 398 S.W.2d 88.—Mines 73.5.

#### **NOTES**

C.A.9 (Cal.) 1963. In view of representations by defendants to public in making sales of trust deeds, jury was properly permitted, in prosecution for mail fraud, securities fraud and conspiracy, to find that the deeds were "notes," "evidence of indebtedness" or "investment contracts" even if, under California law, maker of trust deeds had no personal liability. Securities Act of 1933, §§ 2(1), 17(a) (1), 15 U.S.C.A. §§ 77b(1), 77q(a) (1); 18 U.S.C.A. §§ 371, 1341; West's Ann.Cal.Code Civ.Proc. §§ 580a, 580b, 580d, 726.—Farrell v. U.S., 321 F.2d 409, certiorari denied 84 S.Ct. 631, 375 U.S. 992, 11 L.Ed.2d 478.—Consp 48.2(2); Postal 50; Sec Reg 199.

C.A.5 (Ga.) 1980. As interpreted by Treasury Department regulation, term "notes" in statute which makes it unlawful for any licensed dealer to sell or deliver any firearm to any person unless the licensee "notes" in his records the name, age and place of residence of such person creates a duty to obtain a completed Treasury Department Form 4473 from the purchaser with correct and verified identification in section A of the form before consummating sale of a firearm. 18 U.S.C.A. § 922(b)(5).—U.S. v. Newman, 628 F.2d 362.—Weap 3.

C.A.2 (N.Y.) 1994. Mortgage participations were "notes," and thus, were "securities" for purposes of federal securities laws; motivation of sellers appeared to be to raise funds for its general business activities of making and servicing mortgages, instruments were obtained for buyers by their investment advisor as part of their investment port-

folios, instruments allegedly were offered for sale to general investing public, and there were no risk-reducing factors making protection of federal securities laws unnecessary. Securities Act of 1933, § 2(1), 15 U.S.C.A. § 77b(1); Securities Exchange Act of 1934, § 3(a)(10), 15 U.S.C.A. § 78c(a)(10).—Pollack v. Laidlaw Holdings, Inc., 27 F.3d 808, certiorari denied 115 S.Ct. 425, 513 U.S. 963, 130 L.Ed.2d 339, on remand 1995 WL 261518, reargument denied 1995 WL 634841.—Sec Reg 5.14.

C.A.10 (Okla.) 1993. “Enhanced automobile receivables” (EARs), consisting of car loans purchased from automobile dealers and resold on secondary market in package that contained certain enhancements to insure collectability, were not “notes” that would constitute “securities” under Securities Act of 1933, and therefore seller of such receivables could not be held liable for fraud under RICO in connection with their sale; seller’s purpose was not to raise money for general investments in seller, EARs were not commonly traded for speculation or investment, and EARs were often collateralized by vehicles for which underlying loans were made. 18 U.S.C.A. §§ 1961 et seq., 1962(c, d); Securities Act of 1933, §§ 1 et seq., 2(1), 12(2), 15 U.S.C.A. §§ 77a et seq., 77b(1), 77(2); Securities Exchange Act of 1934, § 3(a)(10), 15 U.S.C.A. § 78(a)(10).—Resolution Trust Corp. v. Stone, 998 F.2d 1534.—Sec Reg 5.13.

D.Conn. 1953. Where corporation issued 29 instruments evidencing borrowing of \$3,125,000 by corporation from bank so that corporation might increase its cash and working capital and refinance its existing loans, and last instrument was not payable until seven years later, and restrictions were placed by bank on corporation’s fiscal activities, instruments were “debentures” within meaning of section of Internal Revenue Code imposing stamp taxes on “debentures” and they were not “notes” exempt from stamp taxes. 26 U.S.C.A. (I.R.C.1939) § 1801.—Niles-Bement-Pond Co. v. Fitzpatrick, 112 F.Supp. 132, reversed 213 F.2d 305.—Int Rev 4399.

S.D.Ohio 1996. Under “family resemblance” test, leveraged derivative transactions involving interest rate swaps were not “notes” or “evidences of indebtedness” that should be deemed securities, for purposes of federal securities laws, where agreements did not involve payment or repayment of principal, parties’ motives were more toward commercial than investment purposes, swaps were customized for plaintiff and not widely distributed, and swaps were not traded on national exchange. Securities Act of 1933, § 2(1), as amended, 15 U.S.C.A. § 77b(1); Securities Exchange Act of 1934, § 3(a)(10), as amended, 15 U.S.C.A. § 78c(a)(10).—Procter & Gamble Co. v. Bankers Trust Co., 925 F.Supp. 1270.—Sec Reg 5.13.

M.D.Tenn. 1987. “Risk capital” approach of determining whether “notes” transaction is “investment” and thus, a “security” subject to antifraud provisions of Securities Acts requires consideration of factors of time, collateralization, form of obligation, circumstances of issuance, relationship between amount found and size of borrower’s busi-

ness and borrower’s contemplated use of funds. Securities Act of 1933, §§ 1 et seq., 2(1), 17(a), as amended, 15 U.S.C.A. §§ 77a et seq., 77b(1), 77q(a); Securities Exchange Act of 1934, §§ 1 et seq., 3(a)(10), 10, 15 U.S.C.A. §§ 78a et seq., 78c(a)(10), 78j; Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.—Home Guar. Ins. Corp. v. Third Financial Services, Inc., 667 F.Supp. 577.—Sec Reg 5.13.

Bkrcty.W.D.Mich. 1992. Debtor-in-possession was not “underwriter,” and “notes” were not “equity securities,” within meaning of Bankruptcy Code, provision governing exemption from registration and prospectus delivery requirements of securities laws. Bankr.Code, 11 U.S.C.A. §§ 101(16), 364(f), 1145(b)(1)(A-D); Securities Act of 1933, §§ 2(4, 11), 3(a)(7), 5, 301, 302, as amended, 15 U.S.C.A. §§ 77b(4, 11), 77c(a)(7), 77e, 77aaa, 77bbb.—Matter of Standard Oil & Exploration of Delaware, Inc., 136 B.R. 141.—Sec Reg 14.17.

Ala. 1927. “Notes” in common parlance do not include certificates of deposit in bank, notwithstanding they are so in law.—Wilson v. Witt, 112 So. 222, 215 Ala. 685, 52 A.L.R. 1095.—Bills & N 42.

Ala. 1927. Certificates of deposit held not “notes” within will bequeathing to wife all personal property except notes and mortgages.—Wilson v. Witt, 112 So. 222, 215 Ala. 685, 52 A.L.R. 1095.—Wills 584.

Ala.App. 1917. Complaint alleging cause of action on “notes” held not supported by instruments containing promise to pay on a condition.—Cairns v. Daniel, 77 So. 56, 16 Ala.App. 218.—Bills & N 489(7).

Ala.App. 1917. A complaint alleging a cause of action on “notes” therein described was not supported by written instruments whereby the maker promised to pay a specified amount on a certain date providing a building was completed and turned over to him by the payee within 30 days from date, since a “note” under commercial law is a written agreement by one person to pay another person therein named absolutely and unconditionally a certain sum of money at a time specified therein, and the instrument in question, being a conditional promise to pay, was a “specialty.”—Cairns v. Daniel, 77 So. 56, 16 Ala.App. 218.

Cal. 1940. Trust receipts prepared under Uniform Trust Receipt Act, given by automobile dealer to finance company to secure repayment, by dealer, of money loaned to him to pay for automobiles purchased from manufacturer or distributor, were not “notes” so as to be exempt from solvent credits tax by virtue of lien income tax, where trust receipts did not contain an unconditional promise to pay a sum certain in money. Civ.Code, §§ 3012 to 3016.16, 3082; Pol.Code, § 3627a (repealed. See Revenue and Taxation Code, §§ 212, 445, 1058 et seq., 2226–2233, 2604, 2902); St.1935, p. 1090 (repealed 1945. See Revenue and Taxation Code, § 17001 et seq.); Const. art. 13, §§ 1, 14.—Commercial Discount Co. v. Los Angeles County, 105 P.2d 115, 16 Cal.2d 158.—Tax 200.

Cal. 1934. General power of attorney granting power to execute "bills," "notes," and other necessary or proper instruments *held* to authorize attorney in fact to indorse for collection check made payable to principal and received by attorney in fact in principal's business, especially since under power attorney in fact was authorized to demand, sue for, collect, and receive all sums of money and debts due principal. Civ.Code, §§ 3265a, 3266.—Kiekhofer v. U.S. Nat. Bank of Los Angeles, 39 P.2d 807, 2 Cal.2d 98, 96 A.L.R. 1244.—Princ & A 109(4).

Cal.App. 2 Dist. 1953. Federal reserve notes and national bank notes are not choses in action, are not intangible property, but are tangible property and are not "notes" within statutory provision exempting notes, debentures, etc., from taxation. Revenue and Taxation Code, § 212; 12 U.S.C.A. § 109; 31 U.S.C.A. § 462.—Beery v. Los Angeles County, 253 P.2d 1005, 116 Cal.App.2d 290.—Tax 219.

La. 1954. No distinction exists between the words "bonds" and "notes" for the reason that the essence of each is to pay a certain sum to the bearer, and therefore Port Commission resolution to issue term notes or bonds was not in violation of constitutional amendment which established the Port Commission and provided that bonds issued by the Commission would pledge the full faith and credit of certain political subdivisions. Const.1921, art. 6, § 29.—Miller v. Greater Baton Rouge Port Commission, 74 So.2d 387, 225 La. 1095.—Bills & N 28; Bonds 1; Nav Wat 14(2).

Mo.App. 1939. Under will bequeathing to testator's son "the certificate which I have in my possession" and to his daughter all of his "notes," there was no ambiguity authorizing admission of extrinsic evidence to show that "certificate" was meant to describe a certain note, where testator owned property of each description when he made will.—Eberlin v. Brunner, 123 S.W.2d 543, 233 Mo.App. 563.—Wills 490.

Mo.App. 1939. Under will bequeathing to testator's son "the certificate which I have in my possession" and to his daughter all of his "notes," testator intended to bequeath certificate of bank stock in his possession at his death to son and notes, including son's note, to daughter, and term "certificate" did not refer to son's note or any other note.—Eberlin v. Brunner, 123 S.W.2d 543, 233 Mo.App. 563.—Wills 570.

N.D. 1964. Corporate notes offered to shareholders of another corporation in exchange for their stock as part of plan to acquire majority of stock of such other corporation constituted "notes" and "evidence of indebtedness" within Securities Act and were "securities" required to be registered under the Act. NDCC 10-04-01 et seq., 10-04-02, subd. 12.—State v. Davis, 131 N.W.2d 730.—Sec Reg 5.13, 250.

Ohio App. 8 Dist. 1953. Promissory "notes" are forms of intangible property and are evidence of debts owing their holders.—Department of Taxa-

tion v. Weber, 113 N.E.2d 141, 94 Ohio App. 511, 52 O.O. 298.—Bills & N 28.

Wyo. 1937. Interest-bearing warrants to defray organization expense *held* "notes" and "bonds" which irrigation statute authorized irrigation commissioners to issue. W.C.S.1945, § 71-831.—In re Bear River Irr. Dist., 65 P.2d 686, 51 Wyo. 343.—Waters 230(2).

## NOTES AND ACCOUNTS

Iowa 1921. A will making bequests from "cash on hand," and others from the proceeds of executor's sale of "notes and accounts," construed to include money in the bank, represented by short-time certificates bearing interest, but subject to check and withdrawal in "cash which I may have on hand" and not in "notes and accounts."—In re Johnston's Estate, 180 N.W. 740, 190 Iowa 679.—Wills 566.

## NOTES AND BILLS

Ala. 1894. "A check is a bill of exchange, drawn on a banker, payable on demand." Rand. Com.Paper, § 8. The authorities and textbooks, as a general thing, class them among commercial instruments. All checks are bills, but all bills are not checks, is the conclusion of the authorities. Id., and authorities there cited; Morse, Banks, §§ 363, 393; 2 Daniel, Neg.Inst. § 583; Byles, Bills, 13; 1 Edw.Bills & N. § 19; 2 Pars.Bills & N. 57; Story, Prom.Notes, 487; 3 Am. & Eng.Enc. Law, 211, note 1. In Branch Bank v. Crocheron, 5 Ala. 250, 254, this court, in defining the term "notes and bills" as employed in a statute against the issuance of such instruments by a corporation, said they were sufficiently comprehensive to include checks, drafts, bills single, bonds, or tokens.—First Nat. Bank v. Nelson, 16 So. 707, 105 Ala. 180.

## NOTES AND MORTGAGES

Ariz. 1958. Bequest of "notes and mortgages" included contracts for sale of real property, in view of showing that testator owned no other notes and mortgages and listed such contracts as mortgages in his book of accounts.—In re Shield's Estate, 327 P.2d 1009, 84 Ariz. 330.—Wills 569.

## NOTES AND RECORDS

Tex.Crim.App. 1996. All admitted exhibits are part and parcel of "notes and records" of court reporter for purposes of appellate rule entitling defendant to new trial when court reporter's notes and records have been lost or destroyed. Rules App.Proc., Rule 50(e).—Melendez v. State, 936 S.W.2d 287.—Crim Law 1166.13.

## NOTES ASSUMED

Tex.Civ.App.—Austin 1912. Where defendants were deeded certain property on which plaintiff held a vendor's lien, evidenced by notes, and asked for an extension of time, for which they executed a trust deed, which contained the recital that the defendants "are justly indebted to the plaintiff, as evidenced by certain notes assumed" by the defen-

dants, an indebtedness was created on the part of the defendants, although the ordinary office of a trust deed is to furnish security for a debt already created; the expression "notes assumed" meaning that payment was assumed.—*Peterson v. Kerbey*, 151 S.W. 321, writ refused.

**NOTES, BILLS, BONDS, MORTGAGES OR OTHER SECURITIES OR CONVEYANCES**

E.D.Mich. 1990. Michigan's public policy against gambling prohibited payee from collecting on money orders that were paid to discharge a gambling debt in New Jersey, even though the gambling was not unlawful in New Jersey and Michigan has established exceptions, such as state lottery, to antigambling policy, and despite contention that money orders, functioning as cash equivalents, are not the type of instruments invalidated under the applicable Michigan statute, which refers to "notes, bills, bonds, mortgages or other securities or conveyances"; "money order" falls under definition of a "bill of exchange." M.C.L.A. §§ 600.2939(3), 750.301–750.315.—*Boardwalk Regency Corp. v. Travelers Exp. Co., Inc.*, 745 F.Supp. 1266.—Gamming 19(1).

**NOTE SHALL STATE ACTUAL AMOUNT OF MONEY LOANED**

Ind.App. 1928. Recital "value received" in note held not sufficient compliance with Petty Loan Act requiring that note shall state actual amount of money loaned; "note shall state actual amount of money loaned". Burns' Ann.St. § 18–3003.—*Wells v. Indianapolis Co.*, 161 N.E. 687, 88 Ind.App. 231.—Cons Cred 16.

**NOTE SHAVERS**

Tenn.Ch.App. 1899. Acts 1893, c. 89, imposing a license tax on "security dealers" and persons "shaving notes," and Act June 14, 1895, imposing a privilege tax on "note shavers," do not apply to the purchaser of a judgment on a note for less than the face thereof.—*Mace v. Buchanan*, 52 S.W. 505.—Licens 16(0.1).

**NOTES INTENDED TO BE SOLD UNDER THIS SECTION**

N.D.Iowa 1997. For purposes of Agricultural Credit Act of 1987 subsection, providing that Consolidated Farm and Rural Development Act subsection protecting federally-indebted rural water associations against municipal encroachment "shall be applicable to all notes or other obligations sold or intended to be sold under this section," "notes intended to be sold under this section" means notes of federally-indebted rural water associations offered by Farmers Home Administration (FmHA) for sale to third parties but not yet purchased, or notes offered for sale to third parties but never purchased at all and, thus, still in hands of FmHA. Omnibus Budget Reconciliation Act of 1986, § 1001(a–g), 100 Stat. 1874 as amended.—*Rural Water System No. 1 v. City of Sioux Center, Iowa*, 967 F.Supp. 1483, affirmed 202 F.3d 1035, rehearing and rehearing denied, certiorari denied 121

S.Ct. 61, 531 U.S. 820, 148 L.Ed.2d 28.—Waters 202.

**NOTES OF ANOTHER**

Md. 1972. Transcripts of recorded conversations between defendant and member of general assembly, who defendant was charged with attempting to bribe, constituted "exhibits" which under rule are permitted to be taken to jury room in discretion of trial judge, and did not constitute either "notes of another" which may not be taken to jury room nor "depositions" which may not be taken to jury room except by agreement of all parties. Maryland Rules, Rules 558, 558 b, d, 757.—*Raimondi v. State*, 288 A.2d 882, 265 Md. 229, certiorari denied 93 S.Ct. 293, 409 U.S. 948, 34 L.Ed.2d 219.—Crim Law 858(3).

**NOTES OF EXAMINATION**

Pa.Super. 1964. The words "notes of examination" in statute providing that, in event of subsequent death of witness, notes of examination of witness in criminal proceeding conducted in court of record are competent evidence upon subsequent trial of same criminal issue are not limited to the words of the absent witness. 19 P.S. § 582.—*Com. v. Miller*, 201 A.2d 256, 203 Pa.Super. 511.—Crim Law 547(2).

**NOTES OR OTHER OBLIGATIONS**

C.C.A.2 1937. The words "notes or other obligations," in statute prohibiting transfers to corporation's officers when insolvency of corporation is imminent, mean written obligations, Stock Corporation Law N.Y. § 15.—*Weil v. Commissioner of Internal Revenue*, 91 F.2d 944.—Corp 545(1).

C.C.A.2 (N.Y.) 1932. Corporation's unpaid "notes or other obligations," within statute prohibiting transfers to officers when insolvency is imminent, do not include ordinary current accounts. Stock Corporation Law N.Y. § 15.—*Emerson v. Berman*, 57 F.2d 637.—Corp 542(2).

D.N.J. 1947. "Notes or other obligations" within provision of the New York Stock Corporation Law prohibiting any corporation which has refused to pay any of its "notes or other obligations", when due, from transferring any of its property, to any of its officers, directors or stockholders means obligations embodied in some form of written instrument and excludes indebtedness for merchandise or for work, labor and services upon a running account, or which has not been embodied in some more or less formal writing. Stock Corporation Law N.Y. § 15; Debtor and Creditor Law N.Y. § 273.—*Rockmore v. Schilling*, 72 F.Supp. 172, affirmed 167 F.2d 204.—Corp 545(1).

N.Y. 1924. Chattel mortgage given stockholder for past-due indebtedness held not prohibited by statute; "notes or other obligations." Chattel mortgage given by corporation to stockholder to secure a past-due indebtedness was not prohibited by Stock Corporation Law, § 66 (not section 15), where corporation's only other indebtedness which it had refused to pay was on a 'running account';

**NOT EXCEEDING A**

such indebtedness not constituting “notes or other obligations” within statute.—*Tierney v. J.C. Dowd & Co.*, 144 N.E. 583, 238 N.Y. 282.—Corp 545(2).

N.Y. 1924. Chattel mortgage given by corporation to stockholder to secure a past-due indebtedness was not prohibited by Stock Corporation Law, § 66 (now section 15), where corporation’s only other indebtedness which it had refused to pay was on a “running account”; such indebtedness not constituting “notes or other obligations” within statute.—*Tierney v. J.C. Dowd & Co.*, 144 N.E. 583, 238 N.Y. 282.—Corp 545(2).

**NOTES PAYABLE**

N.C. 1938. Where woman conveyed personality to a personal holding corporation “subject to existing current accounts and notes payable,” and such corporation conveyed to another holding corporation, woman’s liability to third party for personal injuries negligently inflicted was not included in “current accounts” or “notes payable,” and hence corporations were not liable therefor.—*Stevens v. Cecil*, 199 S.E. 163, 214 N.C. 273.—Sales 227.

**NOTES RECEIVABLE ACQUIRED IN THE ORDINARY COURSE OF TRADE OR BUSINESS**

C.A.7 2000. Treasury securities acquired by large-scale trader in United States treasury notes and bonds were not “notes receivable acquired in the ordinary course of trade or business,” and thus were not eligible for section 1221 exception to capital assets tax treatment for property held primarily for sale to customers in ordinary course of business. 26 U.S.C.(1994 Ed.) § 1221(4).—*Bielfeldt v. C.I.R.*, 231 F.3d 1035, certiorari denied 122 S.Ct. 38, 534 U.S. 813, 151 L.Ed.2d 11.—Int Rev 3236.

**NO TESTIMONY**

Fla.App. 2 Dist. 1982. Where court-appointed experts presented testimony on defendant’s insanity on behalf of defendant at defendant’s request, defendant did not offer “no testimony” within meaning of rule of criminal procedure which entitles defendant to opening and concluding final argument before jury if he offers no testimony other than his own. West’s F.S.A. Rules Crim.Proc., Rules 3.216(h), 3.250.—*Bentley v. State*, 422 So.2d 68.—Crim Law 645.

**NOTES USED FOR CIRCULATION**

U.S.Utah 1884. “Notes used for circulation,” as used in Act Feb. 8, 1875, c. 36, § 19, 18 Stat. 311, 12 U.S.C.A. § 562, requiring every person, firm, association, other than national banking associations and other corporations, etc., to pay a tax on the amount of their notes used for circulation, means negotiable promissory notes payable in money.—*Hollister v. Zion’s Cooperative Mercantile Inst.*, 4 S.Ct. 263, 111 U.S. 62, 28 L.Ed. 352.

**NOTE THEREON**

Ill. 1895. “Note thereon,” as used in Rev.St. 1893, c. 78, § 17, S.H.A. ch. 78, § 17, making it the

duty of the foreman of the grand jury to indorse each true bill as such, signing his name thereto as foreman, and requiring him to note thereon the names of the witnesses upon whose evidence the same shall have been found, should be construed to have been complied with by the witnesses’ names being indorsed upon it by the prosecuting attorney.—*Bartley v. People*, 40 N.E. 831, 156 Ill. 234.

**NOT EXCEEDING**

C.C.A.6 (Tenn.) 1926. Policies of insurance on use and occupancy of mill, which fixed insurer’s liability at “not exceeding” a certain amount per day, held open and not valued policies; “not exceeding.”—*Stuyvesant Ins. Co. v. Jacksonville Oil Mill*, 10 F.2d 54.—Insurance 2171.

C.C.A.5 (Tex.) 1939. The words “not exceeding,” as used in city charter provision for debt limit, are words not of grant or apportionment, but of limitation only, and standing alone are ordinarily construed as such.—*City of Kingsville v. Meredith*, 103 F.2d 279.—Mun Corp 865(1).

S.D.N.Y. 1937. Interest demanded in suit against United States for refund of income tax payments must be considered as part of claim in determining whether suit was within District Court’s jurisdiction as involving claim “not exceeding” \$10,000. Tucker Act; 28 U.S.C.A. §§ 1346, 2401, 2402.—*Otis Elevator Co. v. U.S.*, 18 F.Supp. 87.—Courts 426.

Ark. 1937. Under statute authorizing commitment of a defendant to the state insane hospital for observation for such time as the court shall direct, “not exceeding” one month, order committing defendant to the state hospital to be kept under observation for a period not to exceed 15 days was not error, and the hospital authorities were not required to keep the defendant under observation for the full 15 days upon becoming convinced of his sanity before expiration of that period, since the words “not exceeding” in both instances were words of limitation. Initiated Act No. 3 of 1936, § 11, Acts 1937, p. 1388.—*Brockelhurst v. State*, 111 S.W.2d 527, 195 Ark. 67.—Mental H 435.

**NOT EXCEEDING AT ANY ONE TIME**

Wyo. 1947. The phrase “not exceeding at any one time” as used in statute authorizing any incorporated city or town to borrow money and issue coupon bonds in any amount “not exceeding at any one time” four per cent of the assessed valuation of the city or town to acquire and equip a municipal airport, does not authorize the creation of indebtedness for other times regardless of the fact that the statutory percentage limit has been attained. W.C.S.1945, § 29-2401, as amended by Laws 1947, c. 123.—*Hanson v. Town of Greybull*, 183 P.2d 393, 63 Wyo. 467.—Mun Corp 916.

**NOT EXCEEDING A TOTAL OF THIRTY DAYS IN ONE CALENDAR YEAR**

N.Y.A.D. 3 Dept. 1980. Language “not exceeding a total of thirty days in one calendar year”, in section of Military Law requiring that every public

officer or employee be paid his salary or other compensation for any and all periods of absence while engaged in performance of ordered military duty not exceeding total of 30 days in any one calendar year, meant 30 "calendar days" and not 30 "working" days, and thus public employee, who spent 31 calendar days on active military duty during 1978, used more than the "30 days" paid leave allowed by such statute even though such 31-day period conflicted with only 24 "working days". Military Law § 242, subd. 5.—Schampier v. Office of General Services, 424 N.Y.S.2d 57, 73 A.D.2d 1011, affirmed 436 N.Y.S.2d 276, 52 N.Y.2d 746, 417 N.E.2d 570.—Time 8.

**NOT EXCEEDING FIVE PER CENTUM**

Ct.Cl. 1917. The words "not exceeding five per centum," in Act March 4, 1913, c. 143, 39 Stat. 797, meant that there should be added to the fixed compensation for mail transportation 5 per cent. and not exceeding 5 per cent., and there is nothing in the act upon which a discretion to pay a lesser sum was to operate.—Atchison, T. & S.F.R. Co. v. U.S., 52 Ct.Cl. 338, reversed 39 S.Ct. 325, 249 U.S. 451, 63 L.Ed. 703.—Postal 21(4).

**NOT EXCEEDING FIVE YEARS**

Ill. 1919. Under Smith-Hurd Stats. c. 38, § 139, prior to 1919 amendment, fixing imprisonment at "not exceeding five years," the unit of time is one day, unless there are hostile claims requiring the division of the unit for the purpose of settling relative rights, and the punishment prescribed by the Criminal Code is therefore imprisonment for the minimum time of one day and maximum time of five years.—People v. Moses, 123 N.E. 634, 288 Ill. 281.—Sent & Pun 1155.

**NOT EXCEEDING ONE YEAR**

Cal.App. 5 Dist. 1965. Phrase "not exceeding one year" in statutory provision that employee who is injured in course of his duty and suffers temporary disability, if member of State Employees' Retirement System, is entitled to leave of absence while so disabled without loss of salary, in lieu of temporary disability benefits, if any, which would be payable for period of such disability but "not exceeding one year" or until such earlier date as he is retired on permanent disability pension, means cumulative total of 52 weeks so that temporary disability resulting in leave of absence need not be continuous. West's Ann.Labor Code, §§ 3202, 4850.—Eason v. City of Riverside, 43 Cal.Rptr. 408, 233 Cal.App.2d 190.—States 60.2.

Utah 1925. As statute provides punishment for involuntary manslaughter by imprisonment in jail "not exceeding one year," sentence of defendant to imprisonment in jail "not exceeding one year" is construed as sentence for one year.—State v. Empey, 239 P. 25, 65 Utah 609, 44 A.L.R. 558.—Sent & Pun 1127.

**NOT EXCEEDING 15%**

Tex.App.—Houston [1 Dist.] 1992. "Reasonable-ness", within the meaning of statute providing for

recovery of costs and expenses in suit to collect delinquent tax, is fact that must be established by taxing units; statute provides only for "reasonable attorney fees" "not exceeding 15%" and does not provide that taxing unit must receive 15%. (Per Bissett, J., with one Judge filing concurring opinion.) V.T.C.A., Tax Code § 33.48.—City of Houston v. First City, 827 S.W.2d 462, writ denied.—Tax 598.

**NOT EXCEEDING 30 MILLS**

Minn. 1943. The words "not exceeding 30 mills", as used in statute authorizing county court to levy annual assessment for ditch repairs at rate not exceeding 30 mills of assessed benefits as confirmed in original proceeding for establishment of the ditch, are words of limitation, fixing a ceiling on amount of the assessment beyond which boards cannot go, and such language imposes no duty on board to adopt maximum rather than some lesser amount authorized. Minn.St.1941, § 106.48, subd. 3 (M.S.A.)—Saxhaug v. Jackson County, 10 N.W.2d 722, 215 Minn. 490.—Drains 75.

**NOT EXCEEDING 90 DAYS**

Ky. 1938. A statute requiring employer of injured workman to furnish medical treatment "not exceeding 90 days" refers to duration of treatment, not of period before beginning treatment. Ky.St. § 4883.—Black Mountain Corp. v. Stewart, 113 S.W.2d 1141, 272 Ky. 140.—Work Comp 983.

**NOT EXECUTED**

W.Va. 1900. Any credible person may serve a summons or other process, or legal notice, and make verified return of such service, though there has not been any prior return of "Not executed" by an authorized officer.—Hollandsworth v. Stone, 35 S.E. 864, 47 W.Va. 773.—Proc 51.

**NOT EXEMPT FROM EXECUTION**

Wis. 1903. The words "not exempt from execution," in the statute authorizing application to the judgment of any property of the judgment debtor in the hands either of himself or any other person, or due to the judgment debtor, not exempt from execution, are equivalent to "not exempted by express statute from execution."—Williams v. Smith, 93 N.W. 464, 117 Wis. 142.

**NOT EXPRESSLY DENIED**

N.M. 1974. Term "not expressly denied," as used in home rule amendment, requires that, in order for municipal action to be prohibited, there must be some express statement of the authority or power denied contained in a general law. Const. art. 10, § 6.—Apodaca v. Wilson, 525 P.2d 876, 86 N.M. 516.—Mun Corp 78.

**NOT FALSE, FORGED, FICTITIOUS, SIMULATED, SPURIOUS OR COUNTERFEIT**

C.A.5 (Tex.) 1966. The word "genuine" as applied to bonds and securities means "not false, forged, fictitious, simulated, spurious or counter-

feit"; and fact that United States treasury bonds had been cancelled and replaced would affect their redeemability but not their genuineness, for purposes of criminal charges involving them. 18 U.S.C.A. §§ 2314, 2315.—Wright v. U.S., 356 F.2d 261, certiorari denied 87 S.Ct. 114, 385 U.S. 861, 17 L.Ed.2d 88, certiorari denied Richardson v. U.S., 87 S.Ct. 33, 385 U.S. 844, 17 L.Ed.2d 77.—Forg 7(1).

#### NOT FAR FROM

Ala. 1888. In a complaint alleging that plaintiff was injured while attempting to descend the steps when the train was "about arriving," means "nearly," "not far from," the arrival of the train, and does not imply that the time had come when it was reasonably or apparently necessary that plaintiff should descend from the platform and place himself in readiness to enter a car without undue haste, and did not sufficiently aver that the time had arrived when it became the duty of the railroad company to have the depot lighted, failure to do which was the negligence complained of in the action.—Alabama G.S.R. Co. v. Arnold, 4 So. 359, 84 Ala. 159, 5 Am.St.Rep. 354.

#### NOT FAVORED

Cal.App. 2 Dist. 1951. Under rule that actions for malicious prosecution are for reasons of public policy "not favored", quoted phrase merely means that public policy is in favor of apprehension and punishment of criminals and limits the person complaining of criminal charges by placing upon him burden of proving basic elements of the tort.—Siffert v. McDowell, 229 P.2d 388, 103 Cal.App.2d 373.—Mal Pros 38.

#### NOT FEASIBLE

Cal.App. 1 Dist. 1986. Words "not feasible" mean "unreasonable" or "unsuitable" under statute [West's Ann.Cal.Vehicle Code § 13353(a)(3)] restricting arrestee's choice of alcohol test if a particular test is determined to be "not feasible" for arrestee housed at medical facility. West's Ann.Cal.Vehicle Code § 13353(a)(2)(A).—Smith v. Department of Motor Vehicles, 224 Cal.Rptr. 543, 179 Cal.App.3d 368.—Autos 415.

Hawai'i 1975. Words "not feasible" in context of trial court's finding that a partition of 300 x 500 foot tract into nine individual parcels was not feasible were synonymous with word "impracticable" within statute which provides that, with regard to suit for partition, court has power "to divide and allot portions of the premises to some or all of the parties and order a sale of the remainder, or to sell the whole, were for any reason partition in kind would be impracticable in whole or in part or be greatly prejudicial to the parties interested." HRS § 668-7(6).—Chuck v. Gomes, 532 P.2d 657, 56 Haw. 171.—Partit 77(1).

#### NOT FINANCIALLY ABLE TO EMPLOY COUNSEL

Cal. 1968. Public defender's determination that a person applying for his services is "not financially able to employ counsel" is not subject to review by

trial court even if public defender's services are sought for a collateral attack on a final judgment rather than a defense to a pending charge. West's Ann.Gov.Code, § 27706(a-e).—Ingram v. Justice Court for Lake Valley Judicial Dist. of El Dorado County, 447 P.2d 650, 73 Cal.Rptr. 410, 69 Cal.2d 832, 36 A.L.R.3d 1391.—Crim Law 641.9.

#### NOT FITTED

Del.Spr. 1974. The words "not fitted" as contained in statute providing that procedure for termination of parental rights may be initiated whenever it appears that parent of such child was "not fitted" to continue to exercise parental rights have a common and ordinary usage and accepted dictionary meaning and, as to matters pertaining to custody of children, should be read generally as meaning "unfitted for parental duties," so that the statute was not unconstitutional by reason of vagueness. 13 Del.C. § 1103(4).—In re Dingee, 328 A.2d 139.—Statut 47.

#### NOT FOR A VALUABLE CONSIDERATION

Bkrcty.M.D.Ga. 1997. For purposes of Georgia statute governing fraudulent conveyances, terms "voluntary" and "not for a valuable consideration" are synonymous. O.C.G.A. § 18-2-22(3).—Matter of Galbreath, 207 B.R. 309.—Fraud Conv 73.1.

#### NOT FOR JUST CAUSE

Mass. 1970. Phrase "not for just cause," within statute providing that if discharge of applicant, within one month of entering employment, is not for just cause, employment agency shall on demand refund that portion of fee paid in excess of ten percent of gross wages paid to applicant, is not unconstitutionally vague, in that discharge for a just cause is to be contrasted with discharge on unreasonable grounds or arbitrarily, capriciously, or in bad faith. M.G.L.A. c. 140 § 46O(a).—G & M Employment Service, Inc. v. Com., 265 N.E.2d 476, 358 Mass. 430, appeal dismissed 91 S.Ct. 1662, 402 U.S. 968, 29 L.Ed.2d 133.—Statut 47.

#### NOT FOR PROFIT

C.A.3 (Pa.) 1978. For purposes of substitute facilities doctrine which permits private property owner to recover cost of constructing substitute facilities to replace the facilities taken in condemnation proceeding if the property is operated on a not-for-profit basis, if there is no ready market for the particular type of property, and if the property is reasonably necessary to public welfare, the "not-for-profit" element of doctrine concerns monetary profit, and the alleged operation of facilities for "spiritual profit" did not preclude application of doctrine. (Per Van Dusen, Circuit Judge, with one Judge concurring specially.)—U.S. v. 564.54 Acres of Land, More or Less, in Monroe and Pike Counties, Com. of Pa., 576 F.2d 983, certiorari granted U.S. v. 564.54 Acres of Land, More or Less, Situated in Monroe and Pike Counties, Pennsylvania, 99 S.Ct. 562, 439 U.S. 978, 58 L.Ed.2d 649, reversed 99 S.Ct. 1854, 441 U.S. 506, 60 L.Ed.2d 435.—Em Dom 133.

E.D.Va. 1993. Foundation which operated historical village was not a "charitable institution" protected from tort liability by Virginia charitable immunity doctrine where foundation's articles of incorporation in effect at time of accident did not state that foundation operated exclusively "not-for-profit," foundation's financial goal was to earn more money than it spent, foundation was not dependent on charitable contributions for its existence, foundation paid significant salaries to its officers, and foundation charged fee to visitors.—Davidson v. Colonial Williamsburg Foundation, 817 F.Supp. 611.—Char 45(2).

Mo.App. S.D. 1993. Requirement that land be operated on "not-for-profit" basis, in order to qualify for charitable exemption, does not mean that land must be operated at deficit, as long as any excess of income over expense is achieved incidentally to accomplishment of dominant charitable objective, and provided further that all such gain is devoted to charitable objectives of project. V.A.M.S. § 137.100(5).—Tri-State Osteopathic Hosp. Ass'n, Inc. v. Blakeley, 848 S.W.2d 571, appeal after remand 898 S.W.2d 693, rehearing, transfer denied, and transfer denied.—Tax 241.1(1).

Ohio 1921. A telephone company engaged in business of transmitting messages held a "public utility" within the Public Utilities Act, though it purports to have organized "not for profit" notwithstanding Gen.Code, § 614-2a, exempting from operation of the act companies such as operate their utilities "not for profit," since such company does a public as distinguished from a private business and must as a common carrier furnish its service indiscriminately, and therefore cannot operate its utility "not for profit" under such statute.—Celina & Mercer County Tel. Co. v. Union-Center Mut. Tel. Ass'n, 133 N.E. 540, 19 Ohio Law Rep. 125, 19 Ohio Law Rep. 152, 102 Ohio St. 487, 21 A.L.R. 1145.—Pub Ut 113.

#### NOT FOR PROFIT BUT EXCLUSIVELY

Va. 2000. Charitable hospital was entitled to real and personal property tax exemption for its nursing home, despite claim that nursing home was not being conducted in manner "not for profit but exclusively" as charity; requirement that operation be conducted "not for profit but exclusively" as charity applied to hospital, not to nursing home, and operation of nursing home directly promoted one of hospital's purposes, i.e., provision of nursing services. Code 1950, § 58.1-3606, subd. A, par. 5.—Smyth County Community Hosp. v. Town of Marion, 527 S.E.2d 401, 259 Va. 328.—Tax 241.2.

#### NOT-FOR-PROFIT CORPORATION

Mo.App. S.D. 1997. "Not-for-profit corporation" means corporation where no part of income or property is distributable to its members, directors, or officers. V.A.M.S. § 355.025.—Osage Water Co. v. Miller County Water Authority, Inc., 950 S.W.2d 569, rehearing, transfer denied, and transfer denied.—Corp 3.

N.Y.A.D. 1 Dept. 2000. "Not-for-profit corporation" is not the same as a corporation that loses

money; it is simply a corporation that devotes whatever proceeds it receives from its operations to charitable causes rather than disbursing the funds as dividends to shareholders and compensation to executives. McKinney's N-PCL § 102(a)(5).—American Baptist Churches of Metropolitan New York v. Galloway, 710 N.Y.S.2d 12, 271 A.D.2d 92.—Corp 3.

#### NOT FOR PURPOSE OF TRANSFERRING PROPERTY IN INSTRUMENT

E.D.Wis. 1958. In section of Florida Uniform Negotiable Instruments Act providing that delivery of instrument may be shown to have been conditional or for a special purpose only, and "not for purpose of transferring property in instrument", the use of the quoted phrase means the right to set up by parol conditions; parol conditions as to delivery, not parol conditions to vary the terms of the written instrument. F.S.A. § 674.18.—American Nat. Bank of Fort Lauderdale v. Knab Co., 158 F.Supp. 695.—Bills & N 64; Evid 444(6).

#### NOT FOR VALUE

Ill.App. 2 Dist. 1976. Fact that company which was transferred to transferer in exchange for note had never made profit did not render company worthless, and did not render transfer of note "not for value," where there was no evidence that company's assets were worthless. S.H.A. ch. 26, § 3-302.—Ritz v. Karstenson, 350 N.E.2d 870, 39 Ill.App.3d 877.—Bills & N 353.

#### NOT FOUND

Conn. 1895. Where a defendant, having appealed, requested the judge to incorporate in the findings certain alleged facts which he claimed to be proven by the evidence, embraced in certain numbered paragraphs, upon the margin of which the court wrote "Found" and "Not found," the judge used "found" as meaning "proven," and "not found" as signifying "not proven."—Ketchum v. Packer, 33 A. 499, 65 Conn. 544.

Ind.App. 1 Div. 1910. Under Burns' Ann.St. 1908, § 966 (Burns' Ann.St. § 3-522), authorizing the issuance of a garnishee summons where at the time the "action is commenced" plaintiff files with the clerk an affidavit averring that any person has the control of any property of defendant, etc., a garnishee summons may issue on the filing of the complaint, the issuance of summons, returned "Not found," and the filing of an affidavit averring that the party sought to be summoned as garnishee has property of a nonresident defendant; for the quoted words must be taken in their ordinary sense, and not within the definition of the commencement of an action under section 317.—Northern Indiana Ry. Co. v. Lincoln Nat. Bank, 92 N.E. 384, 47 Ind.App. 98.—Garn 92.

Tenn. 1929. Return of "not found" and false return of "executed" are not equivalent to two returns "not found," within statute relating to judgment upon bail bonds. Shannon's Code, § 7143.—Diehl v. Knight, 12 S.W.2d 717, 158 Tenn. 246.—Bail 77(1).

W.Va. 1980. When injured pedestrian's attempted service on defendant motorist, who at time of incident was a West Virginia resident but who had since moved from the state, was returned "not found" and there was no forwarding address in-state or out-of-state, the nonresident motorist statute was unavailable, and since defendant's residency was unknown it was "concealed" for purpose of statute tolling statute of limitations when defendant has left the jurisdiction. Code, 55-2-17, 56-3-31.—Gray v. Johnson, 267 S.E.2d 615, 165 W.Va. 156.—Lim of Act 92.

#### **NOT FOUNDED UPON AN INSTRUMENT IN WRITING**

Utah 1938. The statutes of limitations on liabilities "founded upon an instrument in writing" and "not founded upon an instrument in writing" mean the same as though the word "founded" were omitted, and action is "founded upon an instrument in writing" if liability grows out of written instruments, not remotely or ultimately, but immediately; if it arises or is assumed or imposed from the instrument itself, or its recitals; if the instrument acknowledges or states a fact from which law implies obligation to pay or contains the contract or promise to pay or to do the thing for which action is brought. Rev.St.1933, 104-2-22; 104-2-23, as amended by Laws 1935, c. 113.—Bracklein v. Realty Ins. Co., 80 P.2d 471, 95 Utah 490, rehearing denied 82 P.2d 561, 95 Utah 506.—Lim of Act 24(2).

#### **NOT FOUND IN MY COUNTY**

Okla. 1933. Statement in sheriff's return that defendant was "not found in my county" held equivalent to "not summoned," authorizing court clerk to issue alias summons. 12 Okl.St.Ann. § 157.—Schuman v. Joseph H. Cohen & Sons, 26 P.2d 733, 166 Okla. 159, 1933 OK 567.—Proc 45.

#### **NOT FRAUDULENT**

C.C.A.10 (Colo.) 1935. Word "false," within accident policy providing that right to recovery under policy shall be barred if any statement in application material to acceptance of risk or hazard assumed by insurer is false or made with intent to deceive, held to mean intentionally or willfully untrue, in view of double meaning of word "false." Word "false" is defined as not according with truth or reality; not true; erroneous; as, a false statement; not genuine or real; assumed or designed to deceive; intentionally or willfully untrue; counterfeit; artificial; hypocritical; sham; feigned; as false tears; false modesty; false colors; false jewelry; a false check or entry; false teeth; false gods. In one sense, that only is "true" which is conformable to the actual state of things. In that sense, a statement is "untrue" which does not express things exactly as they are, but in another and broader sense the word "true" is often used as a synonym of "honest," "sincere," "not fraudulent."—Sentinel Life Ins. Co. v. Blackmer, 77 F.2d 347, certiorari denied 56 S.Ct. 119, 296 U.S. 602, 80 L.Ed. 427.

Ill. 1900. In one sense, that only is true which is conformable to the actual state of things. In that sense a statement is "untrue" which does not express things exactly as they are, but in another and broader sense the word "true" is often used as a synonym of "honest," "sincere," "not fraudulent." Answers by an applicant for life insurance which are honest, sincere, and not fraudulent are not untrue, within the meaning of the application, declaring the contract null and void if the answers of the insured to the questions propounded to him are in any respect untrue.—Globe Mut. Life Ins. Ass'n v. Wagner, 188 Ill. 133, 58 N.E. 970, 80 Am.St.Rep. 169, 52 L.R.A. 649.

La. 1895. Though in one sense it may be said that that only is true which is conformable to the actual state of things, and that that which does not embrace things exactly as they are is untrue, yet the word "true" is often used as a synonym for "honest," "sincere," "not fraudulent." As applied to a stipulation making an insurance policy void in case any of the warranties prove to be "untrue," it should not be held to require absolute verity; but a warranty should not be considered untrue unless it appears that the warrantor knew or had reason to believe, at the time the warranties were made, that they were not founded on fact.—Weil v. New York Life Ins. Co., 17 So. 853, 47 La.Ann. 1405.

#### **NOT FRIVOLOUSLY BROUGHT**

C.A.11 1990. "Not frivolously brought" standard of statute requiring temporary reinstatement of miner to job if miner's complaint of discriminatory discharge for filing safety violation charges is not frivolously brought, is functional equivalent to "reasonable cause to believe" standard. Federal Mine Safety and Health Act of 1977, § 105(c)(2), 30 U.S.C.A. § 815(c)(2).—Jim Walter Resources, Inc. v. Federal Mine Safety and Health Review Com'n, 920 F.2d 738.—Mast & S 10.5.

#### **NOT GOOD**

N.Y.A.D. 1 Dept. 1913. A check is "not good" within clearing house rules, providing that checks returned as not good should be returned to the members from whom received before 3 o'clock of the same day, when the drawee bank refuses to pay it, and a memorandum on a check "assigned," together with notice of insolvency of the drawee, was a sufficient notice that the check was returned as "not good."—Columbia-Knickerbocker Trust Co. v. Miller, 142 N.Y.S. 440, 156 A.D. 810, affirmed 109 N.E. 179, 215 N.Y. 191, Am.Ann.Cas. 1917A, 348.—Banks 320.

#### **NOT GOVERNED BY ANY FIXED RULES OR STANDARD**

N.Y.Sup. 1921. Mandamus will not lie to compel the performance of a power the exercise of which lies in the discretion of the officer against whom the writ is sought; but, if his action is arbitrary, tyrannical, or unreasonable, or is based on false information, the relator may have a remedy to right the wrong which he has suffered—"arbitrary" being defined as "not governed by any fixed rules

or standard.”—People ex rel. Hultman v. Gilchrist, 188 N.Y.S. 61, 114 Misc. 651, affirmed 188 N.Y.S. 944, 196 A.D. 964, affirmed 134 N.E. 587, 232 N.Y. 598.—Mand 72.

### NOT GUILTY

E.D.Pa. 1954. Where defendant was arraigned and entered plea of “not guilty” on May 18, 1953, a motion for bill of particulars filed on April 22, 1954, by additional counsel who entered his appearance of record on that date, was not timely. Fed. Rules Crim.Proc. rule 7(f), 28 U.S.C.A.—U.S. v. Sterling, 122 F.Supp. 81.—Ind & Inf 121.3.

Ala. 1946. The general issue in action in nature of ejectment is “not guilty”, and legal effect thereof is to admit possession but to deny title and plaintiff's right of possession. Code 1940, Tit. 7, §§ 938, 941.—Wetzel v. Hobbs, 25 So.2d 850, 247 Ala. 659.—Eject 69, 81.

Ala. 1946. In action in nature of ejectment, defendant's plea denying that property set out in the complaint was property of plaintiff or that plaintiff was entitled thereto, was in substance a plea of “not guilty”. Code 1940, Tit. , §§ 938, 941.—Wetzel v. Hobbs, 25 So.2d 850, 247 Ala. 659.—Eject 69.

Ariz. 1927. General verdict is finding that defendant did or did not commit crime charged (Pen. Code 1913, § 1084). General verdict is definite finding that defendant did or did not commit crime charged, which may be stated under Pen. Code 1913, § 1084, by words ‘guilty’ or “not guilty.”—Holder v. State, 253 P. 629, 31 Ariz. 357.—Crim Law 881(1).

Ariz. 1927. Verdict of ‘guilty of felony, to wit, altering a brand’ of animal, held sufficient as general verdict (Pen. Code 1913, § 1084). In prosecution for altering brand on another’s steer with intent to convert, verdict finding defendant ‘guilty of felony, to wit, altering a brand,’ held sufficient as general verdict, which under Pen. Code 1913, § 1084, may be stated in words ‘guilty’ or “not guilty”; additional words being mere attempt to describe crime.—Holder v. State, 253 P. 629, 31 Ariz. 357.—Anim 13.

Cal.App. 1 Dist. 1906. By a plea of “not guilty” defendant denied every fact essential to his guilt, including his identity with the person who committed the homicide.—People v. Wong Sang Lung, 84 P. 843, 3 Cal.App. 221.

Colo. 1938. A verdict of “not guilty” is not a verdict of innocence, but is simply a verdict of not proven in the particular case tried, and is not conclusive against the state in favor of any other person than the defendant who was actually acquitted.—Roberts v. People, 87 P.2d 251, 103 Colo. 250.—Judgm 751.

Fla. 1931. “Not guilty” plea in tort action operates as denial only of breach of duty or wrongful act alleged, not of facts stated in inducement; pleas in denial other than “not guilty” take issue on particular matter of fact alleged in declaration; “not guilty” plea does not put in issue alleged agency

relation between defendant and person committing wrongful act, that, standing alone, amounts to admission of alleged relationship.—L.B. McLeod Const. Co. v. Cooper, 134 So. 224, 101 Fla. 441.—Plead 127(1).

Fla. 1931. “Not guilty” plea of defendant sued as joint tort-feasor amounted to admission of declaration allegations that driver of automobile which ran down plaintiff was agent of three defendants, rendering inadmissible evidence that driver was agent of only one defendant.—L.B. McLeod Const. Co. v. Cooper, 134 So. 224, 101 Fla. 441.—Plead 127(2).

Fla. 1931. “Not guilty” plea does not put in issue alleged agency relation between defendant and person committing wrongful act, but, standing alone, amounts to admission of alleged relationship.—L.B. McLeod Const. Co. v. Cooper, 134 So. 224, 101 Fla. 441.—Plead 127(1).

Fla. 1931. Pleas in denial, other than “not guilty,” take issue on particular matter of fact alleged in declaration.—L.B. McLeod Const. Co. v. Cooper, 134 So. 224, 101 Fla. 441.—Plead 380.

Fla. 1931. “Not guilty” plea in tort action operates as denial only of breach of duty or wrongful act alleged, not of facts stated in inducement.—L.B. McLeod Const. Co. v. Cooper, 134 So. 224, 101 Fla. 441.—Torts 26(1).

Ga.App. 1907. A plea of “not guilty” by one accused of crime is an express contention on his part antagonistic to every fact necessary to be proved by the state in order to establish his guilt; and, unless the accused admits one or more of the facts which it devolves upon the state to prove, such fact must be established by evidence. To assume that an important fact in the case on trial has been admitted, and to so instruct the jury, when no such admission has been made, is reversible error.—Cooper v. State, 59 S.E. 20, 2 Ga.App. 730.

Ky. 1908. A plea of “not guilty” puts in issue every fact which the commonwealth must establish to secure a conviction.—Frazier v. Commonwealth, 114 S.W. 268.

Miss. 1940. A plea of “not guilty” puts in issue all material facts of the case and all of the material facts alleged in the declaration.—Commercial Credit Co. v. Newman, 198 So. 303, 189 Miss. 477.—Plead 378.

Miss. 1940. In replevin action, plea of “not guilty” put in issue allegation of declaration that prior to filing of affidavit in replevin defendant was in default in payment of installment due on automobile and for that reason under conditional sale contract and note the plaintiff was entitled to immediate possession of the automobile.—Commercial Credit Co. v. Newman, 198 So. 303, 189 Miss. 477.—Sales 479.2(7).

Ohio App. 3 Dist. 1947. Where essence of charge against accused was that he had willfully or intentionally exposed his person, willfulness being an essential element of offense, statement by accused that he had exposed himself but had not

done so willfully or intentionally constituted a plea of "not guilty" instead of a plea of "guilty", and mandamus would issue to compel mayor, who entered the plea on his docket as one of "guilty", to change the entry. Gen.Code, § 13032-1.—State ex rel. Sparling v. Bronson, 82 N.E.2d 780, 83 Ohio App. 108, 38 O.O. 203.—Crim Law 252; Mand 62.

Indian Terr. 1906. Under Mansf.Dig. § 2283, providing that a "general verdict" is either "guilty" or "not guilty," if guilty the jury affixing the punishment, if the amount thereof is not determined, by law, in force in the Indian Territory, by reason of Act Cong. March 1, 1895, one on trial for crime punishable by fine not exceeding a specified sum, and by imprisonment, for not less nor for more than a specified time, is entitled to have the jury determine the punishment on their finding him guilty.—Taylor v. U.S., 98 S.W. 123, 6 Ind.T. 350.

Or. 1908. Under B. & C.Comp. §§ 1336, 1356, a defendant accused of a misdemeanor can appear for arraignment and enter a plea of not guilty by counsel. Held, that a stipulation entered into by the district attorney and counsel for defendant that all the matters alleged in the indictment are true and admitted, and that judgment should be entered according to the facts and the law, was in effect a plea of "not guilty" as it in effect admitted the facts charged, but denied that they constituted a crime.—State v. Sullivan, 98 P. 493, 52 Or. 614.

Pa. 1893. The word "sentence" means a final determination by a criminal court or by a court of admiralty. Ordinarily this final determination fixes the punishment to be imposed on the defendant when the verdict is one of "Guilty"; but it may declare the freedom of the defendant from the obligation imposed by his recognizance, and his discharge therefrom, when the verdict is "Not guilty."—Wright v. Donaldson, 27 A. 867, 158 Pa. 88.

Pa.Cmwth. 1992. Use of words "not guilty" in granting of defendant's motion in arrest of judgment was not necessarily indicative of acquittal for purposes of rule that generally prosecution has no right to appeal acquittal. U.S.C.A. Const.Amend. 5.—Com. v. Huffman, 608 A.2d 1118, 147 Pa. Cmwth. 630.—Crim Law 1024(4), 1024(5).

Tex.Civ.App.—San Antonio 1923. Where defendant in trespass to try title seeks affirmative relief on a plea of "not guilty," and refuses to amend his pleading at the court's suggestion, the judgment cannot be reversed and the case remanded to permit such amendment.—Tanner v. Imle, 253 S.W. 665, writ dismissed.—App & E 1164.

Tex.Civ.App.—San Antonio 1923. Under Rev.St. art. 7741, Vernon's Ann.Civ.St. art. 7374, in trespass to try title, the trespasser pleading "not guilty" will be left in possession by raising any bar that will maintain his possession, such as by showing superior title in himself or in another.—Tanner v. Imle, 253 S.W. 665, writ dismissed.—Tresp to T T 35(2).

Tex.Civ.App.—San Antonio 1923. Under Rev.St. arts. 7733, 7739, Vernon's Ann.Civ.St. arts. 7366, 7372, in an action of trespass to try title where the

pleadings are in statutory form, plea being "not guilty," defendant may prove a title either equitable or legal, but if equitable it must be complete and ample in itself; and "equitable title" meaning, not a title, but a mere right in the owner thereof to have the legal title transferred to him.—Tanner v. Imle, 253 S.W. 665, writ dismissed.—Tresp to T T 35(2).

Tex.Civ.App.—San Antonio 1923. The rule that, in trespass to try title, under a plea of "not guilty" an "equitable title" may be shown to defeat recovery, means that the "equitable title" must be a right so complete as to require little else to be done and must rise to the dignity of a title.—Tanner v. Imle, 253 S.W. 665, writ dismissed.—Tresp to T T 35(2).

Tex.Civ.App.—San Antonio 1923. Under Rev.St. arts. 7733, 7739, Vernon's Ann.Civ.St. arts. 7366, 7372, in an action of trespass to try title, where the petition and plea of "not guilty" are in statutory form, defendant cannot obtain specific performance of a contract to convey land, though justified by the evidence, in the absence of a special affirmative plea, since the only questions presented are title and right to possession.—Tanner v. Imle, 253 S.W. 665, writ dismissed.—Tresp to T T 35(2).

Tex.Civ.App.—San Antonio 1923. In trespass to try title, the plea of "not guilty" renders admissible any fact not of an affirmative nature to defeat plaintiff's recovery, and may be applied defensively for an equitable estoppel.—Tanner v. Imle, 253 S.W. 665, writ dismissed.—Tresp to T T 35(2).

Tex.Civ.App.—San Antonio 1923. In trespass to try title, where defendant merely pleaded "not guilty," but sought to show, as a defense, an unexecuted contract for exchange of lands, *held* that, where defendant acquired the releases of certain liens on his land after institution of suit, such releases, offered at the time of trial, and not set up by supplemental pleading, were not available as part performance of obligations imposed by the contract.—Tanner v. Imle, 253 S.W. 665, writ dismissed.—Tresp to T T 35(2).

Utah 1904. Rev. St. 1898, § 4891, providing that verdict on a plea of not guilty shall be either "Guilty" or "Not guilty," which imports a conviction or acquittal on the offense charged, and that on a plea of former conviction or acquittal it shall be either "For the state" or "For defendant," requires a verdict on the latter plea, and, where defendant pleaded not guilty and autrefois acquit, it was error to enter judgment on a verdict of guilty.—State v. Creechley, 75 P. 384, 27 Utah 142.—Crim Law 879.

Wis. 1894. In an action to recover a forfeiture provided by law in case a property owner shall "intentionally make a false statement in regard to his property," a verdict of "guilty not criminally but negligently" means that the defendant made the false statement, not intentionally, but negligently, and is equivalent to a verdict of "not guilty," since the statute declares no penalty for a negligent false statement.—State v. Wolfrum, 60 N.W. 799, 88 Wis. 481.

Wyo. 1907. The plea of "not guilty," in a criminal action, puts in issue every material allegation of the indictment or information, and, like a general denial in a civil action, casts the burden of establishing the facts necessary to convict upon the prosecution. In civil actions, under a general denial, the plaintiff will recover unless his evidence is met and overcome by evidence of equal or greater weight; and if the jury believes from a consideration of all of the evidence in the case that the preponderance, however slight, is in favor of the plaintiff, he will be entitled to a verdict. But in criminal cases, in order to convict, the prosecution is required to prove every material allegation of the indictment or information, every essential element of the crime charged, not only by a preponderance of the evidence, but to the satisfaction of the jury beyond a reasonable doubt. And if, upon consideration of all of the evidence in the case, there exists in the mind of the jury a reasonable doubt as to the existence of any one or more of these essential elements which must be proven to render the act criminal, the defendant is entitled to the benefit of that doubt, and should be acquitted.—State v. Presler, 92 P. 806, 16 Wyo. 214, 15 Am. Ann. Cas. 93.

**NOT GUILTY BY REASON OF INSANITY**

Mo.App. E.D. 1995. Unlike doctrine of "not guilty by reason of insanity," which provides that defendant is not criminally liable for his conduct if, as result of mental disease or defect, defendant was incapable of knowing and appreciating nature, quality, or wrongfulness of his conduct, under "diminished capacity" doctrine, defendant accepts criminal responsibility for his conduct but seeks conviction of lesser degree of crime because mental disease or defect prevented defendant from forming mental element of higher degree of crime. V.A.M.S. § 552.030, subd. 1.—State v. Gary, 913 S.W.2d 822, rehearing, transfer denied (65495), and transfer denied, certiorari denied 117 S.Ct. 91, 519 U.S. 827, 136 L.Ed.2d 47, denial of habeas corpus affirmed Gary v. Dormire, 256 F.3d 753.—Crim Law 46.

S.C. 1942. In murder prosecution, instruction that if jury should find that defense of insanity had been established by the greater weight of the evidence the verdict should be "not guilty, by reason of insanity" was preferable to "guilty, but insane" but use of the latter phrase was not error since it was the same as the former in effect.—State v. Jones, 23 S.E.2d 387, 201 S.C. 403.—Homic 1502.

**NOT GUILTY BY REASON OF JUSTIFICATION**

N.Y.Sup. 1989. "Not guilty by reason of justification" is a "possible verdict" within meaning of statute and common law. McKinney's CPL § 310.20.—People v. Miller, 549 N.Y.S.2d 554, 146 Misc.2d 16.—Crim Law 38.

**NOT GUILTY OF NEGLIGENCE OR MISCONDUCT**

Minn. 1970. Phrase "not guilty of negligence or misconduct" in bankers blanket bond is to be given natural and ordinary meaning that it conveys to popular mind and is construed to mean free from

or innocent of negligence or misconduct.—State Bank of New London v. Western Cas. & Sur. Co., 178 N.W.2d 614, 287 Minn. 339, 49 A.L.R.3d 1244.—Insurance 1825.

**NOT GUILTY VERDICT**

Miss. 1983. "Not guilty verdict" does not establish affirmatively that defendant was innocent of crime, but rather, means that jury failed to find beyond reasonable doubt that defendant was guilty.—Sanders v. State, 429 So.2d 245.—Crim Law 893.

N.Y.A.D. 3 Dept. 1992. Grand jury's return of "no bill" was equivalent to "not guilty verdict," for purposes of county department of fire prevention and control's adoption of hearing officer's penalty recommendation that fire dispatcher be dismissed from his position provided that, if he were subsequently acquitted of pending criminal charges involving same incident pursuant to "not guilty verdict" or judgment, he would be reinstated or placed on preferred eligible employee list.—Greiner v. Greene County Dept. of Fire Prevention and Control, 591 N.Y.S.2d 864, 188 A.D.2d 880.—Counties 67.

**NOT HAPPY WITH CAR**

N.C. 1968. Under contract for trade of automobiles in which defendant agreed to "trade back" if plaintiff was "not happy with car," phrase "not happy with car" meant if not satisfied, "satisfaction" in such connection being a synonym for "happiness."—Fulcher v. Nelson, 159 S.E.2d 519, 273 N.C. 221.—Exch of Prop 10.

**NOT HARMFUL**

C.A.5 (La.) 1978. At hearing to determine whether civil penalties should be assessed against owner, operator or person responsible for discharge of oil, defendant must be allowed to offer proof that its oil spill was not harmful despite the presence of a "sheen" on the water; for such purpose, "not harmful" means only that the quantity of oil spilled was de minimis, not that a harmful quantity was spilled but fortunately did not actually cause any harm. Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), § 311(b), (b)(3, 6) as amended 33 U.S.C.A. § 1321(b), (b)(3, 6).—U.S. v. Chevron Oil Co., 583 F.2d 1357.—Environ Law 223.

**NOT HAVING**

Me. 1926. "Not having" may be used in enacting clause of criminal statute to denote proviso or exception requiring, in some cases, indictment founded thereon to show that accused was not within exception.—State v. Webber, 133 A. 738, 125 Me. 319.

Mass. 1939. The words "unless," "other than," "not being," "not having" and similar words create an exception within rule that if there is exception in enacting clause of statute or general clause descriptive of duty or obligation or crime defined by statute, the party pleading must allege and prove

## NOT HEREAFTER PROHIBITED

that his adversary is not within exception, but if exception is in subsequent, separate or distinct clause or statute, party relying on exception must allege and prove it.—*Sullivan v. Ward*, 24 N.E.2d 672, 304 Mass. 614, 130 A.L.R. 437.—Ind & Inf 111(2); Plead 63.

### **NOT HAVING A PERMANENT ESTABLISHMENT**

C.A.4 1963. Where Income Tax Convention of 1951 between the United States and Switzerland exempted from federal taxation royalties derived from sources in the United States by a Swiss resident "not having a permanent establishment" in the United States, and by Treasury regulation the condition of no permanent establishment was declared to require that there be no establishment at any time during taxable year, and such regulation in other treaties had continued uninterruptedly, a regulation of such constancy was staunchly endowed with a presumption of validity. U.S.C.A. Const. art. 6, cl. 2.—*Samann v. C.I.R.*, 313 F.2d 461.—Int Rev 4082.

### **NOT HAVING BEEN MARRIED**

N.J.Err. & App. 1933. Under will making bequest over on death of testator's daughter "not having been married," bequest fell notwithstanding daughter's husband predeceased her.—*Douglass v. Board of Foreign Missions of Presbyterian Church in U.S. of America*, 164 A. 489, 112 N.J.Eq. 361.—Wills 544.

N.J.Err. & App. 1933. Bequest fell, since a widow never dies "not having been married," and the words 'never haing been married' are perfectly well understood, and are synonymous with words "not having been married."—*Douglass v. Board of Foreign Missions of Presbyterian Church in U.S. of America*, 164 A. 489, 112 N.J.Eq. 361.—Wills 544.

N.J.Err. & App. 1933. The words "never having been married" are synonymous with words "not having been married."—*Douglass v. Board of Foreign Missions of Presbyterian Church in U.S. of America*, 164 A. 489, 112 N.J.Eq. 361.

N.J.Ch. 1932. Phrase "not having been married," used in will, may mean not married at time of death.—*Douglass v. Board of Foreign Missions of Presbyterian Church in U.S. of America*, 160 A. 37, 110 N.J.Eq. 331, reversed 164 A. 489, 112 N.J.Eq. 361.—Wills 504.

N.J.Ch. 1932. Words "not having been married" within clause in will disposing of part of residue of estate upon death of daughter held to cover situation where daughter had been married, but husband predeceased her.—*Douglass v. Board of Foreign Missions of Presbyterian Church in U.S. of America*, 160 A. 37, 110 N.J.Eq. 331, reversed 164 A. 489, 112 N.J.Eq. 361.—Wills 504.

Okl. 1938. A statute providing that parent's estate inherited by a surviving child subsequently dying under age and "not having been married" should descend in equal shares to the other children of the same parent was an exception to general

rule that estate of a decedent leaving no issue or husband or wife should go to father and mother and should be strictly construed and should not be enlarged or extended by judicial construction, and any doubts and implications should be resolved in favor of the rule rather than the exception. 84 Okl.St.Ann. § 213, subds. 2, 7.—*Deal v. Logan*, 83 P.2d 563, 183 Okla. 513, 1938 OK 500.—Des & Dist 33.

Okl. 1938. The words "not having been married," in statute providing that parent's estate inherited by a surviving child subsequently dying under age and "not having been married" should descend in equal shares to the other children of the same parent, were not synonymous with "unmarried at the time of death," and were not applicable to a girl who had been married but was divorced prior to her death. 84 Okl.St.Ann. § 213, subd. 7.—*Deal v. Logan*, 83 P.2d 563, 183 Okla. 513, 1938 OK 500.—Des & Dist 33.

Okl. 1938. The entire estate of an unallotted Osage minor who had been married but was divorced at time of her death and who dies intestate without issue, survived by her mother and a half-sister having the same father, descended to mother under statute providing that estate of a decedent leaving no issue or husband or wife should go to surviving parent, as against contention that that portion of estate inherited from her father should go to half-sister under statute providing that parent's estate inherited by a surviving child subsequently dying under age and "not having been married" should descend in equal shares to the other children of the same parent, since minor did not die "not having been married." 84 Okl.St.Ann. § 213, subds. 2, 7; Act Cong. June 28, 1906, 34 Stat. 539.—*Deal v. Logan*, 83 P.2d 563, 183 Okla. 513, 1938 OK 500.—Indians 18.

### **NOT HELD IN COMMON OWNERSHIP WITH ANY ADJOINING LAND**

Mass.App.Ct. 1989. Notwithstanding landowners' transfer of title to adjacent lots such that one was in name of landowners as tenants by entirety and other was in their names as trustees of trust of which they were sole beneficiaries, lots were held "in common ownership," within meaning of statute making increases in dimensional zoning requirements inapplicable to previously conforming lots where such lots were "not held in common ownership with any adjoining land" and, accordingly, statute did not afford grandfather protection from zoning by-law amendment preventing use of land as two separate building lots. M.G.L.A. c. 40A, § 6.—*Planning Bd. of Norwell v. Serena*, 542 N.E.2d 314, 27 Mass.App.Ct. 689, review granted 545 N.E.2d 43, 405 Mass. 1205, affirmed 550 N.E.2d 1390, 406 Mass. 1008.—Zoning 321.

### **NOT HEREAFTER PROHIBITED BY LAW**

Wis. 1972. Phrase "not hereafter prohibited by law" in constitutional provision conferring on circuit courts original jurisdiction in all matters civil and criminal within state, not excepted in Constitution and "not hereafter prohibited by law" does not

extend to kind of prohibition expressed in statute declaring that no court shall be opened or transact business on certain specified days including holidays and day of general election. W.S.A. 256.15; Const. art. 7, § 8.—State v. Wimberly, 198 N.W.2d 360, 55 Wis.2d 437.—Holidays 5.

**NOT HEREINBEFORE DISPOSED OF**

N.Y.Sur. 1909. Under a will bequeathing an equal sum to each of six charitable institutions, but providing that, if such bequests should exceed one-half of the personal estate of which he died possessed, such a proportionate amount should be taken from each as would reduce the sum thereof to one-half of his personal estate, but that, if the sum of the bequests should not equal one-half of the personal estate of which he died possessed, such an equal amount should be added to each bequest as would make the sum of the bequests equal to one-half of his personal estate, and directing the executors to divide the remainder of the estate “not hereinbefore disposed of” as therein provided, the words “not hereinbefore disposed of” mean the half of the estate in value at the time of the testator’s death, which he had set aside to meet the requirements of the provisions of his will, and do not mean that the residuary legatees should share equally the interests and dividends and any other property which might come to the estate with the specific and general legatees.—In re Barton’s Estate, 118 N.Y.S. 1087, 64 Misc. 242.

**NOT HEREIN EXPRESSLY PROHIBITED OR PROVIDED FOR**

Mich.App. 1967. Section of zoning ordinance providing that any lawful use of land or buildings not herein expressly prohibited or provided for shall be lawful use in all M-2 (general manufacturing) districts, when such uses shall comply with the following regulations incorporated by reference the uses delineated as allowable uses in other zones and made them prohibited uses in M-2 zones since words “not herein expressly prohibited or provided for” refer to provisions of entire ordinance.—Prevost v. Macomb Tp., 149 N.W.2d 453, 6 Mich.App. 462.—Zoning 286.

**NOTHING**

C.A.4 1977. Within section of the Communications Act of 1934 providing that nothing therein shall be construed to give the FCC jurisdiction with respect to practices, facilities or regulations for or in connection with intrastate communication service, “intrastate facilities” are those facilities separable from and not substantially affecting the conduct or development of interstate communications, and use of the word “nothing” does not detract from such analysis nor suggest that “intrastate facilities” are those items of terminal equipment used predominantly for local communication. Communications Act of 1934, §§ 2(a), (b)(1), 3(a), 201–205, 410(c) as amended 47 U.S.C.A. §§ 152(a), (b)(1), 153(a), 201–205, 410(c).—North Carolina Utilities Commission v. F.C.C., 552 F.2d 1036, certiorari denied 98 S.Ct. 222, 434 U.S. 874, 54 L.Ed.2d 154, certiorari denied U.S. Independent Telephone

Ass’n v. Federal Communications Commission, 98 S.Ct. 222, 434 U.S. 874, 54 L.Ed.2d 154, certiorari denied American Telephone and Telegraph Co. v. Federal Communications Commission, 98 S.Ct. 222, 434 U.S. 874, 54 L.Ed.2d 154, certiorari denied United System Service, Inc. v. Federal Communications Commission, 98 S.Ct. 223, 434 U.S. 8—Tel 6.

Ga.App. 1954. “Nothing” is the absolute absence of anything.—Savannah & Atlanta Ry. Co. v. Newsome, 83 S.E.2d 80, 90 Ga.App. 390.

Ky. 1913. An application for insurance asked concerning the applicant’s “practice” as regards the use of spirits, wines, malt liquors, or other alcoholic beverages, and subdivided the answer by the words “kind,” “amount,” and “how often,” which the applicant answered “nothing,” “none,” and “never,” respectively. Held, that the word “practice” was used in the sense of habit or custom; and, it appearing that the applicant, in a period covering several years, had only been seen to take two or three drinks, and was not known by his employers and associates to drink at all, the answers were true.—Columbia Life Ins. Co. v. Tousey, 153 S.W. 767, 152 Ky. 447.

Mo.App. 1935. “Nothing” is defined as nought; that which is nonexistent, a nonentity.—Croghan v. Savings Trust Co., 85 S.W.2d 239, 231 Mo.App. 1161.

**NOTHING CONTAINED IN THIS TITLE SHALL BE CONSTRUED**

Cal.App. 2 Dist. 1994. Introductory clause, “nothing contained in this title shall be construed,” usually indicates that statute is meant to clarify point rather than to create substantive law.—Union Asphalt, Inc. v. Planet Ins. Co., 27 Cal.Rptr.2d 371, 21 Cal.App.4th 1762.—Statut 210.

**NOTHING ELSE**

Mo.App. 1976. Under statute proscribing repeated telephone calls made “solely” to harass, “solely” is synonymous with “only,” “exclusively,” “entirely,” and “wholly”; it means “exclusively for,” “nothing else,” “to the exclusion of other purposes,” “apart from other things,” “to the exclusion of alternate or competing things,” and “to the exclusion of all else”; it “leaves no leeway” and is equivalent to the phrase “and nothing else.” Section 563.910, subd. 1(4) RSMo 1969, V.A.M.S.—State v. Patterson, 534 S.W.2d 847.—Tel 362.

**NOT HIS OWN**

Or. 1907. The words “not his own,” which are essential to an allegation in a complaint for trespass on inclosed lands or premises, not the property of the person against whom the complaint is made, is an exclusive negative, denying any right, however small, and is intended to include any right of the usufruct, control, occupation, or of entry. A complaint failing to charge that the lands on which defendant was alleged to have trespassed were “not his own” is fatally defective.—Binhoff v. State, 90 P. 586, 49 Or. 419.

**NOT HITCHED**

Mo.App. 1911. In an action for injuries to a person on a street from collision with a runaway team, where the petition averred that the team was not hitched, a charge authorizing a recovery for plaintiff against the owner of the team, if the jury should find that the team was left without any person in charge and without exercising ordinary care to securely hitch it while the driver was absent, was not objectionable as authorizing a recovery for negligence not alleged in the pleading, as the law devolves upon the owner the obligation to exercise ordinary care in hitching the team in some reasonably secure manner, and the allegation that the team was not hitched should be viewed in the sense of the law under which, if the team was unsecurely hitched, when considered with respect to the obligation to exercise ordinary care in that behalf, they would be "not hitched" in the eye of the law.—Miller v. United Rys. Co. of St. Louis, 134 S.W. 1045, 155 Mo.App. 528.—Mun Corp 706(8).

**NOT HOME**

N.Y.Com.Pl. 1893. A statement to a person presenting a notice of rejection by an administrator of a claim against an estate that the claimant was not home does not apprise such person that the claimant was not absent temporarily, or was not at home to visitors. "Not home" is a common expression used by servants when a party does not wish to be seen, though in the house at the time.—Peters v. Stuart, 51 N.Y.St.Rep. 120, 21 N.Y.S. 993, 2 Misc. 357, reargument denied 52 N.Y.St.Rep. 936, 22 N.Y.S. 1134, 3 Misc. 636.

**NOT HOSTILE TO**

Wash. 1912. Spokane Commission Charter, § 125, provides that it may be amended by a majority vote on the amendments, that the provision with respect to submission of legislation to popular vote by initiative or by the council of its own motion shall apply to and include the proposal, submission, and adoption of amendments, and that the council may make further regulations to carry out the provisions of the article, not "inconsistent with" such provisions. Section 82, par. "c," provided for the filing of initiative petitions, requiring that the ordinance petitioned for be either adopted or submitted to a referendum vote within 30 days after the election is ordered unless a municipal election is to be held within 60 days. Held, that the words "consistent with," used in Const. art. 11, § 10, authorizing the amendment of the charters of first class cities so long as the amendment is consistent with the Constitution and statutes meant "not hostile to," therefore conferring power on such cities to legislate on every subject not "inconsistent with" or hostile to the statutes and Constitution, so that the provision for the submission of amendments at a special election was not in violation of Const. art. 11, § 10, providing that such amendments may be submitted at any general election.—State v. Superior Court for Spokane County, 126 P. 920, 70 Wash. 352.

**NOTICE**

U.S.Ohio 1941. Under Ohio statute providing that value placed on his stock by dissenting stockholder should, after six months and certain circumstances, conclusively be deemed to be equal to the fair cash value, when majority stockholders vote to sell corporate property and assets, notice to corporation of demand for payment of fair cash value of shares of minority stockholders constitutes "notice" to majority stockholders, and such notice is an adequate compliance with constitutional requirement of "due process of law". Gen.Code Ohio, §§ 8623-65, 8623-72; U.S.C.A.Const. Amend. 14.—Voeller v. Neilston Warehouse Co., 61 S.Ct. 376, 311 U.S. 531, 19 O.O. 222, 85 L.Ed. 322.—Const Law 309(1); Corp 182.4(5).

C.A.D.C. 1976. Term "notice" in Civil Rights Act required an interpretation animated by broad humanitarian and remedial purposes underlying federal proscription of employment discrimination. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.—Coles v. Penny, 531 F.2d 609, 174 U.S.App.D.C. 277, on remand 450 F.Supp. 897.—Civil R 373.

App.D.C. 1942. Where Federal Power Commission, which had determined cost of licensed hydroelectric project, ordered the total of all disallowed items to be transferred from the project account and charged to earned surplus account, and there was no showing that the commission overstepped bounds of its administrative power or that the order was at odds with fundamental principles of correct accounting and opportunity to suggest alternative to that proposed by commission had not been exercised, there was no denial of "due process" of law", no lack of "notice", and no deprivation of "fair hearing". Federal Power Act § 301(a), 16 U.S.C.A. § 825(a).—Alabama Power Co. v. Federal Power Commission, 128 F.2d 280, 75 U.S.App.D.C. 315, certiorari denied 63 S.Ct. 48, 317 U.S. 652, 87 L.Ed. 525.—Electricity 8.4.

C.A.9 (Alaska) 1965. "Notice" referred to in those paragraphs of Alaska Non-Resident Motorist Statute which provide for the sending of notice of service by registered mail and for the filing of an affidavit showing service of notice is the notice of fact that a summons has been served on the Commissioner of Revenue. AS 09.05.020(c, d).—Allen v. U. S. Fidelity & Guaranty Co., 342 F.2d 951.—Autos 235(4).

C.A.9 (Cal.) 1961. Constructive "notice" includes implied actual notice and inquiry notice.—F.P. Baugh, Inc. v. Little Lake Lumber Co., 297 F.2d 692, 3 A.L.R.3d 625, certiorari denied 82 S.Ct. 1256, 370 U.S. 909, 8 L.Ed.2d 404.—Notice 5, 6.

C.A.9 (Cal.) 1952. In instruction, under Federal Employers' Liability Act, to effect that when foreman gives employee express or implied order, employee has right to assume in absence of warning or notice to contrary that he would not thereby be subjected to injury, word "notice" was used in sense of "knowledge" and the instruction, thus viewed, was, as an abstract proposition of law, more favorable to employer than law would warrant. Federal

## NOTICE

28B W&P— 170

Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.—Atchison, T. & S. F. Ry. Co. v. Seamas, 201 F.2d 140.—Emp Liab 276; Fed Cts 908.1.

C.A.7 (Ill.) 1954. "Notice" in its legal sense may be defined as information concerning a fact, actually communicated to a person by an authorized person, or actually derived by him from a proper source, and notice is regarded in law as "actual" when the person sought to be affected by it knows thereby of the existence of the particular fact in question.—U.S. v. Tuteur, 215 F.2d 415.—Notice 1.6.

C.A.7 (Ind.) 1968. The rule that whatever puts a person on inquiry amounts in law to "notice" of such facts as an inquiry pursued with ordinary diligence and understanding would have disclosed is applicable to charge an insurer with notice.—Union Ins. Exchange, Inc. v. Gaul, 393 F.2d 151.—Insurance 3090.

C.A.6 (Ky.) 1958. "Notice" is knowledge or information legally equivalent to knowledge, or brought home to the party notified in immediate connection with subject to which the notice relates so that it is not the sending, but the receipt, of a letter that will constitute notice.—Baldwin v. Fidelity Phenix Fire Ins. Co. of N.Y., 260 F.2d 951.—Notice 1.

C.A.5 (La.) 1996. Under Louisiana law, Federal Deposit Insurance Corporation (FDIC) documents that insured provided to directors and officers (D&O) liability insurer did not qualify as "notice" within meaning of provision of claims-made policy stating that written notice of negligent act, error, omission, or breach of duty qualified as claim; even though insurer required director to supply the financial and regulatory information, directors gave specific assurances that documentation indicated no potential liability, and the documents could thus not later serve opposite function of providing notice of potential liability.—F.D.I.C. v. Booth, 82 F.3d 670.—Insurance 2266.

C.A.1 (Mass.) 1981. Under Massachusetts law, a person has "notice" of a fact when from all the information at his disposal, he has reason to know of it. M.G.L.A. c. 106, § 1–201(19, 25, 27).—Michelin Tires (Canada) Ltd. v. First Nat. Bank of Boston, 666 F.2d 673.—Notice 2.

C.A.8 (Mo.) 1950. Under Missouri law, gas company must exercise a high degree of care which is commensurate with the deadly and dangerous character of its product, and even though defect is in appliances belonging to consumer if gas company is notified of escaping gas its duty is to do something about it, either to repair or cause to be repaired defect or to shut off flow of gas until repairs are made and "notice" within such rule means knowledge of any fact that would put an ordinarily prudent man on inquiry.—Gas Service Co. v. Payton, 180 F.2d 505.—Gas 18.

C.A.8 (Mo.) 1950. Under Missouri law, gas company must exercise a high degree of care which is commensurate with the deadly and dangerous

character of its product, and even though defect is in appliances belonging to consumer, if gas company is notified of escaping gas its duty is to do something about it, either to repair or cause to be repaired defect or to shut off the flow of gas until repairs are made, and "notice" within such rule means knowledge of any fact that would put an ordinarily prudent man on inquiry.—Gas Service Co. v. Helmers, 179 F.2d 101.—Gas 17.

C.A.2 (N.Y.) 1961. Under the statute requiring copyright owner, if he uses musical compositions for recording, or licenses others to do so, to file "notice" thereof, the "notice of use" provision is designed to notify all other persons that a musical composition has become available for mechanical reproduction. 17 U.S.C.A. §§ 1(e), 101(e).—Norbay Music, Inc. v. King Records, Inc., 290 F.2d 617.—Copyr 48.

C.A.9 (Or.) 1959. Commencement of action by buyer to recover damages for burns in cigarette-lighted fire in shirt he was wearing on theory of breach of implied warranty of fitness of shirt for use as suitable apparel at time of such fire was not reasonable "notice" within Oregon Uniform Sales Act provision that if, after acceptance of goods, buyer fails to give notice to seller of breach of any promise or warranty within reasonable time after buyer knows, or ought to know of such breach, seller shall not be liable therefor. ORS 75.490.—Owen v. Sears, Roebuck & Co., 273 F.2d 140.—Sales 285(3).

C.A.3 (Pa.) 2001. Under the rule of civil procedure which provides for a relation back amendment to a complaint, "notice" does not require actual service of process on the party sought to be added since notice may be deemed to have occurred when a party who has some reason to expect his potential involvement as a defendant hears of the commencement of litigation through some informal means; at the same time, the notice received must be more than notice of the event that gave rise to the cause of action, it must be notice that the plaintiff has instituted the action. Fed.Rules Civ.Proc.Rule 15(c)(3), 28 U.S.C.A.—Singletary v. Pennsylvania Dept. of Corrections, 266 F.3d 186.—Lim of Act 124.

C.A.1 (Puerto Rico) 1999. In the context of a sua sponte summary judgment, "notice" means that the targeted party had reason to believe the court might reach the issue and received a fair opportunity to put its best foot forward.—Leyva v. On The Beach, Inc., 171 F.3d 717.—Fed Civ Proc 2533.1.

C.A.8 (S.D.) 1948. Under South Dakota statute providing that, in case any bridge shall become out of repair, governing board on receiving notice thereof should cause guards to be erected within 24 hours, the word "notice" includes constructive notice. SDC 28.0913.—Turner County, S. D. v. Miller, 170 F.2d 820, certiorari denied 69 S.Ct. 656, 336 U.S. 925, 93 L.Ed. 1087.—Bridges 42.

C.A.7 (Wis.) 1993. Fact that tort-feasor's insurers knew that attorney represented injured party did not place insurers on such "notice" of attorney's lien against proceeds of lawsuit as would allow

attorney to recover unpaid portion of fee from insurers. W.S.A. 757.36, 757.37.—Gerald R. Turner & Associates, S.C. v. Moriarty, 25 F.3d 1356, rehearing denied.—Atty & C 180.

Ct.Cl. 1942. Where corporate taxpayer had kept its books on a fiscal year basis and had been making its tax returns on such basis, the collector had “notice” that corporation was operating on a fiscal year basis and had designated September 30 as the last day of its fiscal year and hence corporation was entitled to have income and excess profits taxes payable by it computed on such fiscal year basis. Revenue Act 1916, § 13(a), 39 Stat. 770.—Monarch Mills v. U.S., 44 F.Supp. 334, 96 Ct.Cl. 471.—Int Rev 3097.

C.C.A.3 1944. A trust donor’s filing with collector a ‘Donee’s or Trustee’s Information Return of Gifts’ form, under section 527(b) was “notice” to the commissioner that the trustee was acting in a fiduciary capacity, as respects trustee’s liability for a gift tax. Revenue Act 1932, Sec. 527(b), 26 U.S.C.A.Int.Rev.Acts, page 601.—Fidelity Trust Co. v. C I R, 141 F.2d 54.—Int Rev 4815.1.

C.C.A.6 1943. In determining whether there was reasonable ground for failure of petitioner, who sought review of order of Securities and Exchange Commission to adduce certain evidence before commission, that trail leading to existence of facts concerning which petitioner sought to introduce additional testimony before Circuit Court of Appeals was discernible in reports of Federal Trade Commission did not constitute “notice” to petitioner of existence of the facts. Public Utility Holding Company Act of 1935, § 24(a), 15 U.S.C.A. § 79x(a).—Todd v. Securities and Exchange Commission, 137 F.2d 475.—Pub Ut 215.

C.C.A.6 1943. Litigants are not bound to take “notice” of executive decisions on legal questions nor of statements of fact embodied in public records compiled by administrative agencies.—Todd v. Securities and Exchange Commission, 137 F.2d 475.—Admin Law 127; Notice 5; Records 19.

C.C.A.6 1941. Where employer entered into closed shop agreement with labor organization representing majority of employees as exclusive bargaining agency, knowledge of the terms of the agreement received by the employees’ representatives who negotiated the contract while acting within the scope of their authority was “notice” to every employee, so as to permit discharge of employee attempting to bring in a rival union. National Labor Relations Act §§ 7, 8(1, 3), 9(a), 29 U.S.C.A. §§ 157, 158(1, 3), 159(a).—N.L.R.B. v. Electric Vacuum Cleaner Co., 120 F.2d 611, certiorari granted National Labor Relations Board v. Electric Vacuum Cleaner Co, 62 S.Ct. 131, 314 U.S. 600, 86 L.Ed. 483, reversed 62 S.Ct. 846, 315 U.S. 685, 86 L.Ed. 1120, rehearing denied 62 S.Ct. 1038, 316 U.S. 708, 86 L.Ed. 1775.—Labor 375.

C.C.A.9 1941. The fiduciary capacity and power of taxpayer’s California executor to conduct proceeding before Board of Tax Appeals continued during that proceeding, though he had ceased under California law to be executor and so stated in

petition before the board, since such statement was not the “notice” of termination of fiduciary capacity required by statute and regulations. Revenue Act 1932, §§ 277, 311, 312, 26 U.S.C.A. (I.R.C.1939) §§ 277, 311, 312.—Tooley v. Commissioner of Internal Revenue, 121 F.2d 350.—Int Rev 4573.

C.C.A.2 (Conn.) 1943. Under Connecticut law, the filing of a conditional sale contract which was not executed or acknowledged as required by statute, in order to be valid as against attachment and execution creditors, did not impute “notice” to buyer’s creditors. Gen.St.1930, §§ 4697, 4699 (Rev.1949, §§ 6692, 6694).—Maguire v. Gorbaty Bros., 133 F.2d 675.—Sales 474(2).

C.C.A.7 (Ill.) 1942. Letters sent to manufacturer and subsequently to factors to whom accounts had been assigned showing that buyer was asserting its right to receive goods in accordance with warranty constituted a sufficient “notice” of breach of warranty as required by Uniform Sales Act of Illinois in order to hold seller liable therefor. Smith-Hurd Stats.Ill. c. 121½, § 49.—Hubshman v. Louis Keer Shoe Co., 129 F.2d 137.—Sales 285(3).

C.C.A.10 (Kan.) 1942. Notice to third party that oral agreement between third party and agent would be represented by a written contract prepared in principal’s home office was “notice” to third party of limitations upon agent’s authority.—Cox v. Pabst Brewing Co., 128 F.2d 468.—Princ & A 148(2).

C.C.A.5 (La.) 1943. The filing of debtor’s petition for composition and extension of debts was a “caveat” and “notice” to all the world, so that knowledge of the debtor’s incapacity to make valid lease of property was imparted to both the debtor and party contracting with him. Bankr.Act, § 75, 11 U.S.C.A. § 203.—Price v. Louisiana Rural Rehabilitation Corp., 134 F.2d 548, certiorari denied 64 S.Ct. 65, 320 U.S. 758, 88 L.Ed. 452.—Bankr 3085.

C.C.A.5 (La.) 1943. Where deed purported to convey S.E. ¼th of the S.W. ¼ of certain section, historical reference to grantor’s source of title was not sufficient, under Louisiana law, to put subsequent purchaser on “notice” that grantor had only acquired title to S.W. ¼ of the S.W. ¼ from such source and that such property was the intended subject of the conveyance to the grantees. LSA-C.C. art. 2266.—Kaufman v. Arkansas Fuel Oil Co., 133 F.2d 787.—Ven & Pur 230(4).

C.C.A.1 (Mass.) 1940. Where taxpayer’s claim for credit and claim for refund which were copending asked for adjustment of the same item, the distributive share of taxpayer in partnership net income for 1917, and commissioner’s certificate of overassessment made the adjustment called for by both claims, even if notice were required of disallowance or other final adjustment of claim for refund, certificate of over assessment constituted such “notice”, as regards taxpayer’s right to amend claim. Revenue Act 1916, Sec. 29, as added by Revenue Act 1917, Sec. 1211, 40 Stat. 337; Revenue Act 1932, Sec. 1103(a), 26 U.S.C.A. 1672-1673.—Edwards v. Malley, 109 F.2d 640.—Int Rev 4966.

C.C.A.6 (Mich.) 1941. The officers of drain district represented all creditors of the district, including bondholders, in state court actions involving legality of projects for which bonds were issued, and hence bondholders had "notice" and were given "day in court" in such cases, and judgments that such projects were illegal as determinative of validity of the bonds and estoppel against denying validity, were "res judicata" in bondholders' action in federal court.—Bloomfield Village Drain Dist. v. Keefe, 119 F.2d 157, certiorari denied Keefe v. Bloomfield Village Drain District., 62 S.Ct. 95, 314 U.S. 649, 86 L.Ed. 520, motion denied 62 S.Ct. 133, 314 U.S. 709, rehearing denied 62 S.Ct. 910, 315 U.S. 830, 86 L.Ed. 1224, certiorari denied 62 S.Ct. 95, 314 U.S. 649, 86 L.Ed. 520, motion denied 62 S.Ct. 133, 314 U.S. 709, rehearing denied 62 S.Ct. 911, 315 U.S. 830, 86 L.Ed. 1224, certiorari denied 62 S.Ct. 95, 314 U.S. 649, 86 L.Ed. 521, motion denied 62 S.Ct.—Judgm 828.14(8).

C.C.A.5 (Miss.) 1940. The provision of collective agreement between railroad and trainmen's union that rules and rates shall remain effective until abrogated by giving thirty days' written notice refers to collective agreement as a whole, and "notice" contemplated is between railroad and the union and does not mean that by written notice to an employee his contract can be ended without just cause after thirty days. Railway Labor Act as amended 45 U.S.C.A. § 151 et seq.—Illinois Cent. R. Co. v. Moore, 112 F.2d 959, certiorari granted 61 S.Ct. 392, 311 U.S. 643, 85 L.Ed. 410, reversed 61 S.Ct. 754, 312 U.S. 630, 85 L.Ed. 1089.—Mast & S 21.

C.C.A.2 (N.Y.) 1942. The real purpose of common-law requirement that possession of pledged property must pass to the pledgee is to give "notice" to third parties that property apparently owned by the debtor is subject to a security interest.—Swetnam v. Edmund Wright Ginsberg Corp, 128 F.2d 1, certiorari denied 63 S.Ct. 42, 317 U.S. 647, 87 L.Ed. 521.—Plgs 11.

C.C.A.2 (N.Y.) 1929. "Notice" of removal of goods which requires refiling of conditional sales contract means actual notice, oral or written (Uniform Conditional Sales Law N.Y. Secs. 73, 74). Under Uniform Conditional Sales Law N.Y. (Consol. Laws N.Y. c. 41, art. 4) Sec. 74, providing that if property which is subject of conditional sale is removed from district where contract is filed to another filing district, reservation of property in seller shall be void as to certain purchasers and creditors unless contract is refiled in filing district to which goods are removed within 10 days after seller has received notice of removal; "notice" prescribed is not the written notice which buyer is required to give seller under certain circumstances by section 73, but actual notice of the removal is sufficient, regardless of how obtained and whether oral or in writing.—In re Bowman, 36 F.2d 721, 68 A.L.R. 550.—Sales 472(2).

C.C.A.2 (N.Y.) 1929. Statement to conditional seller's representative that trucks had been removed to another filing district without indicating length of removal held insufficient "notice" to require refil-

ing of contract (Uniform Conditional Sales Law N.Y. Secs. 73, 74). Oral statement by conditional buyer of motortrucks to branch manager of conditional seller that trucks were then in another filing district without indicating length of their stay, held not the "notice" of removal of trucks from filing district for period exceeding 30 days prescribed by section 73 necessary to require refiling by conditional seller in new refiling district under Uniform Conditional Sales Law N.Y. (Consol. Laws N.Y. c. 41, art. 4) Sec. 74, providing that reservation of title to property in seller shall be void as to certain purchasers and creditors unless conditional sales contract is filed in filing district to which goods are removed within 10 days after seller has received notice of removal.—In re Bowman, 36 F.2d 721, 68 A.L.R. 550.—Sales 472(2).

C.C.A.2 (N.Y.) 1929. "Notice" of removal of goods which requires refiling of conditional sales contract means actual notice, oral or written. Uniform Conditional Sales Law N.Y. §§ 73, 74.—In re Bowman, 36 F.2d 721, 68 A.L.R. 550.—Sales 472(2).

C.C.A.2 (N.Y.) 1929. Statement to conditional seller's representative that trucks had been removed to another filing district without indicating length of removal held insufficient "notice" to require refiling of contract. Uniform Conditional Sales Law N.Y. §§ 73, 74.—In re Bowman, 36 F.2d 721, 68 A.L.R. 550.—Sales 472(2).

C.C.A.6 (Ohio) 1942. Where foreign corporation's salesman was no more than a soliciting agent, and sales contract recited that it was "subject to confirmation by the Seller", an Ohio purchaser was charged with "notice" of lack of authority of salesman to make a conditional sale or one in violation of Ohio statutes. Gen.Code Ohio, §§ 13069, 13070.—Dayton Bread Co. v. Montana Flour Mills Co., 126 F.2d 257, 23 O.O. 277.—Corp 429.

C.C.A.6 (Ohio) 1937. The word "notify" is not synonymous with "notice." "Notification" is the act of notifying.—General Motors Corporation v. Swan Carburetor Co, 88 F.2d 876, certiorari denied Reeke-Nash Motors Co v. Swan Carburetor Co, 58 S.Ct. 10, 302 U.S. 691, 82 L.Ed. 533, certiorari denied 58 S.Ct. 49, 302 U.S. 691, 82 L.Ed. 534, rehearing denied 58 S.Ct. 137, 302 U.S. 777, 82 L.Ed. 601.

C.C.A.10 (Okla.) 1943. Where Oklahoma Occupying Claimants' Act was in effect at time special assessments were made and pavement bonds issued, bondholders purchased with "notice" of provisions thereof and could not complain that requirement of reimbursement of person occupying land under a void tax deed for value of improvements to realty before bondholders could evict would effect a wrongful diminution of their security. 12 O.S.1951, §§ 1481-1487.—Bradford v. Schmucker, 135 F.2d 991.—Mun Corp 579.

C.C.A.3 (Pa.) 1947. "Notice", within federal rule prohibiting issuance of preliminary injunction without notice to adverse party, implies opportunity to be heard, and "hearing" requires trial of issue of fact, and "trial of issue of fact" necessitates oppor-

tunity to present evidence, and not by only one side to the controversy. Federal Rules of Civil Procedure, rule 65(a, b), 28 U.S.C.A. following section 723c.—Sims v. Greene, 161 F.2d 87.—Inj 143(1).

C.C.A.3 (Pa.) 1940. Protests of master of lighter to foreman of stevedoring company against the manner in which lighter was being loaded constituted “notice” of the fault for which the company was responsible and for which it was alone answerable upon capsizing of the lighter as the result of improper loading.—The S. C. L. No. 9, 114 F.2d 964.—Ship 123(4).

C.C.A.8 (S.D.) 1930. Lienor’s knowledge of general reputation of owner of automobile as boot-legger constitutes “notice” within statute relating to forfeiture. National Prohibition Act, tit. 2, § 26, 27 U.S.C.A. § 40.—C.I.T. Corp. v. U.S., 40 F.2d 825.—Int Liq 246.

M.D.Ala. 1989. Mailing which failed to notify union members of specific day of deadline for receiving ballots for local union election did not constitute “notice” within meaning of statute on timely notice by use of mails. Labor-Management Reporting and Disclosure Act of 1959, § 401(e), 29 U.S.C.A. § 481(e).—Dole v. Local Union 317, 711 F.Supp. 577.—Labor 123.

E.D.Ark. 1954. Under Arkansas law, whatever puts a party on inquiry amounts to “notice” where inquiry becomes a duty and would lead to knowledge of the requisite fact by the exercise of ordinary diligence and understanding.—Dierks Lumber & Coal Co. v. Vaughn, 131 F.Supp. 219, affirmed 221 F.2d 695.—Notice 6.

N.D.Cal. 1997. “Notice” of fraud, sufficient to trigger obligation to inquire whether fraud has been committed and start running of statute of limitations for securities fraud under Securities Exchange Act §10(b), is provided by facts that would have caused reasonable person to suspect possibility of misrepresentation or misleading omission. Securities Exchange Act of 1934, §10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.—In re Valence Technology, Inc. Securities Litigation, 987 F.Supp. 796, reversed Berry v. Valence Technology, Inc., 175 F.3d 699, certiorari denied 120 S.Ct. 528, 528 U.S. 1019, 145 L.Ed.2d 409.—Lim of Act 100(11).

S.D.Cal. 1949. “Notice” is actual, constructive, implied and presumptive, while “actual notice” is susceptible of subdivisions, such as information which, of itself, gives actual notification and that which, if prosecuted with ordinary diligence, would furnish information of fact.—U.S. v. Certain Parcels of Land Situate in San Bernardino County, 85 F.Supp. 986.—Notice 1, 6, 5, 6.

S.D.Cal. 1949. Whatever is sufficient to direct attention of purchaser or encumbrancer of realty to third persons’ prior rights or equities therein and enable him to ascertain them by inquiry will operate as “notice” thereof.—U.S. v. Certain Parcels of Land Situate in San Bernardino County, 85 F.Supp. 986.—Ven & Pur 229(1).

S.D.Cal. 1940. A hat buyer’s conversation with department store salesman, in which buyer exhibit-

ed discoloration of forehead and stated that discoloration was caused by hatband, and salesman stated that hatband would be replaced if buyer would bring hatband into store, was insufficient “notice” under statute to store of breach of promise or warranty. Civ.Code, § 1769.—Silvera v. Broadway Dept. Store, 35 F.Supp. 625.—Sales 285(3).

D.Del. 2002. Pursuant to Federal Rule of Civil Procedure providing for relation back of amendment substituting a defendant to date that original complaint was filed if, among other things, the added defendant had requisite notice, “notice” does not necessarily require actual service of process on the defendant sought to be added; rather, notice may be deemed to have occurred when party who has some reason to expect his potential involvement as defendant hears of commencement of litigation through some informal means. Fed.Rules Civ.Proc.Rule 15(c)(3), 28 U.S.C.A.—In re Color Tile, Inc., 278 B.R. 366.—Bankr 2157.

D.Del. 2002. For amendment which substitutes a defendant to relate back to date original complaint was filed, “notice” received by substituted defendant must be more than merely notice of event that gave rise to cause of action; it must be notice that plaintiff has instituted lawsuit. Fed.Rules Civ.Proc.Rule 15(c)(3), 28 U.S.C.A.—In re Color Tile, Inc., 278 B.R. 366.—Bankr 2157.

M.D.Fla. 1994. Letter from trustees of pension plan to employer member of plan constituted original statutory “notice” of member’s partial withdrawal from plan under Multiemployer Pension Plan Amendments Act (MPPAA), notwithstanding previous notification of withdrawal to employer which identified withdrawal for incorrect period of time; fact that letter set payment date prior to required 60-day period did not render notice insufficient, but court would not consider member in default until 60-day period had expired. Employee Retirement Income Security Act of 1974, § 2 et seq., as amended, 29 U.S.C.A. § 1001 et seq.—Trustees of Tampa Maritime Association-International Longshoremen’s Ass’n Pension Plan and Trust v. S.E.L. Maduro (Florida), Inc., 849 F.Supp. 1535.—Pensions 103.

M.D.Ga. 1942. Even if “notice” was necessary for glass company to terminate exclusive sale contract entered into with its dealer which did not state any time during which contract was to continue, formal written notice was not required, but it could be either in form of an actual declaration or acts brought to the dealer’s knowledge amounting in law to such a declaration.—Pittsburgh Plate Glass Co. v. Jarrett, 42 F.Supp. 723, modified 131 F.2d 674.—Princ & A 38.

M.D.Ga. 1942. Even if “notice” was necessary for a glass company to terminate exclusive sale contract entered into with its dealer which did not state any time during which contract was to continue, where dealer alleged that company opened branch store over his protest, dealer had notice of company’s intention to terminate the contract, so that there was no breach.—Pittsburgh Plate Glass

Co. v. Jarrett, 42 F.Supp. 723, modified 131 F.2d 674.—Princ & A 38.

E.D.Ill. 1943. Where the recorded title of one in possession of land revealed only title to the surface, and that the oil and gas rights were retained by his grantor, such actual possession was not sufficient to give "notice" to grantor's lessee of possessor's claim to the oil.—Adkins v. Arsh, 50 F.Supp. 761.—Mines 81.

E.D.Ill. 1943. A prospective purchaser of land may rightfully assume that possession thereof is based upon a recorded right, and where a person in possession claims under several rights, only one of which is recorded, his possession is "notice" to the purchaser of the recorded right only.—Adkins v. Arsh, 50 F.Supp. 761.—Ven & Pur 232(1).

E.D.Ill. 1943. The refusal of a refinery to drill for oil after investigation of title was "notice" to persons claiming title that their claim was exceedingly doubtful.—Superior Oil Co. v. Harsh, 50 F.Supp. 358, modified 143 F.2d 49.—Notice 6.

E.D.Ill. 1943. Where defendant purchased tractor covered by duly recorded chattel mortgage prior to maturity date of mortgage, he was charged with "notice" of mortgagor's rights, and was not entitled to possession of tractor as against mortgagor, even though mortgagor failed to institute proceedings within 90 days after maturity as provided by statute. S.H.A. ch. 95, § 4.—U.S. v. Christensen, 50 F.Supp. 30.—Chat Mtg 150(1).

N.D.Ill. 1982. Mere fact that lender is aware as result of bankruptcy proceedings that government had filed claim against borrower-taxpayer for unpaid withholding taxes is not "notice" to lender that government will seek to hold it liable for taxpayer's unpaid employment taxes under Internal Revenue Code and that it should have taken whatever steps it felt necessary to protect itself. 26 U.S.C.A. § 3505(b).—U.S. v. Associates Commercial Corp., 548 F.Supp. 171, affirmed 721 F.2d 1094.—Int Rev 4541.

D.Kan. 2000. Letter from corporation originally named as defendant in products liability action to company that actually sold, distributed, and/or manufactured allegedly defective medical apparatus, in which corporation advised other company that, in view of its attorneys, this other company would likely find itself drawn into action, was sufficient to put this other company on "notice" of lawsuit, prior to expiration of time for service, as required for amended complaint adding this other company as defendant to relate back to date that original complaint was filed. Fed.Rules Civ.Proc.Rule 15(c)(3), 28 U.S.C.A.—Loveall v. Employer Health Services, Inc., 196 F.R.D. 399.—Lim of Act 124.

D.Kan. 2000. "Notice" of suit, such as proposed new defendant must have in order for amendment substituting him as defendant to relate back to date of original complaint, need not be formal notice. Fed.Rules Civ.Proc.Rule 15(c)(3), 28 U.S.C.A.—Loveall v. Employer Health Services, Inc., 196 F.R.D. 399.—Lim of Act 124.

D.Kan. 1994. Assignee of lessor's rights under equipment lease did not fail to take "without notice" for purposes of enforcing waiver of defenses clause, on ground that there were financing statements on file with Kansas Secretary of State which included some of the same machines as contained in the lease acquired by the assignee; mere existence of financing statement did not constitute either "notice" or "reason to know" for purposes of enforceability of the waiver clause. U.C.C. §§ 1-201(25), 9-206; K.S.A. 84-1-201(25), 84-9-206; V.A.M.S. §§ 400.1-201(25), 400.9-206.—Benedictine College, Inc. v. Century Office Products, Inc., 853 F.Supp. 1315, reconsideration denied 866 F.Supp. 1323.—Sec Tran 186.

W.D.Ky. 1942. Generally, a "notice" to an agent as to any transaction within scope of his authority is considered as notice to principal.—General American Life Ins. Co. v. Anderson, 46 F.Supp. 189, modified 141 F.2d 898, certiorari denied 65 S.Ct. 554, 323 U.S. 798, 89 L.Ed. 637.—Princ & A 178(1).

E.D.La. 1965. When parties use term "notice" with respect to acceptance or rejection of offer they usually mean communication received, but when term is coupled with expression of mode in which notice is to be effected it indicates intention to consider communication "received" when offeree dispatches notice by mode specified.—U. S. for Use and Benefit of Crowe v. Continental Cas. Co., 245 F.Supp. 871.—Contracts 22(1).

W.D.La. 1944. A notice of facts which should excite inquiry and which, if pursued, would lead to knowledge of other facts, operates as "notice".—Cox v. De Soto Crude Oil Purchasing Corp., 55 F.Supp. 467.—Notice 6.

W.D.La. 1943. Lumber company which was member of Southern Pine Association, an auxiliary member of the National Lumber Manufacturers Association, whose assistant to the secretary-manager was in attendance at conference and general hearing conducted by Administrator under Fair Labor Standards Act before promulgation of regulations thereunder, had sufficient "notice" or "hearing" of promulgation of such regulations within requirements of "due process". Fair Labor Standards Act of 1938, § 3(m), 29 U.S.C.A. § 203(m).—Walling v. Peavy-Wilson Lumber Co., 49 F.Supp. 846.—Const Law 275(3); Labor 1425.

W.D.La. 1942. The statement in deed conveying undivided mineral interest in S.E.  $\frac{1}{4}$  of S.W.  $\frac{1}{4}$ , that grantor had acquired mineral interest from certain person under act of named date, was not "notice" to third person that grantor intended to convey mineral interest in S.W.  $\frac{1}{4}$  of S.W.  $\frac{1}{4}$ , notwithstanding that act of named date conveyed mineral interest in S.W.  $\frac{1}{4}$  of S.W.  $\frac{1}{4}$ .—Kaufman v. Arkansas Fuel Oil Co., 44 F.Supp. 36, affirmed 133 F.2d 787.—Ven & Pur 230(4).

D.Me. 1983. "Notice" within purview of federal rule of civil procedure governing relation back of pleading amendments may be informal or constructive, as well as actual. Fed.Rules Civ.Proc.Rule 15(c), 28 U.S.C.A.—U.S. for Use and Ben. of Ar-

## NOTICE

row Electronics, Inc. v. G.H. Coffey Co., Inc., 100 F.R.D. 413.—Lim of Act 127(1).

D.Mass. 1940. Where tax agent examined taxpayer's books and records at office of one of executors and was directed to send notices of deficiencies to that office, and, accordingly, registered letter notifying executors of the deficiencies was sent to that address, "notice" was sufficient. Revenue Act 1932, Sec. 272(a, k), 26 U.S.C.A.Int.Rev.Acts, pages 558, 561.—U.S. v. Lyman, 36 F.Supp. 53.—Int Rev 4541.

E.D.Mich. 1987. Seller's president received "notice" of defective copyright protection when he first became aware of legal significance of omission of copyright notice from film. 17 U.S.C.A. §§ 401, 405(a), (a)(2).—M & A Associates, Inc. v. VCX, Inc., 657 F.Supp. 454, affirmed 856 F.2d 195.—Copyr 50.1(4).

D.Minn. 1985. Notice on front page of contract of disclaimers on back of the form was insufficient to bring presence of disclaimers of warranty and consequential damages to attention of reasonable buyer, and thus, the disclaimers were not "conspicuous," and were unenforceable under Minnesota law where, although word "notice" on front of the form was capitalized, the rest of the sentence, apart from two letters, was not, and where words forming rest of the sentence were smaller than any others which appeared on the front page; furthermore, fact that notice provision was underlined merely caused it to blend in with other lines and boxes, and, viewed as a whole, the provision did not stand out sufficiently. M.S.A. §§ 336.1-201(10), 336.1-201(10) comment, 336.2-316, 336.2-316(2).—Agristor Leasing v. Guggisberg, 617 F.Supp. 902.—Sales 267.

S.D.Miss. 1995. If plaintiff's complaint fails to reflect on its face federal cause of action, 30-day period within which defendant must file notice of removal starts to run at point when defendant is first put on notice that case is removable; "notice" may be supplied through, *inter alia*, discovery and amended pleadings. 28 U.S.C.A. § 1446(b).—Herrington v. J.R. Pounds, Inc., 874 F.Supp. 133.—Rem of C 79(1).

D.Nev. 1995. Document captioned "Notice of Intent to Levy," and indicating intent of Internal Revenue Service (IRS) to levy wages of Chapter 13 debtors, qualified as "notice" required by procedural due process principles, Internal Revenue Code, and regulation, even though document was computer generated sheet that did not contain signature. U.S.C.A. Const.Amend. 14; 26 U.S.C.A. § 6331(d); 26 C.F.R. § 301.6331-2(a)(1).—In re Hopkins, 192 B.R. 760.—Const Law 286; Int Rev 4855.

D.N.H. 1941. Where contract for construction of bridge provided that if contractor encountered subsurface or latent conditions at site materially differing from those shown in specifications, he should immediately give notice to engineer in order to secure extra compensation for additional work and materials, and that term "notice" should mean written notice, fact that no written notice was given did not preclude recovery for extra work and mate-

rials, where bridge authority had actual notice of all facts; "notice" being for protection of the parties.—Frederick Snare Corp. v. Maine-New Hampshire Interstate Bridge Authority, 41 F.Supp. 638.—Bridges 20(2.1).

D.N.J. 1993. Under New Jersey law, savings and loan association's submission of audit report and several Federal Home Loan Bank Board (FHLBB) reports to insurers with its application to renew officers and directors liability policies did not provide insurers with written "notice" of potential for regulatory suit by Federal Deposit Insurance Corporation (FDIC), within meaning of policy requiring insured to give written "notice" of basis of claim during policy period.—American Cas. Co. of Reading, Pennsylvania v. Continisio, 819 F.Supp. 385, affirmed 17 F.3d 62.—Insurance 2266.

D.N.J. 1942. Where automobile liability policy restricted authority of agent to waive or change any part of policy or to estop company from asserting any right under terms of policy and policy was accepted by insured, policy was "notice" to insured of all its terms so that knowledge of agent that one automobile covered by policy was owned by insured's wife, notwithstanding declaration in policy that named insured was sole owner of all automobiles therein listed, did not "estop" insurer from denying liability under policy.—Trinity Universal Ins. Co. v. Woody, 47 F.Supp. 327.—Insurance 3084.

E.D.N.Y. 1995. Under New York law, holder of instrument has "notice" of defense, so as not to qualify as "holder-in-due-course," if he has actual, subjective knowledge of defense.—Fortunoff v. Triad Land Associates, 906 F.Supp. 107.—Bills & N 332.

E.D.N.Y. 1995. Under New York law, existence of mere suspicious circumstances does not constitute "notice," such as will prevent holder of negotiable instrument from qualifying as "holder-in-due-course."—Fortunoff v. Triad Land Associates, 906 F.Supp. 107.—Bills & N 336.1.

E.D.N.Y. 1937. The filing of schedules in bankruptcy listing a conditional sales contract simultaneously with filing of voluntary petition giving trustee in bankruptcy rights of a creditor was not such "notice" which carries with it the significance of advice upon which some right may be predicated, as to give conditional seller a claim to truck sold to bankrupt under contract superior to trustee's claim.—In re Youngs Cornell Utilities, 20 F.Supp. 381.—Bankr 2586.1.

N.D.N.Y. 1949. Whatever is sufficient to put a party on inquiry amounts to "notice", provided inquiry becomes duty and would lead to knowledge of requisite facts by exercise of ordinary diligence.—Woods v. Barnes, 84 F.Supp. 155.—Notice 6.

S.D.N.Y. 1999. Inclusion of employee's New York law intentional infliction of emotional distress claim in discrimination claim filed with New York State Division of Human Rights (NYSHDR) or Equal Employment Opportunity Commission

(EEOC) charge was insufficient to serve employer with "notice" of claim, as required under New York law. N.Y.McKinney's Racing, Pari-Mutuel Wagering and Breeding Law §§ 618, 619, subd. 6.—Meckenberg v. New York City Off-Track Betting, 42 F.Supp.2d 359.—Mun Corp 741.50.

S.D.N.Y. 1942. In patent infringement action, wherein defendant's counsel, in concluding memorandum on motion for summary judgment, stated that defendant was satisfied to accept argument on motion as embodying with ample notice a motion for leave to file a supplemental complaint and acceptance of amended complaint as a supplemental complaint, original complaint would be considered "notice" of infringement without formal filing of a new or supplemental complaint. 35 U.S.C.A. § 287; Fed.Rules Civ.Proc. rules 15(a, b, d), 56(b), 28 U.S.C.A.—Sweets Laboratories v. Phil Silverstein Corp, 48 F.Supp. 726.—Pat 310.11.

S.D.N.Y. 1942. Where plaintiff did not mark its patented electric light bulbs so as to indicate that they were patented, the filing of complaint by plaintiff in patent infringement action constituted "notice" of infringement required by statute to entitle plaintiff to recover, and authorized recovery of profits for infringement occurring after the complaint was filed. 35 U.S.C.A. § 287.—General Elec Co v. Grand Gaslight, 46 F.Supp. 822.—Pat 222.

S.D.N.Y. 1941. Under New York statute requiring presentment of notice of claim against Westchester County and Westchester County Park Commission and presentment of notice of intention to sue before civil action for damages for injuries to person or property could be brought against county or commission, and requiring residence of claimant to be given in notice, a "notice" of a claim against county for patent infringement which set forth plaintiff's business address, but which failed to disclose his residence, failed to comply with statute. Laws N.Y.1922, c. 292, § 16, as amended by Laws 1931, c. 561.—Cooper v. Westchester County, 42 F.Supp. 1.—Counties 212.

S.D.N.Y. 1941. Under New York statute requiring presentment of notice of claim against Westchester County and Westchester County Park Commission and presentment of notice of intention to sue before action for damages or injuries to person or property can be brought against county or commission, a "notice" of claim based on alleged infringement by county of certain patents of plaintiff, which misstated by number one of the three patents sued on, was defective, but only in so far as the notice related to patent which was misstated in the notice.—Cooper v. Westchester County, 42 F.Supp. 1.—Counties 212.

S.D.N.Y. 1941. Under New York statute requiring presentment of notice of claim against Westchester County and Westchester County Park Commission and presentment of notice of intention to sue within 30 days after alleged cause of action arose before action for damages or injuries to person or property can be brought against county or commission, a "notice", in patent infringement action against county was not defective because not

presented within 30 days after alleged infringing apparatus was first installed, since the alleged infringement would be a "continuing tort" and the cause of action could not be restricted to time at which the alleged infringing apparatus was first installed. Laws N.Y.1922, c. 292, § 16, as amended by Laws 1931, c. 561.—Cooper v. Westchester County, 42 F.Supp. 1.—Counties 212.

S.D.N.Y. 1941. In action for unpaid overtime compensation together with liquidated damages and counsel fees brought under the Fair Labor Standards Act, against New York and Delaware corporations wherein complaint made no clear disclosures concerning when and by which of the corporations the employees were respectively employed, and wherein there was nothing to show whether employees' union had a contract with Delaware corporation, complaint failed to satisfy the "notice" requirement of federal rule relating to statement of claim, and motion to dismiss cause of action was granted without prejudice to right to amend. Fed.Rules Civ.Proc. rules 8(a)(2), 84, 28 U.S.C.A., Fair Labor Standards Act 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.—Keegan v. Jacob Ruppert, 2 F.R.D. 8.—Labor 1496.1.

W.D.N.Y. 1941. Under New York Personal Property Law providing for filing of conditional sales contract or copy thereof in order to protect reservation of property in seller, the fact that customer's order, signed by bankrupt and filed by seller as conditional sales contract, provided that conditional sales contract would be executed by buyer, was not sufficient to give trustee in bankruptcy "notice" of the existence of such conditional sales contract, which was purportedly executed prior to filing of involuntary petition in bankruptcy but was not filed until several days thereafter. Personal Property Law N.Y. §§ 65, 66.—In re Martina, 39 F.Supp. 255.—Bankr 2576.

W.D.Okla. 1943. "Notice" is the equivalent of knowledge and is constructive and actual, "constructive notice" being that imparted by the record and is a matter of statute, and "actual notice" existing when knowledge is actually brought home to the party to be affected thereby, and notice includes "implied notice" which is notice to the authorized agent of the party sought to be bound. 25 O.S.1941 §§ 11-14; 46 O.S.1941 §§ 1, 7, 75.—Continental Supply Co. v. Marshall, 52 F.Supp. 717, reversed 152 F.2d 300, certiorari denied Federal Nat. Bank of Shawnee, Oklahoma v. Continental Supply Co., 66 S.Ct. 962, 327 U.S. 803, 90 L.Ed. 1028.—Notice 2, 12; Princ & A 177(1); Records 19.

E.D.Pa. 1965. Under Uniform Commercial Code making assignee for benefit of creditors a lien creditor from time of assignment, assignee is a creditor who, in absence of notice of prior security interest, would prevail as against person who did not comply with requirements for perfecting of security interest, but actual knowledge on part of any such creditor would be at least the equivalent of the "notice" that the code requires. 12A P.S.Pa. § 9-401.—In re Komfo Products Corp., 247 F.Supp. 229.—Debtor & C 6.

## NOTICE

E.D.Pa. 1941. A stockholder's equitable action for an accounting and discovery based on alleged fraudulent conspiracy whereby investments were made which improperly benefited railroad to detriment of the corporation which was dominated and controlled by voting trustees who were officers and directors of the railroad was not barred by "laches" for stockholder's failure to assert her rights until 10 to 12 years after transactions complained of had occurred, where there were prior representative actions brought against defendants, based upon same transactions, since pendency of the prior actions was deemed to be "notice" to defendants of rights asserted by stockholder.—Overfield v. Penn-road Corp., 39 F.Supp. 482.—Corp 209.

E.D.Pa. 1939. Whatever puts a party on inquiry amounts in judgment of law to "notice" providing the inquiry becomes a duty, as in the case of purchasers and creditors, and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence.—In re Leader Furniture Co., 36 F.Supp. 986.—Notice 6.

E.D.Pa. 1939. Where a corporation received copy of will which disclosed 10-year trust provision when first unsuccessful attempt was made to transfer stock and also received tax papers which undoubtedly disclosed date of death, and again received copies of will and certificate of trustee's appointment when subsequent transfer was requested and made on December 18, 1934, and certificate of appointment was dated November 19, 1930, and disclosed that will was probated on March 12, 1930, corporation could not avoid liability for permitting transfer of stock by trustee in breach of trust on ground that it had no "notice" that trustee was violating trust obligations. 20 P.S.Pa. § 3351.—First Nat. Bank v. Pittsburgh, F. W. & C. Ry. Co., 31 F.Supp. 381.—Corp 134.

E.D.Pa. 1939. Generally, whatever puts a party on inquiry amounts in judgment of law to "notice," provided that inquiry becomes a duty and would lead to knowledge of the facts by the exercise of ordinary intelligence and understanding.—First Nat. Bank v. Pittsburgh, F. W. & C. Ry. Co., 31 F.Supp. 381.—Notice 6.

M.D.Pa. 1988. Electrical contractor's third-party complaint against manufacturer of circuit breaker box that allegedly caused house fire served as "notice" of breach of warranty under Pennsylvania law. 13 Pa.C.S.A. §§ 1201, 2607, 2607 comment, 2607(c)(1).—Bednarski v. Hideout Homes & Reality, Inc., A Div. of U.S. Homes & Properties, Inc., 709 F.Supp. 90.—Sales 285(3).

D.S.C. 1994. Fact that subcharterer knew that charterer was disponent owner of vessel did not give rise to such "notice" of maritime lien granted in contract between charterer and vessel owner as would allow vessel owner to enforce lien against subcharterer's cargo or against subfreights due; while subcharterer knew that some sort of contractual relationship existed between charterer and vessel owner, it did not know what type of period charter party vessel was under or whether charter party had lien clause.—Finora Co., Inc. v. Amitie

Shipping, Ltd., 852 F.Supp. 1298, affirmed 54 F.3d 209.—Ship 49(5).

D.S.C. 1966. Filing with highway department of state form reciting that automobile was insured under policy covering insured truck was not type of "notice" contemplated by policy requiring notice within 30 days of delivery of newly acquired automobile, and automobile was not covered under policy where department records showed it had informed insurer of acquisition of automobile more than 30 days later and insurer denied receiving notice.—Nationwide Mut. Ins. Co. v. Fleming, 257 F.Supp. 261, affirmed 383 F.2d 145.—Insurance 2655(2).

W.D.S.C. 1942. Under South Carolina law, where notice of acceptance of guaranty is required notice of acceptance by creditor to the debtor, who delivers the letter of guaranty, is not "notice" to the guarantor in absence of proof of agency.—Hudepohl Brewing Co. v. Bannister, 45 F.Supp. 201.—Guar 7(4).

W.D.S.C. 1942. Under South Carolina law, where "notice" of acceptance of guaranty is required, it is not necessary that the guarantor be given direct, actual and personal notice of acceptance by guaranteee of his agent, but such notice may be implied from the circumstances of the particular transaction.—Hudepohl Brewing Co. v. Bannister, 45 F.Supp. 201.—Guar 7(4).

E.D.S.C. 1942. A 999-year lease of land to railroad company, recorded in clerk of court's office, was "notice" to city seeking to enforce lien for improvement of street abutting such land.—City of Orangeburg v. Southern Ry. Co., 45 F.Supp. 734, affirmed 134 F.2d 890.—Mun Corp 525.

M.D.Tenn. 1974. "Notice" within Uniform Commercial Code means notice at time of taking, i.e., time of negotiation of the note. T.C.A. § 47-1-201(25).—Third Nat. Bank in Nashville v. Hardi-Gardens Supply of Illinois, Inc., 380 F.Supp. 930.—Bills & N 334, 336.1.

N.D.Tex. 1973. Word "notice," in social security regulations which provide that upon a finding of good cause the Secretary of Health, Education and Welfare may reopen an initial determination and that good cause shall be deemed to exist where new and material evidence is furnished after notice to party to initial determination, does not require notice to claimant before reopening of his claim. Social Security Act, § 205(g), 42 U.S.C.A. § 405(g); Social Security Administration Regulations, §§ 404.957, 404.958, 42 U.S.C.A. App.—Crits v. Weinberger, 364 F.Supp. 956.—Social S 142.25.

N.D.W.Va. 1943. Where there are words indicating representative or fiduciary capacity following name of payee, indorser, or indorsee on commercial paper deposited in bank, the bank in accepting the paper in payment of individual debt due to it is chargeable with "notice" of the trust character of the instrument.—American Surety Co. of New York v. First Nat. Bank in West Union, 50 F.Supp. 180, modified 141 F.2d 411, certiorari denied 64

S.Ct. 1267, 322 U.S. 754, 88 L.Ed. 1583.—Banks 130(1).

N.D.W.Va. 1943. A bank is not charged with “notice” of misappropriation by an agent or fiduciary merely because the latter deposits to his individual account a check payable to or endorsed by him in his fiduciary capacity.—American Surety Co. of New York v. First Nat. Bank in West Union, 50 F.Supp. 180, modified 141 F.2d 411, certiorari denied 64 S.Ct. 1267, 322 U.S. 754, 88 L.Ed. 1583.—Banks 130(1).

Bkrty.W.D.Ark. 1995. Creditor did not receive “notice” or “actual knowledge” of bankruptcy, as required to discharge debt neither listed nor scheduled, where no notice was sent to creditor and record was devoid of any indication that creditor had knowledge or any reason to know of case. Bankr.Code, 11 U.S.C.A. § 523(a)(3)(B).—In re Pulley, 196 B.R. 498.—Bankr 3361.

Bkrty.C.D.Cal. 2000. Creditor’s conduct, with knowledge that deadline for perfecting its oil and gas lien was about to expire, in placing telephone call to debtor’s principal for purpose of informing him that creditor was filing lawsuit and taking necessary legal action to enforce its lien, clearly qualified as “notice” of creditor’s intent to perfect or enforce its lien, of kind sufficient to permit lien to be perfected postpetition pursuant to bankruptcy statute allowing liens to be perfected postpetition if applicable law permits such perfection to relate back. Bankr.Code, 11 U.S.C.A. § 546(b); West’s Ann.Cal.C.C.P. § 1203.61.—In re Rincon Island Ltd. Partnership, 253 B.R. 880.—Bankr 2577.

Bkrty.N.D.Ga. 2002. Trustee had “notice” of creditor’s security interest in Chapter 7 debtor’s real property, preventing trustee from “filling the shoes” of bona fide purchaser or lien creditor, even though release was recorded; trustee had actual notice of security interest because creditor filed affidavit stating that release was filed in error and trustee had inquiry notice because deed records were inconsistent. Bankr.Code, 11 U.S.C.A. § 544(a); O.C.G.A. § 44-2-1.—In re Henderson, 284 B.R. 515.—Bankr 2704, 2705.

Bkrty.N.D.Ga. 2002. Under Georgia law, any circumstance which would place a man of ordinary prudence fully upon his guard, and induce serious inquiry, is sufficient to constitute “notice” of a prior unrecorded deed. —O.C.G.A. § 44-2-1.—In re Henderson, 284 B.R. 515.—Ven & Pur 229(2).

Bkrty.D.Mont. 1990. Mortgagee’s request for relief from automatic stay, and subsequent prompt application in state court for appointment of receiver for postpetition rents, did not adequately give debtors “notice” that it was invoking provisions of Bankruptcy Code to perfect interest in postpetition rents; mortgagee’s representations to Bankruptcy Court that it would seek foreclosure after relief from stay was entirely silent as to appointment of receiver. Bankr.Code, 11 U.S.C.A. § 546(b).—In re Kurth Ranch, 110 B.R. 501.—Bankr 2588.

Bkrty.N.D.Ohio 1992. Even though creditors are not listed in schedules, they can be charged with

“notice” of bankruptcy, for nondischargeability purposes, if they were in possession of sufficient facts such as would cause reasonably prudent person to make further inquiry. Bankr.Code, 11 U.S.C.A. § 523(a)(3).—In re Heuring, 139 B.R. 856.—Bankr 3361.

Bkrty.W.D.Tex. 1995. Although requirements for “bona fide purchaser (BFP)” and “buyer in ordinary course (BOC)” of business under Texas law are similar, they are not the same: “knowledge” required of BOC is more demanding awareness standard than “notice” required of BFP; “buying” required of BOC is more restrictive than “purchasing for value” required of BFP; and BOC has additional requirement that it essentially “buy from inventory.” V.T.C.A., Bus. & C. §§ 1.201(9, 25), 2.403 comment; V.T.C.A., Tax Code § 32.03.—In re Winn’s Stores, Inc., 177 B.R. 253.—Sales 234(1); Ven & Pur 220.

Bkrty.E.D.Va. 1994. Under Massachusetts law, inquiry is required for purchaser of note to satisfy “notice” prerequisite for holder-in-due-course status, if purchaser has actual knowledge of facts that would alert him to possible irregularities concerning note. M.G.L.A. c. 106, § 3-302(1).—In re Military Circle Pet Center No. 94, Inc., 181 B.R. 282.—Bills & N 339.

Bkrty.E.D.Va. 1991. Under Virginia version of the Uniform Commercial Code (U.C.C.), person in possession of note endorsed to his order did not qualify as “holder in due course,” as he did not satisfy requirement that he take instrument without “notice” that it was overdue or had been dishonored or of any defense against or claim to instrument on part of any person; initially, endorsee took note for value and without notice of any claims or defenses, but he then negotiated instrument back to company with unrestricted endorsement, and when endorsee had note negotiated back to him for second time, he was aware note was overdue. Va. Code 1950, §§ 8.3-201(1), 8.3-302(1), 8.3-304(3).—In re Valentine, 146 B.R. 945.—Bills & N 347.1.

Ala. 1989. Disclosure to an individual or supervisor other than city clerk cannot be treated as “notice” for purposes of notice-of-claim statute, which requires tort claim to be presented to city clerk within six months and other claims to be presented within two years. Code 1975, § 11-47-23.—Large v. City of Birmingham, 547 So.2d 457.—Mun Corp 741.30.

Ala. 1969. Prospective mortgagee’s use of plans and specifications in making its appraisal prior to execution of mortgage on construction site does not constitute “notice” to mortgagee of prospective mechanic’s or materialman’s liens which might accrue and become perfected against construction site because of that which is in plans and specifications. Code 1940, Tit. 33, § 38.—Gamble’s, Inc. v. Kansas City Title Ins. Co., 217 So.2d 923, 283 Ala. 409.—Mtg 154(2).

Ala. 1943. To constitute “notice” of an infirmity in a negotiable instrument, indorsee must have knowledge of such facts that his action in taking the

instrument amounted to bad faith, where such gross negligence as is evidence of bad faith. Code 1940, Tit. 39, §§ 58, 61.—Tennessee Valley Bank v. Williams, 14 So.2d 368, 244 Ala. 468.—Bills & N 337.

Ala. 1943. In disciplinary proceedings against attorney, who was a prospective candidate for judicial office, for sending letter to incumbent, who had declared candidacy for renomination, by which attorney sought to obtain nomination without opposition and in which a sharing of official salary was proposed, charge of violation of rule providing that no one licensed to practice should be guilty of conduct unbecoming an attorney gave attorney full “notice” of facts upon which charge was based. Amended Rules of Supreme Court Governing Conduct of Attorneys, Section A, rule 36.—Ex parte Grace, 13 So.2d 178, 244 Ala. 267, appeal dismissed Grace v. Board of Commissioners of State Bar of Alabama., 64 S.Ct. 78, 320 U.S. 708, 88 L.Ed. 415.—Atty & C 52.

Ala. 1942. The record of a subsequent deed of realty to cotenant by one of other cotenants, without more, was insufficient “notice” to other cotenants not joining in execution of deed that cotenant was exercising adverse acts of ownership.—Saltsman v. Saltsman, 10 So.2d 752, 243 Ala. 495.—Ten in C 15(7).

Ala. 1942. The purpose of statute requiring “notice” to the city before bringing suit for injury or death is to enable the municipalities to investigate and determine the merits of the claim. Code 1940, Tit. 37, § 504.—Smith v. City of Birmingham, 9 So.2d 299, 243 Ala. 124.—Mun Corp 812(1).

Ala. 1942. Injured pedestrian's complaint alleging that water company negligently failed to maintain the portion of a street occupied by unused water meter box between sidewalk and curb or immediately adjacent thereto in reasonably safe condition for travel of pedestrians implied “notice” to water company for a sufficient time in which to remedy the defect or negligence in not discovering the defect, if water company had duty to maintain the adjoining strip of land.—Birmingham Water Works Co. v. Walker, 8 So.2d 827, 243 Ala. 149.—Waters 195.

Ala. 1942. Pedestrian's claim against city for personal injuries stating that while walking along public sidewalk at described address, she tripped and fell, over, or by reason of a metal lid in the sidewalk, at certain time on certain day, that she claimed certain sum as damages for her injuries, and that she resided at certain address and resided at that address at time of the accident, substantially complied with statute dealing with “notice”, and was sufficient. Code 1940, Tit. 37, § 504.—City of Birmingham v. Hornsby, 6 So.2d 884, 242 Ala. 403.—Mun Corp 812(6.1), 812(7).

Ala. 1942. In suit against deceased's grantee to enforce an equitable interest in realty because of agreement that grantor would execute a will making complainant his sole devisee, allegation that, at time deed was executed and delivered, grantee had knowledge “either actual or constructive” of com-

plainant's right, was subject to demurrer as a mere “conclusion”, since “constructive knowledge” is but “notice”, and, if the bill had averred that grantee had notice, that would have been sufficient, and such averment could have been supported by proof of either actual knowledge or notice.—Stone v. Lacy, 6 So.2d 481, 242 Ala. 393.—Plead 192(3).

Ala. 1942. The recording of a mortgage operates as a “notice” to all subsequent purchasers and mortgagees. Code 1940, Tit. 47, § 102.—Blocker v. Boyd, 6 So.2d 19, 242 Ala. 345.—Mtg 171(1); Ven & Pur 231(17).

Ala. 1941. Purchasers of lot who could have readily discovered by measurements that a wall of building located on their lot was wholly on their lot and of necessity was a supporting wall for adjoining owners' building, were charged with “notice” of existence of an easement in the wall for the support of such building.—Nabers v. Wise, 4 So.2d 149, 241 Ala. 612.—Party W 9(7).

Ala. 1939. The “notice” required by constitution, of election on proposed amendments to Constitution, must be given by proclamation of Governor and be published in each county in such manner as Legislature shall direct, and sheriffs of respective counties are not required to publish additional notice of such elections. Code 1923, §§ 447, 533; Const.1901, Amend. No. 24.—In re Opinions of the Justices, 192 So. 905, 238 Ala. 150.—Const Law 9(2).

Ala. 1931. Where insured procured loan from insurer and assigned paid-up policy as security, notice that “premium” would be due held not such “notice” of overdue interest as was contemplated by forfeiture provision of contract.—Protective Life Ins. Co. v. Thomas, 134 So. 488, 223 Ala. 106.—Insurance 1868.

Ala. 1926. Where buyer's guarantors claimed that sales of extracts containing alcohol were for beverage purposes, refusing to charge that sale was legal, in absence of notice of buyer's intent to make such use, was reversible error; “notice” being equivalent to “under circumstances from which the seller might reasonably deduce” unlawful intention, found in Volstead Act, tit. 2, § 4, 27 U.S.C.A. § 13.—Furst v. Shows, 110 So. 299, 215 Ala. 133.

Ala. 1921. Where a seller of cotton seed meal had knowledge that the meal was to be used on the farm of the buyer, as a fertilizer, such circumstance became an implied element of the contract, and where a meal of an inferior grade and one which was injurious to crops was delivered, the seller was liable for loss of the crops, though he was not informed as to the particular crop which the buyer intended to fertilize with the meal, as “notice” includes knowledge of and means of knowing the facts.—Abercrombie v. Virginia-Carolina Chemical Co., 91 So. 311, 206 Ala. 615.—Sales 418(19).

Ala. 1902. A complaint alleging that an act by which plaintiff, a passenger, was injured was done with “knowledge” or “notice” of defendant's agent does not state a cause of action for wantonness; “notice” not being the equivalent of “knowledge,”

and the averment in the disjunctive not affirming either.—*Birmingham Ry. & Elec. Co. v. Butler*, 33 So. 33, 135 Ala. 388.

Ala. 1902. “Notice” is not the equivalent of “knowledge,” within the rule that wantonness in the doing of or omission to do an act, the probable result of which will be to injure, can only be predicated upon actual knowledge of the existing conditions attending the act or omission that caused the injury; and hence a complaint alleging that an engineer allowed his engine to propel a car against other cars with great force, with knowledge or notice that plaintiff was between the cars, is bad as stating a cause of action for wantonness.—*Southern Ry. Co. v. Bunt*, 32 So. 507, 131 Ala. 591.

Ala. 1896. “Notice” means “exclusive or special consideration; observant care.”—*Manier v. Appling*, 20 So. 978, 112 Ala. 663.

Ala. 1887. “Notice,” with reference to a purchaser from a fraudulent vendee for value and without notice of the fraud, is not equivalent to and synonymous with “knowledge.”—*Cleveland Woolen Mills v. Sibert*, 1 So. 773, 81 Ala. 140.

Ala.Civ.App. 1979. For purposes of warranty in real estate sales contract that vendor had not received any notification from any governmental agency of any pending public improvements, compliance with statutory requirements regarding newspaper publication of ordinance resulting in assessment for street improvement was sufficient to constitute “notice” to the vendor. Code of Ala. 1975, § 11-48-7.—*Southeastern Homes, Inc. v. Jackson*, 374 So.2d 341, writ denied *Ex parte Southeastern Homes, Inc.*, 374 So.2d 344.—Covenants 64.

Ala.Civ.App. 1978. Filing of complaint is not “notice” within requirement of statute governing notice required to be given to owner of property in connection with filing of materialman’s lien. Code of Ala. 1975, § 35-11-218.—*Harper v. J. & C. Trucking and Excavating Co., Inc.*, 374 So.2d 886, writ quashed 374 So.2d 893.—Mech Liens 122.

Ala.App. 1932. Where liability insurer entered into written agreement with insured’s counsel negativing insurer’s waiver of defense of lack of insured’s co-operation by helping defend suit against insured, regardless whether insured’s counsel was authorized to enter agreement, insured, not having objected, was bound thereby, since agreement constituted “notice” to insured. Code 1923, § 9491.—*Blackwood v. Maryland Cas. Co.*, 150 So. 179, 25 Ala.App. 308, certiorari denied 150 So. 180, 227 Ala. 343.—Insurance 3214.

Alaska 1998. Employer has “notice” of employee’s actual injury, for purposes of statute providing that employer’s knowledge of employee’s injury triggers obligation to pay benefits, when employee files his original workers’ compensation claim. AS 23.30.100, 23.30.155.—*Hammer v. City of Fairbanks*, 953 P.2d 500.—Work Comp 1240.

Ariz. 1977. “Notice,” so as to disqualify assignee of note from holder in due course status, contemplates actual knowledge of defense or of such

facts that would alert person to possible defense. A.R.S. § 44-2532[A].—*Stewart v. Thornton*, 568 P.2d 414, 116 Ariz. 107.—Bills & N 332, 336.1.

Ariz. 1967. “Notice,” as used in rule of civil procedure providing that when party ordered to pay compensation allowed by the court does not pay it after notice and within time prescribed by court, master is entitled to writ of execution against delinquent party, refers to notice to debtor of his obligation and rule does not further require notice of intent to execute, once notification of judgment is properly given. 16 A.R.S. Rules of Civil Procedure, rule 53(a).—*Knight v. DeMarcus*, 425 P.2d 837, 102 Ariz. 105, certiorari granted *Hanner v. Demarcus*, 88 S.Ct. 288, 389 U.S. 926, 19 L.Ed.2d 277, certiorari dismissed 88 S.Ct. 1437, 390 U.S. 736, 20 L.Ed.2d 270, rehearing denied 88 S.Ct. 2051, 392 U.S. 917, 20 L.Ed.2d 1379.—Refer 76(5).

Ariz. 1964. Telephonic notice given by Commissioner to attorney for motor carriers at time hearing on reinstatement of a certificate of convenience and necessity was being conducted was not the kind of “notice” contemplated by statute since it would afford no opportunity to be heard. A.R.S. § 40-252.—*Gibbons v. Arizona Corp. Commission*, 390 P.2d 582, 95 Ariz. 343.—Autos 106.

Ariz. 1962. Under the statute prohibiting advertising to produce abortion or prevent conception and the rule of *noscitur a sociis*, the words “writes, composes or publishes” may limit the meaning of “notice” and “advertisement,” and the words “write” and “compose” connote a more or less formal announcement as contrasted to a person to person referral, and the word “publish” implies the utilization of newspaper or some similar mass media and hence the word “advertising” is not used in a broad sense but has a limited meaning. A.R.S. § 13-213.—*Planned Parenthood Committee of Phoenix, Inc. v. Maricopa County*, 375 P.2d 719, 92 Ariz. 231.—Abort 0.5.

Ariz. 1943. Evidence established that plaintiffs had “notice” of order requiring a guaranty deposit to be made by consumers to defendant water company, precluding recovery of damages sustained when plaintiffs’ service was discontinued during the year after some 38 days’ failure to make the deposit, notwithstanding that the order was entered after plaintiffs had paid for service to the end of the year, where plaintiffs for eight days made no inquiry as to why service was cut off and had opportunity to know why service was cut off.—*Maricopa Utilities Co. v. Cline*, 134 P.2d 156, 60 Ariz. 209.—Waters 203(13).

Ariz. 1943. “Notice” of facts which would put a man of ordinary prudence and intelligence on inquiry is equivalent to knowledge of all of the facts which a reasonably diligent inquiry would disclose.—*Maricopa Utilities Co. v. Cline*, 134 P.2d 156, 60 Ariz. 209.—Notice 6.

Ariz.Terr. 1907. A distinction is to be observed between knowledge of the pendency of a suit and “notice” thereof. Jurisdiction can be acquired if one does not submit himself to it, in no other way than by actual notice or by constructive notice. Actual

## NOTICE

notice is given only by personal service of process; constructive notice by some form of substituted service. Where there is no service there is no notice, irrespective of any knowledge which the defendant may acquire informally. Notice is given only by a service of process. Informal knowledge will not supply it, and cannot be relied upon to put the one acquiring the knowledge on notice or to force him into court to defend himself.—National Metal Co. v. Greene Consol. Copper Co., 89 P. 535, 11 Ariz. 108, 9 L.R.A.N.S. 1062.

Ariz.App. Div. 1 1985. The term “notice” as used in Industrial Commission rule requiring carrier to give notice of claim’s denial to claimant and to claimant’s attorney refers to a notice of claim status. A.R.S. § 23-947.—Black v. Industrial Com’n of Arizona, 716 P.2d 1018, 149 Ariz. 81.—Work Comp 1689.

Ariz.App. 1965. Word “notice”, in statute providing that upon receipt of “notice” of accident insurer should furnish written notice that policy or bond was not in effect at time of accident, if such was case, and that policy or bond would be deemed in effect if no such notice was received, meant notice from Financial Responsibility Division that person involved in accident claimed or asserted coverage under policy issued by insurer. A.R.S. § 28-1142, subsec. D.—Sampson v. Transport Indem. Co., 405 P.2d 467, 1 Ariz.App. 529.—Insurance 3110(2).

Ark. 1984. “Notice” in independent action means service of process. Rules Civ.Proc., Rule 4.—Proposed Annexation to Town of Beaver v. Ratliff, 669 S.W.2d 467, 282 Ark. 516.—Proc 35.

Ark. 1949. Whatever is “notice” enough of prior unrecorded deed to excite attention and put subsequent purchaser of land on guard and call for inquiry, is notice of everything to which such inquiry might lead, since when a person has sufficient information to lead him to a fact, he is deemed conversant of it.—Henderson v. Ozan Lumber Co., 224 S.W.2d 30, 216 Ark. 39.—Ven & Pur 229(2).

Ark. 1948. Whatever is “notice” enough of prior unrecorded deed to excite attention and put subsequent purchaser of land on guard and call for inquiry, is notice of everything to which such inquiry might lead, since when a person has sufficient information to lead him to a fact, he is deemed conversant of it.—Millman Lumber Co. v. Bryant, 209 S.W.2d 878, 213 Ark. 277.—Ven & Pur 229(2).

Ark. 1942. Where one occupied portion of wild, unimproved land adversely to owner of record title, such occupancy was “notice” to such owner of the adverse claim and after seven years such notice and occupancy ripened into title to so much of the land as was occupied.—Smith v. Southern Kraft Corp., 159 S.W.2d 59, 203 Ark. 814.—Adv Poss 31.

Ark. 1942. Where warranty deeds executed by original owner’s heirs in 1932 and 1935 conveying their interest in timber land to defendants’ predecessor were not recorded until December, 1940, and plaintiff had obtained a quitclaim deed from heirs in March of that year, the warranty deeds did

not constitute “notice” to plaintiffs, and, where no other notice of warranty deeds was shown and defendants did not otherwise have valid claims to land, plaintiff was an “innocent purchaser” and was entitled to land as against defendants. Pope’s Dig. § 1847.—Sturgis v. Nunn, 158 S.W.2d 673, 203 Ark. 693.—Ven & Pur 229(2).

Ark. 1941. Whatever puts a party on inquiry amounts to “notice” when the inquiry becomes a duty and would lead to knowledge of the requisite facts by the exercise of ordinary diligence and understanding.—Stricker v. Britt, 157 S.W.2d 18, 203 Ark. 197.—Notice 6.

Ark. 1941. A complaint before the Eclectic State Medical Board seeking to revoke physician’s license on ground that he falsely represented that he had attended a certain medical college and that diploma was illegally and fraudulently obtained and that license was obtained by fraud and deception, and requesting that the physician be given a hearing before the board, was not so vague, indefinite and uncertain as not to constitute proper “notice” to the physician of the charges against him. Pope’s Dig., §§ 10739, 10740(e).—Eclectic State Medical Board v. Beatty, 156 S.W.2d 246, 203 Ark. 294.—Health 216.

Ark. 1941. Evidence was insufficient to show that mortgagee “waived” lien of recorded chattel mortgage providing that mortgagor could not sell or dispose of mortgaged chickens without mortgagee’s consent, by orally consenting to mortgagor’s sale of chickens, and hence buyer took chickens subject to mortgage, of which buyer would be deemed to have had “notice” by virtue of fact that mortgage was recorded. Pope’s Dig. § 9434.—May Way Mills, Inc., v. Jerpe Dairy Products Corp., 150 S.W.2d 615, 202 Ark. 397.—Chat Mtg 229(3).

Ark. 1938. Whatever puts a party on inquiry amounts to “notice” when the inquiry becomes a duty and would lead to knowledge of the requisite facts by the exercise of ordinary diligence and understanding.—Wilkins v. Jernigan, 113 S.W.2d 108, 195 Ark. 546.—Notice 6.

Ark. 1905. Where an attorney was charged with the duty of having a deed to his client executed and acknowledged, “notice” to him, while engaged in the transaction, that there was in fact a mortgage on the premises, though it did not appear of record, owing to a mistake in the description, was “notice” to the client.—Allison v. Falconer, 87 S.W. 639, 75 Ark. 343.

Cal. 1975. “Notice,” in purview of statute providing that where security has been lost, destroyed or wrongfully taken and owner fails to notify issuer of that fact within reasonable time after he has notice of it and issuer registers transfer of security before receiving such notification, owner is precluded from asserting claim for wrongful transfer, contemplates either actual or constructive notice. West’s Ann.Com.Code, §§ 8404, 8404(2)(b), 8405(1).—Ibanez v. Farmers Underwriters Assn., 534 P.2d 1336, 121 Cal.Rptr. 256, 14 Cal.3d 390.—Corp 134.

Cal. 1942. A delinquent tax list notice which contained name of person whose property was assessed, a description of property and a figure representing the total amount of taxes, penalties and costs, conformed to the requirements of statute as to "notice", even though it did not state that such figure did include penalties and costs. Pol.Code, §§ 3764, 3766 (repealed. See Revenue and Taxation Code, §§ 3351 et seq., 3391 et seq., 3476, 3477).—Bray v. Jones, 129 P.2d 357, 20 Cal.2d 858.—Tax 627.

Cal. 1942. A finding on which judgment enjoining the enforcement of city ordinances was based requiring each person drilling for oil to obtain a permit that the fees required therefor were imposed for revenue as well as regulation was not sufficient to charge city officers with "notice" that all fees in the nature of the ones in question were prohibited by constitutional provision against taxing property of municipal corporations, in determining whether the refusal of city officers to issue permit required by a materially different amending ordinance without payment of fees required thereby constituted contempt. West's Ann.Const. art. 13, § 1.—Brunton v. Superior Court of Los Angeles County, 124 P.2d 831, 20 Cal.2d 202.—Inj 221.

Cal. 1904. One who knew of deceased's death, was present in the state during the first two publications of the notice to present claims returned to the state, and had actual notice of the publication for more than one month prior to the expiration of the time for filing claims, but yet failed to do so until long after that time had expired, was not one who, "by reason of being out of the state," had no "notice," "as provided in this chapter," to present his claim, within the meaning of West's Ann.Code Civ.Proc. § 1493, and his claim was therefore barred.—MacGowan v. Jones, 76 P. 503, 142 Cal. 593.

Cal. 1901. The words "knowledge" and "notice" are not synonymous, to the extent, at least, that the two words are not always interchangeable in meaning. "Notice," in one sense, means legal instrumentality by which knowledge is conveyed, or by which one is charged with knowledge. One having "knowledge" that he is a defendant in a suit is not bound to appear until there is brought home to him the legal instrumentality of knowledge with proper notice. But, on the other hand, where the Code speaks of actual and constructive "notice," it means no more than that, under the indicated circumstances, the man is legally chargeable with knowledge.—Merrill v. Pacific Transfer Co., 63 P. 915, 131 Cal. 582.

Cal. 1897. "Notice," within St.1887, p. 29, § 2, providing for notice in proceedings for the organization of an irrigation district, is for the purpose of bringing the party before the tribunal exercising judicial powers, and it must be given by some one authorized by the state to give it. "Notice," in the sense of the statute, does not mean "knowledge." Actual knowledge, or the want of it, cannot be shown. It means the statutory instrumentality of knowledge, or formal process emanating from the source, and served in the manner, prescribed by

statute. The advertisement is the process, and the posting in the public place is the service. The notice itself must be issued by persons authorized by law to issue it.—In re Central Irr. Dist., 49 P. 354, 117 Cal. 382.

Cal. 1889. "Notice," as used in (West's Ann.) Code Civ.Proc. § 974, providing that a "notice of appeal" from a justice to a superior court shall be served on the adverse party, is strictly analogous to "summons," and serves the same function. It is the process for bringing the adverse party before the court, and service of such notice on a corporation can be made in the same manner as a summons.—Pacific Coast Ry. Co. v. Superior Court of San Luis Obispo Co., 21 P. 609, 79 Cal. 103.

Cal.App. 1 Dist. 1963. Term "notice" imports that information given thereby comes from authentic source and is directed to someone who is to act or refrain from acting in consequence of information contained in notice.—Bird v. McGuire, 31 Cal.Rptr. 386, 216 Cal.App.2d 702.—Notice 1.

Cal.App. 1 Dist. 1963. "Knowledge" is not synonymous or equivalent of "notice".—Bird v. McGuire, 31 Cal.Rptr. 386, 216 Cal.App.2d 702.—Notice 2.

Cal.App. 1 Dist. 1942. That an agreement for sale of realty stated that purchaser agreed to take title temporarily subject to "Exception three" as shown by preliminary title report wherein "Exception three" mentioned a lease executed by vendor and a trust deed covering leasehold interest did not show that purchaser had actual "notice" of lease and trust deed, in view of purchaser's other testimony, and hence purchaser did not take title subject to lease and trust deed where there was no competent proof that such instruments were executed or recorded.—Pansini v. Weber, 127 P.2d 288, 53 Cal.App.2d 1.—Ven & Pur 244.

Cal.App. 1 Dist. 1942. Where suggestions of bank's branch manager concerning making of personal loans by bank's depositor were made as friendly gestures of good will and business accommodations and no fee was charged for them, the depositor was not charged with "notice" that acts of manager were beyond the scope of his authority, so as to be precluded from recovering from bank for alleged fraud of the manager on ground that the suggestions would put the bank in the loan brokerage business contrary to law.—Ghilione v. American Trust Co., 122 P.2d 301, 49 Cal.App.2d 633.—Banks 112.

Cal.App. 1 Dist. 1941. An order granting defendant five days in which to plead to complaint from ruling on defendant's motion to stay proceedings pending payment by plaintiffs of costs awarded to defendant in a prior action involving same parties and subject matter, if treated as a preliminary injunction under statute, was not in excess of trial court's jurisdiction on ground that it was granted without "notice", where notice, duly served upon plaintiffs, set a definite day and hour, and place and court, when and where the motion would be made, since such notice was equivalent of an "order to show cause" within the statute, why such order

## NOTICE

should not be made at time and place designated. Code Civ.Proc. § 527.—Schoenfeld v. Gerson, 120 P.2d 674, 48 Cal.App.2d 739.—Costs 277(7).

Cal.App. 1 Dist. 1941. To charge one with “notice” the facts must be such as ordinarily to excite inquiry with reference to the particular fact which inquiry is designed to elicit. Civ.Code, § 19.—People v. One 1933 Buick Sedan, 111 P.2d 378, 43 Cal.App.2d 482.—Notice 6.

Cal.App. 1 Dist. 1919. The Improvement Act of 1911, St.1911, p. 730, is applicable to a city in which no paper is published and circulated, the word “notice” in section 79 referring to posting as well as publication of notice, and section 1 expressly making the act applicable to all municipalities.—Coleman v. Spring Const. Co., 182 P. 473, 41 Cal.App. 201.—Mun Corp 294(1).

Cal.App. 2 Dist. 2001. The term “notice” of itself imports that the information given thereby is to be directed to some one who is to act or refrain from acting in consequence of the information contained in the notice.—Woodman Partners v. Sofa U Love, 114 Cal.Rptr.2d 566, 94 Cal.App.4th 766, review denied.—Notice 1.

Cal.App. 2 Dist. 1998. Person generally has “notice” of fact, within meaning of recording statutes, if he or she has knowledge of circumstances which, upon reasonable inquiry, would lead to that particular fact. West's Ann.Cal.Civ.Code §§ 1107, 1214, 1217.—First Fidelity Thrift & Loan Ass'n v. Alliance Bank, 71 Cal.Rptr.2d 295, 60 Cal.App.4th 1433, review denied.—Records 19.

Cal.App. 2 Dist. 1978. Where, even if depositary bank was aware that item was being negotiated by fiduciary, there was no evidence that bank took check with knowledge of breach of trust or without objective indicia from which it could reasonably have concluded that party presenting check was authorized to transact in the manner proposed, there was no “notice” to depositary bank imposing on depositary bank duty to investigate circumstances, and depositary bank was both a “holder in due course” and a “person who has in good faith changed his position in reliance on the payment”, and thus depositary bank qualified for protection under “final payment rule” upon allowing customer to withdraw amount for which check was written after depositary bank received final payment from drawee bank. West's Ann.Com.Code, §§ 3302(1), 3304, 3418.—Fireman's Fund Ins. Co. v. Security Pacific Nat. Bank, 149 Cal.Rptr. 883, 85 Cal.App.3d 797.—Banks 149; Bills & N 342.

Cal.App. 2 Dist. 1964. Letter which was written by sub-subcontractor to subcontractor and a copy of which was allegedly sent to owners and which stated that it was intended as notice of rescission of agreement to do certain work at certain price because of mistake as to material fact was not “notice” within statute providing that as necessary prerequisite to validity of claim of lien subsequently filed, notice must be given to owner and original contractor. West's Ann.Code Civ.Proc. § 1193.—Neptune Gunite Co. v. Monroe Enterprises, Inc.,

40 Cal.Rptr. 367, 229 Cal.App.2d 439.—Mech Liens 122.

Cal.App. 2 Dist. 1954. The word “notice” as used in provision of the Public Liability Act that local agency is liable for injuries to persons and property resulting from dangerous or defective condition of public property if legislative body, board, or person authorized to remedy the condition had knowledge or “notice” of the defective or dangerous condition and, for a reasonable time after acquiring knowledge or receiving “notice”, failed to remedy the condition or take action reasonably necessary to protect the public against the condition means either actual or constructive notice. Government Code, § 53051; Civ.Code, § 19.—Bady v. Detwiler, 273 P.2d 941, 127 Cal.App.2d 321.—Mun Corp 847.

Cal.App. 2 Dist. 1943. Actual notice of trustor under trust deed or court order vacating former order for postponement of trustee's sale and permitting trustee to proceed forthwith in accordance with law to sell property was not actual “notice” of the sale. St.1937, p. 465, § 17.—Holland v. Pendleton Mortg. Co., 143 P.2d 493, 61 Cal.App.2d 570.—Mtg 355.

Cal.App. 2 Dist. 1943. Mere knowledge by defendant company at time it made loan and received mortgage from another company that plaintiff was an unsecured creditor of other company was not enough to show an intent on part of defendant company to defraud plaintiff or to charge defendant company with “notice” of such intent, if any, entertained by the other company, and, hence, would not authorize subjecting defendant company's mortgage to plaintiff's claim. Civ.Code, § 3439.—Enos v. Picacho Gold Min. Co., 133 P.2d 663, 56 Cal.App.2d 765.—Corp 542(1).

Cal.App. 2 Dist. 1942. Where there are conditions which may tend to create a nuisance, accompanied by surrounding circumstances such as would reasonably put landlord on inquiry, and where a landlord is acquainted with specific facts which tend to subject occupants of the property to dangers, actual knowledge on landlord's part of such facts may warrant the conclusion that there was present “notice” of defects that was equivalent of knowledge thereof.—Turner v. Lischner, 126 P.2d 156, 52 Cal.App.2d 273.—Land & Ten 170(1).

Cal.App. 2 Dist. 1942. Evidence that alleged defective condition of street was created and accepted by city, and that accident in which plaintiff was injured, occurred more than four years thereafter, warranted jury's finding that city had “notice” of defect.—George v. City of Los Angeles, 124 P.2d 872, 51 Cal.App.2d 311.—Mun Corp 819(6).

Cal.App. 2 Dist. 1941. Where notary's certificate, in addition to stating that homestead claimant was personally known to notary, contained parenthetical statement “or proved to me on the oath of himself”, notwithstanding such defect, declaration, having been of record for one year, imported “notice” under the Curative Act, since a declaration of homestead clearly is an instrument “affecting title to real property” within meaning of the Curative

Act. Civ.Code, §§ 1189, 1207, 1262.—Thomas v. Speck, 118 P.2d 365, 47 Cal.App.2d 512.—Home 45.

Cal.App. 2 Dist. 1925. The word "notice" as used in West's Ann. Pen.Code, § 317, making it a felony to offer services to assist accomplishment of miscarriage by any "notice," etc., was intended to include such notices as are sent through the mail; also circulars left upon doorsteps, etc.—People v. McKean, 243 P. 898, 76 Cal.App. 114.

Cal.App. 3 Dist. 1985. Defendant's attorneys' service of file-stamped copy of formal order sustaining demurrer, and specifying time for amendment of complaint, constituted lawful service of "notice" of the order as required by West's Ann. Cal.C.C.P. § 472b.—Parris v. Cave, 219 Cal.Rptr. 871, 174 Cal.App.3d 292.—Plead 218(3).

Cal.App. 4 Dist. 1943. Where defendant, who started working mining claim in December, 1940, had knowledge that property had been located as mining claim by another, that prior locator had claimed it as late as 1937, and that at least one corner post was in place, but defendant did not attempt to erect corner posts and locate property, defendant had constructive "notice" that claim had been patented and belonged to plaintiff, and therefore defendant was a "trespasser" and was liable for value of gold he took, notwithstanding cost of mining and reducing ore was much greater than its value. St.1939, p. 1080, § 2302.—Dolch v. Ramsey, 134 P.2d 19, 57 Cal.App.2d 99.—Mines 51(5).

Cal.App. 4 Dist. 1941. A plaintiff seeking to establish trust in oil royalties and to establish her title to royalties which plaintiff claimed to have purchased from person to whom the United States had issued a prospecting permit, was charged with "notice" that the various transfers of interests in permit property were of record in land office, that oil was discovered, that wells were placed in production, that leases based on production were granted, that royalties were paid, and that an association was organized to manage property of which the permit property was a part. Oil Land Leasing Act, 30 U.S.C.A. § 181 et seq.—Arnold v. Universal Oil Land Co., 114 P.2d 408, 45 Cal.App.2d 522.—Records 19.

Cal.App. 4 Dist. 1941. "Notice" to an agent, who negotiated the purchase of real estate, as to the terms of such purchase, was notice to the principal.—Irvin v. Petitfils, 112 P.2d 688, 44 Cal. App.2d 496.—Princ & A 177(3.1).

Cal.Super. 1942. The commencement of an action in the absence of personal service, service by publication or by mail, could not be regarded as "notice" sufficient to satisfy the constitutional conception of "due process of law" even though it might be so declared by statute. U.S.C.A. Const. Amend. 14; West's Ann.Const. art. 1, § 13.—Bruhnke v. Golden West Wineries, 132 P.2d 102, 56 Cal.App.2d Supp. 943.—Const Law 309(1).

Colo. 1984. "Notice" of the water right sought consists of the resume, compiled from the filed applications with the water clerk, from any persons

seeking a determination of a water right. C.R.S. 37-92-302(1)(a), (2), (3)(a, c).—Pueblo West Metropolitan Dist. v. Southeastern Colorado Water Conservancy Dist., 689 P.2d 594.—Waters 133.

Colo. 1943. Where lease of coal interests containing a reference to a contract of purchase of the leased premises by lessor was recorded, but the contract was not recorded and the contract was canceled before the mineral interests in the premises were quitclaimed to plaintiff, reference to the contract bound only the parties to the lease and was not "notice" to plaintiff, and hence plaintiff did not take title subject to the lease. '35 C.S.A. c. 40, § 113.—Rocky Mountain Fuel Co. v. Clayton Coal Co., 134 P.2d 1062, 110 Colo. 334.—Ven & Pur 230(2).

Colo. 1943. Where purchasers under land contract leased coal interest to defendant and by recorded quitclaim deed reconveyed an undivided one-half interest in minerals under the realty to vendor, and reference was made in the deed to purchasers' unrecorded canceled contract of purchase and undelivered and unrecorded warranty deed from vendor to purchasers, and the mineral interests in the realty were quitclaimed to plaintiff, such instruments were not "notice" to plaintiff and plaintiff did not take title subject to the lease. '35 C.S.A. c. 40, § 113.—Rocky Mountain Fuel Co. v. Clayton Coal Co., 134 P.2d 1062, 110 Colo. 334.—Ven & Pur 230(2).

Colo. 1942. Title to real property is not "marketable" unless the record owner or some one claiming under him is in actual possession, as open, notorious and exclusive possession of real estate under a claim of ownership, even though nothing appears of record, constitutes "notice" of the possessor's claim, and such notice places interested parties upon inquiry.—Federal Farm Mortg. Corp. v. Schmidt, 126 P.2d 1036, 109 Colo. 467.—Ven & Pur 130(7).

Colo. 1942. The object of provision in charter of City and County of Denver for "notice" to mayor of injuries to any person on city street or sidewalk is to require injured person to advise city as to what its alleged negligence consists of and to afford it opportunity at early date to investigate nature and cause of injuries while conditions remain substantially the same. Charter of City and County of Denver, § 158.—Nelson v. City and County of Denver, 122 P.2d 252, 109 Colo. 113.—Mun Corp 812(1).

Colo. 1942. The building of a ditch by plaintiff's predecessor on lands of defendant and defendant's predecessors, the diversion of seepage water arising on such lands and its application by plaintiff's predecessor to a beneficial use, and the filing by such predecessor of a statement of claim for water was substantial "notice", both actual and constructive, to defendant and his predecessors, that such rights as they might have had to water were being invaded, as regards whether plaintiff could claim a superior right to use of water by adverse possession.—Lomas v. Webster, 122 P.2d 248, 109 Colo. 107.—Waters 148.

## NOTICE

Colo. 1941. In workmen's compensation proceeding where order of referee was affirmed by Industrial Commission on July 7, 1941, and not, as stated in notice to administratrix of alleged employer, on July 11, 1941, there was insufficient "notice" of entry of commission's award, and therefore the time for filing petition for review did not commence to run. '35 C.S.A. c. 97, § 376.—Zimmerman v. Industrial Com'n, 120 P.2d 636, 108 Colo. 552.—Work Comp 1876.

Colo. 1941. A notice, posted by employer in his tool house on wall opposite entrance door, that he rejected provisions of Workmen's Compensation Act, was sufficient "notice" of such rejection to employees obtaining tools used in their daily work in such building. '35 C.S.A. c. 97, § 299.—Tarrant v. De Lashmutt, 111 P.2d 635, 107 Colo. 300.—Work Comp 397.

Colo.App.Ct. 1903. To constitute "notice" of an infirmity in a negotiable instrument, or defect in title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.—Wedge Mines Co. v. Denver Nat. Bank, 73 P. 873, 19 Colo.App. 182.

Conn. 1942. In probate proceedings, the giving of the "notice" required by law is legal notice to all parties interested in the estate, whether they have actual knowledge of the proceeding, or not. Gen.St. 1930, § 4884 (C.G.S.A. § 45-167).—Haverin v. Welch, 27 A.2d 791, 129 Conn. 309.—Wills 269.

Conn. 1905. "Notice" to the purchaser of a note may be of two kinds: "Explicit notice" of the fraud or illegality, and "implicit" or "general notice." If the purchaser of notes at the time of buying them had notice or knowledge of some illegality or knowledge of some illegality or fraud which vitiated them, though he was not apprised of its nature, this would be such "general notice" as would affect his title. Mere negligence, however gross, not amounting to this willful and fraudulent blindness, will not of itself amount to notice; but the jury may and should consider the fact of such negligence as it may tend to prove such "general notice."—Mack v. Starr, 61 A. 472, 78 Conn. 184.

Conn.Super. 1983. The term "notice," within a statute requiring that notice of a decision of the zoning board of appeals be published, means something more than a bald assertion that a particular petition was either granted or denied and refers to a notice which includes the name of the owner-applicant, the location of the property, the character of the application, and the general substance of the board's decision. C.G.S.A. §§ 8-7, 8-8.—Bridgeport Bowl-O-Rama v. Zoning Bd. of Appeals of City of Bridgeport, 467 A.2d 126, 39 Conn.Sup. 523, set aside 487 A.2d 559, 195 Conn. 276, on remand 491 A.2d 436, 4 Conn.App. 68.—Zoning 361.

Conn.Super. 1961. No "notice" to be present in probate court, within statute giving one without notice greater time to appeal, means legal, and not actual, notice. C.G.S.A. § 45-289.—Rosow v.

Klein, 167 A.2d 925, 22 Conn.Sup. 232.—Courts 202(5).

Del.Supr. 1956. Where insurance agent was not general agent of insurance company, serving of summons and complaint upon insured in presence of agent was not "notice" within automobile liability policy requiring insured to forward notice of suit and summons and complaint to company.—Vechery v. Hartford Acc. & Indem. Ins. Co., 121 A.2d 681, 49 Del. 560, 10 Terry 560.—Insurance 3170.

Del.Supr. 1937. Agreement between buyer and assignee of conditional sale contract, whereby contract was modified with respect to place where property was to be kept, was sufficient "notice" to assignee of removal of property to another filing district within statute providing that reservation of property in seller is void as to buyers and creditors without notice, where property is removed to another filing district, unless contract is refiled in district to which goods are removed. Rev.Code 1935, §§ 5955, 5964.—Maryland Credit Finance Corp. v. Campbell, 195 A. 277, 38 Del. 575, 8 W.W.Harr. 575.—Sales 472(2).

Del.Supr. 1937. "Notice" as used in statute providing that, when goods sold on conditional sale contract are removed from one filing district to another, reservation of property in seller is void as to buyers without notice unless the contract shall be refiled in district to which goods are removed, means actual notice, oral or written, and is not the written notice which is required of buyer under statute authorizing buyer to remove goods from one filing district to another upon giving written notice. Rev.Code 1935, §§ 5955, 5963, 5964.—Maryland Credit Finance Corp. v. Campbell, 195 A. 277, 38 Del. 575, 8 W.W.Harr. 575.—Sales 473(2).

Del.Supr. 1937. "Notice" as used in statute providing that, when goods sold on conditional sale contract are removed from one filing district to another, reservation of property in seller is void as to creditors without notice unless the contract shall be refiled in district to which goods are removed, means actual notice, oral or written, and is not the written notice which is required of buyer under statute authorizing buyer to remove goods from one filing district to another upon giving written notice. Rev.Code 1935, §§ 5955, 5963, 5964.—Maryland Credit Finance Corp. v. Campbell, 195 A. 277, 38 Del. 575, 8 W.W.Harr. 575.—Sales 474(2).

Del.Ch. 1943. The "notice" given by the record of a real estate mortgage is limited by its contents. Rev.Code 1935, § 3684.—Conly v. Industrial Trust Co., 29 A.2d 601, 27 Del.Ch. 28.—Mtg 171(5).

Del.Ch. 1943. The record of a real estate mortgage specifying the sum secured thereby is "notice" only to the extent and amount of the debt stated and cannot be enlarged to include any other debts and claims not specified. Rev.Code 1935, § 3684.—Conly v. Industrial Trust Co., 29 A.2d 601, 27 Del.Ch. 28.—Mtg 171(5).

Del.Ch. 1943. The object of registry laws in providing for the recordation of an instrument is to afford "notice" of its contents and of all rights, or

interests, created by or embraced within it, to every person subsequently dealing with the subject matter whose interest or duty it is to make a search of the records. Rev.Code 1935, § 3684.—Conly v. Industrial Trust Co., 29 A.2d 601, 27 Del.Ch. 28.—Records 19.

Del.Super. 1942. A railroad crossing is a place of danger and its very presence is "notice" of danger.—Leedom v. Pennsylvania R. Co., 29 A.2d 171, 42 Del. 186, 3 Terry 186.—R R 324(1).

Del.Super. 1942. Rendering a statement to a depositor showing balance claimed by bank is equivalent to a "notice" that any claim in excess of that amount will not be paid and as to such excess the statute of limitations begins to run at once, and the depositor may sue without any subsequent notice.—Keller v. President, Directors and Company of Farmers Bank of State of Delaware, 24 A.2d 539, 41 Del. 471, 2 Terry 471.—Lim of Act 67.

D.C. 1996. There are two types of "notice" for statute of limitations purposes: "actual notice" is that notice which plaintiff actually possesses; "inquiry notice" is that notice which plaintiff would have possessed after due investigation.—Diamond v. Davis, 680 A.2d 364.—Lim of Act 95(1).

D.C. 1995. Under negligence law, to recover against owner or occupier of land plaintiff must show that defendant had either actual or constructive notice of the present existence of the allegedly dangerous condition; continuance of the dangerous condition for an unreasonable period of time usually constitutes such "notice".—Croce v. Hall, 657 A.2d 307.—Neglig 1088.

D.C.Mun.App. 1943. Where prospective purchaser induced broker to return his deposit and came to vendors to purchase less than twenty-four hours later, vendors were not upon "notice" of purchaser's misrepresentation with intent to evade liability for broker's commissions, and could not evade such liability.—Lady v. Realty Associates, 31 A.2d 875.—Brok 56(2).

D.C.Mun.App. 1943. Inadequacy of price may be considered along with other circumstances in determining whether buyer had, or should have had, notice sufficient to put him on inquiry regarding possible defect in title acquired by him, but inadequacy alone is rarely sufficient to constitute such "notice" unless the price paid is merely nominal or absurdly low.—Zweig v. Schwartz, 31 A.2d 857.—Sales 235(3).

D.C.Mun.App. 1943. Where conditional buyer of \$400 diamond ring perpetrated fraud in representing herself to be another person, but sellers did not record conditional sale agreement and secondhand dealer purchased ring for \$75 in usual course of business from one known to the dealer, the price paid was not so inadequate as to constitute "notice" to the secondhand dealer of possible defect in the title acquired by him. D.C.Code, 1940, § 42-103.—Zweig v. Schwartz, 31 A.2d 857.—Sales 473(2).

D.C.Mun.App. 1942. "Notice" that notes represented loans made by banking institution for modernizing of homes under the National Housing Act

was given by words on face of notes "Modernization Loan under National Housing Act", and therefore the notes were required to be interpreted in light of such legislation, the regulations promulgated under its authority and executive action in carrying out its provisions. National Housing Act §§ 1, 2(a), (c)(1), (f), as amended, 12 U.S.C.A. §§ 1702, 1703(a), (c)(1), (f).—U.S. v. Reed, 31 A.2d 673.—Bills & N 116.

Fla. 1947. Published notice of intention to apply to Legislature for passage of special act requiring County Commissioners to pay to board of public instruction designated sum from race track funds plus half of amount of interest to become due on obligations issued by board was sufficient "notice" under Constitution, notwithstanding law enacted provided for payment of larger sum, and made moneys received a trust fund for payment of obligations. Gen.Acts 1947, c. 24224; F.S.A.Const. art. 3, § 21.—Prescott v. Board of Public Instruction of Hardee County, 32 So.2d 731, 159 Fla. 663.—Statut 8.5(2).

Fla. 1942. Where purchaser took possession of premises under verbal contract of purchase without knowledge of mortgage and before it was recorded, purchaser's possession was "notice" to mortgagee that purchaser had a real interest in property, and, hence, purchaser's rights were not affected by the lien.—Scott v. Simmons, 10 So.2d 122, 151 Fla. 628.—Mtg 154(3).

Fla. 1942. Mortgagors dealing with administrator of deceased mortgagee's estate were charged with "notice" of all orders and judgments of probate court in connection with administrator's action in settling mortgage debt, including order requiring mortgagors to execute second mortgage for portion of debt in excess of amount of Home Owners' Loan Corporation bonds accepted by administrator.—Rinehart v. Phelps, 7 So.2d 783, 150 Fla. 382.—Ex & Ad 87.

Fla.App. 1 Dist. 1989. "Notice" of hearing on motion for modification of dissolution judgment entails right to be apprised of issues movant intends to argue. West's F.S.A. § 61.1312; West's F.S.A. RCP Rules 1.070(f), 1.110(h).—Brown v. Brown, 552 So.2d 271.—Divorce 164.

Fla.App. 1 Dist. 1959. The written "notice" required by the statute of injury for which compensation is claimed is not the equivalent of the written "claim" required by other sections of the compensation act so as to make actual notice of an injury the equivalent of actually filing a written claim for compensation. F.S.A. §§ 440.01 et seq., 440.18(2), 440.19(1)(a, c), 440.25(2), 440.34(1).—A. B. Taff & Sons v. Clark, 110 So.2d 428.—Work Comp 1263.

Fla.App. 2 Dist. 2001. "Notice" means reasonable notice, including a meaningful opportunity to prepare and to defend against allegations of motion or complaint.—Lucero v. Lucero, 793 So.2d 144.—Motions 21; Plead 48.

Fla.App. 5 Dist. 1999. "Notice," for purposes of a temporary injunction, is a meaningful opportunity to prepare in order to present evidence and secure

## NOTICE

a record of the proceedings. West's F.S.A. RCP Rule 1.610.—Florida High School Activities Ass'n, Inc. v. Benitez, 748 So.2d 358.—Inj 143(1).

Fla.App. 5 Dist. 1996. Former husband did not receive "notice" of former wife's motion to modify alimony award when notice was sent to incorrect address listed in order of withdrawal of husband's counsel.—Baxter v. Baxter, 684 So.2d 886.—Divorce 245(3).

Ga. 1980. The "notice" contemplated by the code section which states that the court shall direct notice of a hearing on an application to confirm a foreclosure sale to be given the debtor at least five days prior thereto is personal service and not notice by certified mail. Code, § 67-1505.—Henry v. Hiwassee Land Co., 269 S.E.2d 2, 246 Ga. 87.—Mtg 367.

Ga. 1967. Fact that both newspapers in city of Augusta for more than 30 days prior to date set forth for holding election relative to annexing into city of Augusta certain parcels of territory in Richmond county published as news items on many occasions facts as to date of election did not constitute "notice" of the election as required by statute. Code, § 34-1702; Laws 1953, Nov.-Dec.Sess. p. 2610.—Richmond County Business Ass'n v. Richmond County, 155 S.E.2d 395, 223 Ga. 337.—Newsp 3(1).

Ga. 1943. Where neither purchaser's deed nor any deed in his chain of title contained any restrictions, evidence of notice to purchaser that citizens of community considered land to be restricted property without specifically identifying lot purchased as covered by any particular restriction was insufficient in law to establish that lot was purchased with "notice" that its sale and use were restricted by extraneous agreement among owners of several lots in subdivision.—England v. Atkinson, 26 S.E.2d 431, 196 Ga. 181.—Inj 128(6).

Ga. 1943. Under statute invalidating a voluntary conveyance as against subsequent bona fide purchasers for value without "notice" thereof, to sustain a voluntary conveyance against a subsequent bona fide purchaser from the grantor for a valuable consideration, notice to the purchaser must be actual. Code, § 96-205.—Roop Grocery Co. v. Gentry, 25 S.E.2d 705, 195 Ga. 736.—Fraud Conv 192.

Ga. 1939. The "notice" which the law presumes from adverse possession of land is actual, not constructive notice. Code 1933, §§ 37-116, 85-408.—Dyal v. McLean, 3 S.E.2d 571, 188 Ga. 229.—Notice 3.

Ga. 1939. The working of timber for turpentine purposes is an act of such nature as may amount to "adverse possession," and thus constitute "notice." Code 1933, §§ 37-116, 85-408.—Dyal v. McLean, 3 S.E.2d 571, 188 Ga. 229.—Notice 3.

Ga. 1939. Possession of land is "notice" not only of whatever title the occupant has but of whatever right he may have in the property. Code 1933, § 85-408.—Dyal v. McLean, 3 S.E.2d 571, 188 Ga. 229.—Notice 3.

Ga. 1928. "Notice" is not synonymous with knowledge, since notice may refer either to a fact which a person knows, or which he is legally bound to inform himself of, such as the description of a lot in a deed.—Feingold v. McDonald Mortgage & Realty Co., 145 S.E. 90, 166 Ga. 838.

Ga. 1899. The terms "knowledge" and "notice" are not synonymous or interchangeable, and should not be confounded the one with the other. That which clearly does not amount to positive knowledge may often in a legal sense constitute actual notice. Accordingly, in applying a statute which contemplates that only actual notice shall affect the rights of one acting in good faith, the language used, expressly or by necessary implication, negating the idea that he is chargeable with constructive notice as well, the mere fact that he did not have precise and definite knowledge concerning the matter in question cannot be considered as having any real importance whatever. On the contrary, the distinction to be drawn in a case calling for the application of such a statute is that between actual and constructive notice, and not between actual knowledge and constructive notice.—Clarke v. Ingram, 33 S.E. 802, 107 Ga. 565.

Ga.App. 1991. Creditor's attorney's demand letter providing that debtor would be relieved of its obligation to pay attorney fees under terms of note if it paid principal and interest "within ten (10) days from the date of this letter" did not constitute substantial compliance with statutory requirement that such "notice" inform debtor that payment had to be made within ten days from date of "receipt" of the letter. O.C.G.A. § 13-1-11.—Professional Cleaners v. Phenix Supply Co., 411 S.E.2d 781, 201 Ga.App. 634.—Costs 194.32.

Ga.App. 1982. Where there was evidence to authorize findings that employer knew of employee's preexisting injury and of worsening of employee's condition so that it could have made investigation had it chosen to do so, such was sufficient to meet "notice" requirements of workers' compensation statute. Code, § 114-303.—Dairymen, Inc. v. Wood, 291 S.E.2d 763, 162 Ga.App. 430.—Work Comp 1240.

Ga.App. 1975. If cancellation of policy is attempted by mailing notice, the mailing constitutes "notice" to insured of cancellation at time prescribed in notice, and subsequent failure of post office to deliver notice has no effect on cancellation and insurer is not required to prove actual receipt of notice by insured. Code, § 56-2430.—Harris v. U. S. Fidelity & Guaranty Co., 216 S.E.2d 127, 134 Ga.App. 739.—Insurance 1929(7), 1935.

Ga.App. 1967. Filing of supplemental agreement stating that workmen's compensation claimant returned to work on certain date and that liability for temporary total disability ceased on that date and of final settlement receipt constituted "notice" to state board of workmen's compensation of final payment of the claim so that board was not authorized to review award or settlement upon claimant's application filed more than two years after filing of supplemental agreement and final settlement re-

ceipt. Code, § 114–709.—Aetna Cas. & Sur. Co. v. Groover, 154 S.E.2d 828, 115 Ga.App. 418.—Work Comp 2073.

Ga.App. 1964. “Notice” required by statute to employer of injury to employee is only that which will put employer on notice to investigate if he sees fit. Code, § 114–303.—Cofield v. Liberty Mut. Ins. Co., 138 S.E.2d 115, 110 Ga.App. 225.—Work Comp 1221.

Ga.App. 1964. Notice of injury given by workers’ compensation claimant to personnel worker whose practice was to report injuries to plant manager or his assistant if notice of injury looked like injury was bad was “notice” to “agent” or “representative” as required by statute and was sufficient. Code, § 114–303.—Cofield v. Liberty Mut. Ins. Co., 138 S.E.2d 115, 110 Ga.App. 225.—Work Comp 1219.

Ga.App. 1963. A “notice” of injury is sufficient which will put employer on notice of injuries so that it may make an investigation if it sees fit to do so. Code, § 114–303.—Employers Mut. Liability Ins. Co. v. Dyer, 134 S.E.2d 49, 108 Ga.App. 623.—Work Comp 1221.

Ga.App. 1949. Publication of notice of bankruptcy proceedings in a newspaper received by creditor was not sufficient “notice” to creditor to render discharge in bankruptcy a release of debtor from the debt pursuant to statute even though debt was not duly scheduled. Bankr.Act, § 17, 11 U.S.C.A. § 35.—Tyler v. Jones County Bank, 52 S.E.2d 547, 78 Ga.App. 741.—Bankr 3361.

Ga.App. 1944. A “notice” of an injury is sufficient which will put employer on notice of the injury so that it might make an investigation if it sees fit to do so, and it is not necessary that a notice be given with a view to claiming compensation.—Railway Exp. Agency v. Harper, 29 S.E.2d 434, 70 Ga.App. 795.—Work Comp 1221.

Ga.App. 1943. The provision for “notice” to Industrial Board of the final payment of compensation, as used in statute authorizing Board to review any award or settlement made between parties and filed with board within two years from date that board is notified of final payment of claim, was sufficiently complied with by insurance carrier giving such notice to board. Ga.Code Ann. § 114–709.—Kirkland v. Employers Liability Assur. Corp., 25 S.E.2d 723, 69 Ga.App. 433.—Work Comp 2016, 2073.

Ga.App. 1943. Under statute authorizing Industrial Board to review any award or settlement made between parties and filed with board within two years from date that board is notified of final payment of the claim, “notice” to the board of final payment of the claim satisfied requirements of statute without giving notice thereof to claimant. Ga. Code Ann. § 114–709.—Kirkland v. Employers Liability Assur. Corp., 25 S.E.2d 723, 69 Ga.App. 433.—Work Comp 2016.

Ga.App. 1942. That defendant had knowingly admitted an intoxicated person into its motion picture theater did not put defendant upon “notice”

that an intoxicated person might reasonably be expected to vomit on the theater floor so as to entitle a patron to recover for injuries sustained by a fall caused by slipping upon the vomitus. Code, § 105–401.—United Theatre Enterprises v. Carpenter, 23 S.E.2d 189, 68 Ga.App. 438.—Theaters 6(12).

Ga.App. 1942. The words of description in a chattel mortgage may be sufficient to create a lien on the property and yet insufficient of themselves to import “notice” of the lien created.—Master Loan Service v. Maddox, 23 S.E.2d 179, 68 Ga.App. 429.—Chat Mtg 47.

Ga.App. 1942. Electric power company’s meter reader was not such a person that “notice” to him of any defective and dangerous wiring on premises of a customer of the company would bind the company.—Milligan v. Georgia Power Co., 22 S.E.2d 662, 68 Ga.App. 269.—Princ & A 178(1).

Ga.App. 1942. A notice given by tenant to landlord of defects in roof of rented, one-story dwelling house, resulting in leakage at various points including through the roof and ceiling of front porch did not charge landlord with “notice” of or with negligence in failing to discover, the hidden defect in the floor of porch which because it was rotten underneath broke causing injury to tenant’s wife so as to render landlord liable therefor.—Gibson v. Littlejohn, 21 S.E.2d 248, 67 Ga.App. 597.—Land & Ten 164(6).

Ga.App. 1942. Where landlord is notified that premises are out of repair, it is his duty to investigate, and, if he fails within reasonable time to make the repairs, he is chargeable with “notice” of all the defects that a proper inspection would have disclosed.—Coker v. Murphrey, 18 S.E.2d 572, 66 Ga.App. 586.—Land & Ten 164(6).

Ga.App. 1942. Where life tenant is in possession, use and enjoyment of property by remainderman is postponed until death of life tenant, so that no act of levying officer in seizing and taking possession of property can amount to “notice” to the remainderman, and entry of levy on attachment reciting such seizure and taking possession is not valid seizure against remainderman.—Oliver v. Parramore, 18 S.E.2d 562, 66 Ga.App. 584.—Attach 167, 171.

Ga.App. 1941. The possession of realty by son for about 25 years under a parol gift from his mother, was “notice” to the world of his claim and rights.—Holton v. Mercer, 15 S.E.2d 253, 65 Ga.App. 53.—Ven & Pur 232(1).

Ga.App. 1935. In action on life policy, answer setting up existence of prior policy in defendant company covering insured’s life without authorization by endorsements required by policy terms stated no defense because disclosing by facts pleaded that insurer had “implied actual notice” of existence of prior policy. “Notice” is “actual” when one either has knowledge of the facts, or is conscious of having the means of knowledge, although he may not use them. “Actual notice” may be divided into “express” and “implied.” “Express notice” em-

brates, not only what may fairly be called "knowledge," from the fact that it is derived from the highest evidence to be communicated by the human senses, but also that which is communicated by direct and positive information, either written or oral, from persons who are personally cognizant of the fact communicated. "Implied notice" arises when the party to be charged is shown to have had knowledge of such facts and circumstances as would lead him, by the exercise of due diligence, to a "knowledge" of the principal fact. The terms "knowledge" and "notice" are not synonymous or interchangeable. That which does not clearly amount to positive "knowledge" may often, in a legal sense, constitute "actual notice."—Interstate Life & Acc. Co. v. Wilson, 183 S.E. 672, 52 Ga. App. 171.

Ga.App. 1924. Any circumstance which would place a prudent man upon his guard, in purchasing negotiable paper, is sufficient to constitute "notice" to a purchaser of such paper before it is due.—Bank of Commerce of Summerville v. Knowles, 124 S.E. 910, 32 Ga.App. 800.

Idaho 1943. "Notice" to employer of employee's death is notice to employer's surety under Workmen's Compensation Law. Code 1932, §§ 43-1205, 43-1806.—In re Cain, 133 P.2d 723, 64 Idaho 389.—Work Comp 1219.

Idaho 1943. Where livestock sold by defendant was branded and brand was duly registered and filed in Department of Agriculture as plaintiff's brand, defendant had "notice" of plaintiff's ownership of livestock having such brand. Code 1932, §§ 24-1004, 24-1011.—Radermacher v. Daniels, 133 P.2d 713, 64 Idaho 376.—Anim 10.

Idaho 1942. Where employer's foreman was present in hospital a few weeks after accident, when compensation claimant's condition was apparent, and discussed the condition with employer's contract physician, the employer was placed on "notice" of the injury and its failure to investigate the case precluded it from contending that claimant's failure to give notice of accident within required time was prejudicial.—Clayton v. Hercules Mining Co., 127 P.2d 762, 64 Idaho 34.—Work Comp 1253.

Idaho 1931. Attorney's receiving formal findings and conclusions signed and mailed by judge held actual "notice" of court's decision within statute requiring filing of cost bill (C.S. § 7218).—Harris v. Chapman, 5 P.2d 733, 51 Idaho 283.—Costs 203.

Idaho 1931. That bankrupt, liable on notes, notified holder's attorney of bankruptcy, held not "notice" to holder within Bankruptcy Act; personal notice being necessary (C.S. § 8192, as amended by Laws 1927, c. 52; Bankr. Act § 17 [11 U.S.C.A. § 35]).—Interstate Credit League v. Widdison, 297 P. 1106, 50 Idaho 493.—Bankr 3361.

Ill. 1943. Where purchasers of servient tenement contracted with reference to easement of ingress and egress, purchasers had "notice" of continued existence of easement, and that the interest of the dominant estate therein had not been waived by abandonment.—Chicago Title & Trust Co. v.

Wabash-Randolph Corp., 51 N.E.2d 132, 384 Ill. 78.—Ease 22.

Ill. 1942. One purchasing at executor's sale of realty to pay debts of decedent was bound to examine the title thereto, and take "notice" of any interest in the realty appearing of record, the holder of which was not made a party to proceeding to sell the realty. Ill.Rev.Stat.1937, c. 3, § 100.—Alward v. Borah, 44 N.E.2d 865, 381 Ill. 134.—Ex & Ad 388(4).

Ill. 1942. Possession of real estate by grantee in a deed is "notice" although the deed has not been recorded. S.H.A. ch. 30, § 29.—Miller v. Bullington, 44 N.E.2d 850, 381 Ill. 238.—Ven & Pur 232(8).

Ill. 1942. Possession of premises by landlord through his tenant is "notice" of landlord's right. S.H.A. ch. 30, § 29.—Miller v. Bullington, 44 N.E.2d 850, 381 Ill. 238.—Ven & Pur 232(9).

Ill. 1942. One having "notice" of facts which put a prudent man on inquiry is chargeable with knowledge of other facts which he might have discovered by diligent inquiry, and whatever is notice enough to excite attention and put the party on his guard is notice of everything to which such inquiry might have led and every unusual circumstance is a ground of suspicion and demands investigation.—Miller v. Bullington, 44 N.E.2d 850, 381 Ill. 238.—Notice 6.

Ill. 1942. A master's deed, issued within five years after expiration of period of redemption from mortgage foreclosure, but not recorded until after recording of quitclaim deed from former owner, was superior to quitclaim deed where quitclaim deed holder's knowledge that part of premises had been conveyed by purchaser at foreclosure sale to his daughter before his death, and that premises were in possession of a tenant, was sufficient to put quitclaim deed holder on "notice" and render him chargeable with knowledge of existence of master's deed. Smith-Hurd Stats. c. 30, § 29; c. 77, § 31.—Miller v. Bullington, 44 N.E.2d 850, 381 Ill. 238.—Ven & Pur 228(3).

Ill. 1942. One having "notice" of facts which would put a prudent man on inquiry is chargeable with knowledge of other facts he might have discovered by diligent inquiry, and whatever is notice enough to excite attention and put the party on his guard is notice of everything to which such inquiry might have led.—Reed v. Eastin, 41 N.E.2d 765, 379 Ill. 586.—Notice 6.

Ill. 1941. Where deed conveying undivided one-half interest in oil and gas was procured by fraud, but grantors retained the other undivided one-half interest in oil and gas and all interest in the surface, grantors' possession of the surface was not "adverse" to the interests that the deed purported to convey, and therefore the grantors' possession did not serve as "notice" to the grantee's grantees of any equitable right the original grantors claimed against the interest which their deed purported to convey to the original grantee.—Logue v. Von Al-

## NOTICE

28B W&P-- 190

men, 40 N.E.2d 73, 379 Ill. 208, 140 A.L.R. 251.—Ven & Pur 232(10).

Ill. 1936. Where body of employee who was last seen alive on January 21, 1933, was recovered from river on April 9, 1933, widow's suggestion to employer within 3 weeks of disappearance that employee might have fallen into river held sufficient "notice" of accident. S.H.A. ch. 48, § 161.—Consumers Co. v. Industrial Commission, 4 N.E.2d 34, 364 Ill. 145, 107 A.L.R. 811.—Work Comp 1221.

Ill. 1917. Whatever is sufficient to put a party upon inquiry which would lead to the truth is "notice."—German-American Nat. Bank of Lincoln v. Martin, 115 N.E. 721, 277 Ill. 629.—Notice 6.

Ill. 1913. Hard Roads Law 1883, p. 132, § 1, provides for an election on the question of levying a hard road tax and declares that on petition of the requisite number of landowners who are legal voters, unless a special election is requested, the town clerk is required, on giving notice of the annual town election, also to give notice that a vote will be taken at said election for or against levying the tax, but, if a special election is requested by the petition, it shall be called as provided for calling special elections in section 4a, which declares that where the people have at any time voted for such special tax, or concurrently with the election for such special tax, if the commissioners desire to expend on hard roads in their town or district more than is available to them from other sources, they may call a special election to vote on the proposition. Held, that the word "call" for the election was used in the act synonymously with the word "notice," and that it was only when a petition under section 1 was for a vote at a special election that the notice must comply with section 4a, and that, where the vote was to be taken at the annual town election, the giving of three notices, as required for the annual town election, was sufficient.—People ex rel. Duncan v. Gough, 103 N.E. 685, 260 Ill. 542.

Ill. 1907. "Notice," in connection with the rule that purchasers of corporate stock in good faith without "notice" that it is unpaid are not liable for the balance due on it, must be given the ordinary signification of that term, and means knowledge that the stock was unpaid, or knowledge of such facts as would have put an ordinarily prudent man on inquiry, when the inquiry might reasonably be expected to lead him to knowledge that the stock was unpaid.—Gillett v. Chicago Title & Trust Co., 82 N.E. 891, 230 Ill. 373.

Ill.App. 1 Dist. 2001. "Notice" to the purchaser of the property regarding the claim, which precludes the purchaser from having bona fide purchaser status as to the claim, may be actual or constructive, and contemplates the existence of circumstances or facts either known to a prospective purchaser or of which he is chargeable with knowledge which imposes upon such purchaser the duty of inquiry.—Schaffner v. 514 West Grant Place Condominium Ass'n, Inc., 258 Ill.Dec. 580, 756 N.E.2d 854, 324 Ill.App.3d 1033.—Ven & Pur 229(1).

Ill.App. 1 Dist. 1943. The statutes requiring persons bringing injury actions against cities to file "notice" to the city attorney stating the place where the accident occurred does not manifest an intent that the terms of the notice should be used to prevent recovery by a meritorious claimant, but if the statement so designates the place that city officers can by reasonable diligence, and without further information from plaintiff, find the exact place where the damage allegedly was received, the notice is sufficient. S.H.A. ch. 70, §§ 7, 8.—Bryant v. City of Chicago, 49 N.E.2d 654, 319 Ill.App. 524.—Mun Corp 741.50.

Ill.App. 1 Dist. 1943. Under statutes requiring persons bringing injury actions against cities to file in the city attorney's office a notice giving the place where the accident occurred, a "notice" stating that plaintiff while walking on a specified place, near a specified avenue in the city of Chicago, stepped into a hole in the sidewalk on such place, near such avenue, was sufficient; where sidewalk on such place averaged 6 feet wide, parkway was 11 feet wide, the street proper was about 66 feet wide, and hole was about one foot wide, two feet long, and three inches deep. S.H.A. ch. 70, §§ 7, 8.—Bryant v. City of Chicago, 49 N.E.2d 654, 319 Ill.App. 524.—Mun Corp 812(7).

Ill.App. 2 Dist. 1999. Hearing that is required as precondition to ordering a defendant to reimburse county for cost of court-appointed counsel must, at a minimum, provide defendant with notice that the trial court is considering imposing a payment order and give defendant an opportunity to present evidence of his ability to pay and other relevant circumstances; required "notice" includes informing defendant of the court's intention to hold such a hearing, what action the court may take as a result of the hearing, and the opportunity defendant will have to present evidence or otherwise be heard. S.H.A. 725 ILCS 5/113-3.1(a).—People v. Spotts, 239 Ill.Dec. 341, 713 N.E.2d 1191, 305 Ill.App.3d 702.—Costs 314.

Ill.App. 2 Dist. 1976. Evidence that holder required full assurance from transferor of \$35,000 note of payment of at least \$20,000 if maker defaulted, that note was transferred in exchange for stock of company which had never made profit, and that transferor's terms of transfer required that transfer be concealed from maker, was insufficient to show that holder had "notice" of fraud in original transfer of note from maker to payee. S.H.A. ch. 26, § 1-201(25).—Ritz v. Karstenson, 350 N.E.2d 870, 39 Ill.App.3d 877.—Bills & N 525.

Ill.App. 2 Dist. 1960. Under the statute respecting third-party common-law action against negligent third party by employee receiving compensation from his employer and requiring the employee to "forthwith" notify employer of existence of such action, intention of Legislature is that the "notice" shall be given forthwith in view of the use of the word "shall" and that the giving of the notice is mandatory. Ill.Rev.Stat.1955, c. 48, § 138.5, and (b).—Legler v. Douglas, 167 N.E.2d 813, 26 Ill.App.2d 365.—Work Comp 2176.

Ill.App. 2 Dist. 1941. The expression of a holder's or transferor's fiduciary character on face of a negotiable instrument is "notice" to purchaser of a probable limited or restricted authority. S.H.A. ch. 98, §§ 72, 73, 78, 215.—Schmahl v. Aurora Nat. Bank, 35 N.E.2d 689, 311 Ill.App. 228.—Bills & N 341.

Ill.App. 4 Dist. 1998. "Notice" of hearing on defendant's ability to pay for appointed counsel means only that trial court should inform defendant in open court immediately before hearing of court's intention to hold hearing, of what action court may take as result of hearing, and opportunity that defendant will have to present evidence and otherwise to be heard regarding whether any payment order should be entered, and if so, in what amount. S.H.A. 725 ILCS 5/113-3.1(a).—People v. Johnson, 231 Ill.Dec. 698, 696 N.E.2d 1269, 297 Ill.App.3d 163.—Costs 314.

Ill.App. 4 Dist. 1943. "Notice" to an attorney is notice to the client, and the neglect of the attorney is the neglect of the client, and the client takes the consequence as though he had been the actor.—Williamson v. Draper, 48 N.E.2d 453, 318 Ill.App. 637.—Atty & C 77, 104.

Ill.App. 4 Dist. 1943. Where proper process has issued, and attorney in the case is in court, he is chargeable with "notice" of all orders affecting pending causes.—Williamson v. Draper, 48 N.E.2d 453, 318 Ill.App. 637.—Notice 5.

Ill.App. 4 Dist. 1941. A municipality could not be held liable for injuries resulting from defect in cover of a catch basin unless it had actual or constructive notice of the unsafe condition, but "notice" could be imputed if such condition existed for such a length of time that the public authorities by the exercise of reasonable care and diligence might have known of the condition.—Baker v. Granite City, 37 N.E.2d 372, 311 Ill.App. 586.—Mun Corp 788, 791(1).

Ind. 1964. Letters which were sent by Board of Trustees of Indiana State Teachers' Retirement Fund to serviceman and which indicated that board was returning serviceman's check representing contribution for school year because of "recent decision" that teachers would be allowed only six military service years toward retirement credit did not constitute "notice" within administrative adjudication and Court Review Act of 1947 and had no legal effect. Burns' Ann.St. §§ 63-3001 to 63-3006.—State ex rel. Rainey v. Board of Trustees of Indiana State Teachers' Retirement Fund, 201 N.E.2d 564, 245 Ind. 693.—Schools 146(7).

Ind. 1950. Paper entitled "Teacher Contract Expires" reciting that services would terminate on stated date was a sufficient "notice" to teacher that contract would not be renewed for ensuing year. Burns' Ann.St. § 28-4321.—State ex rel. Sights v. Edwards, 89 N.E.2d 443, 228 Ind. 13.—Schools 147.34(2).

Ind. 1942. In suit by bankrupt against judgment creditor and sheriff to enjoin the sheriff from enforcing an execution on a judgment in favor of

judgment creditor against bankrupt, on ground that discharge in bankruptcy relieved bankrupt from payment of the judgment, allegation that judgment creditor had actual notice of the filing of the bankruptcy proceedings, and of the pendency of the proceedings, was sufficient to warrant admission of testimony as to knowledge of attorney of judgment creditor with respect to the bankruptcy proceedings, and the imputation of such knowledge to the judgment creditor, since "notice" is "knowledge" under the Bankruptcy Act. Bankr.Act § 17, 11 U.S.C.A. § 35.—Wise v. Curdes, 40 N.E.2d 122, 219 Ind. 606.—Bankr 3418.

Ind. 1941. The purpose of "notice" required by statutes to be given a city before an action can be brought for damages arising from tort is to inform city officials with reasonable certainty of the time, place, cause and nature of the accident and the general nature and extent of the injuries so that the city may investigate all the facts pertaining to its liability and prepare its defense, or adjust the claim. Burns' Ann.St. §§ 48-8001, 48-8002, 48-8003.—Aaron v. City of Tipton, 32 N.E.2d 88, 218 Ind. 227.—Mun Corp 741.15.

Ind. 1888. "Notice" is defined by Webster to mean "intelligence, by whatever means communicated; knowledge given or received."—White v. Fleming, 16 N.E. 487, 114 Ind. 560.

Ind.App. 2000. "Notice" is a term of art within the insurance context, and sufficient notice by an insured to an insurer involves more than just promptly notifying an insurer of a claim, but also encompasses an insurer's right to promptly investigate a claim or to control the defense of a lawsuit with which it might be subjected to liability as an insurer of an insurance policy.—Paint Shuttle, Inc. v. Continental Cas. Co., 733 N.E.2d 513, transfer denied 753 N.E.2d 5.—Insurance 3142.

Ind.App. 2000. For "notice" to be proper under an insurance policy it must be (1) timely as proscribed by the language of the insurance policy, and (2) "true" in the sense that the insured allows the insurer to exercise its rights of investigation and defense of a claim under the policy.—Paint Shuttle, Inc. v. Continental Cas. Co., 733 N.E.2d 513, transfer denied 753 N.E.2d 5.—Insurance 3153, 3163.

Ind.App. 1995. "Notice" within meaning of relation-back rule refers to actual notice by either added party or its agent. Trial Procedure Rule 15(C)(1).—Shafer by Shafer v. Lieurance, 659 N.E.2d 229.—Lim of Act 124.

Ind.App. 2 Dist. 1980. Mere delivery of notation of vote contained in handwritten minutes of school board meeting was not final, formal, and unequivocal "notice" to superintendent of school board's determination that it would not renew superintendent's contract for the following year, as required by statute governing such notice. IC 1971, 20-6-4-4.—Salem Community School Corp. v. Richman, 406 N.E.2d 269.—Schools 147.34(2).

Ind.App. 1943. An employer which had written notice during employee's lifetime that he claimed to be suffering from silicosis contracted during his

employment, and which had written notice of employee's death and was invited to attend the autopsy, received sufficient "notice" of employee's dismemberment as required by statute. Burns' Ann.St. § 40-2225.—Harbison-Walker Refractories Co. v. Harmon, 51 N.E.2d 398, 114 Ind.App. 144.—Work Comp 1218, 1224.

Ind.App. 1943. An assessment against stock of insolvent Michigan bank was not invalid for failure to give notice of proposed plan of reorganization of bank, since "notice" required is notice of any plan for reorganization of insolvent bank, and has nothing to do with levy of assessment. Comp.Laws Mich.1929, § 11945; Pub.Laws Mich.1933, No. 95, § 7.—McKinstry v. Russell, 49 N.E.2d 349, 114 Ind.App. 27.—Banks 47(2).

Ind.App. 1942. Where employer had full knowledge of disability of employee and entered into agreement, approved by Industrial Board, for payment of compensation and agreement was acted upon by parties, the employer had sufficient "notice" of disability of the employee and it was not necessary after the employee's death for employee's widow to give employer further notice to entitle her to compensation under the Workmen's Occupational Disease Act. Burns' Ann.St. § 40-2201 et seq.—Continental Roll & Steel Foundry Co. v. Slocum, 41 N.E.2d 635, 111 Ind.App. 438.—Work Comp 1254.

Ind.App. 1942. Employer had sufficient "notice" of death of employee to entitle employee's widow to recover compensation under the Workmen's Occupational Disease Act where the employer paid to the widow money to cover burial expenses in accordance with the Workmen's Compensation Act. Burns' Ann.St. § 40-2201 et seq.; § 40-1201 et seq.—Continental Roll & Steel Foundry Co. v. Slocum, 41 N.E.2d 635, 111 Ind.App. 438.—Work Comp 1254.

Ind.App. 1941. The rule that whatever puts a person on inquiry amounts in law to "notice" of such facts as an inquiry pursued with ordinary diligence and understanding would have disclosed is applicable to charge an insurer with notice.—Travelers Ins. Co. v. Eviston, 37 N.E.2d 310, 110 Ind.App. 143.—Insurance 3090.

Ind.App. 1941. Notice to or knowledge of an agent while acting within the scope of his authority and with reference to matters over which his authority extends is "notice" to or knowledge of his principal.—Conrad v. Olds, 37 N.E.2d 297, 110 Ind.App. 208.—Princ & A 178(1).

Ind.App. 1941. Under life policy provision that failure to pay any policy loan, automatic premium loan, or interest thereon should not avoid policy unless total indebtedness equalled or exceeded full amount available, and in no event until 30 days after notice thereof had been mailed to insured or assignee, a "notice" that policy would terminate 30 days hence because indebtedness equalled cash value was sufficient without giving of notice after date specified for, lapse of policy. Acts 1909, c. 95, § 5, subd. 9, as amended by Burns' Ann.St. § 39-801.—Lincoln Nat. Life Ins. Co. v. Sobel, 35 N.E.2d 121,

110 Ind.App. 331, rehearing denied 37 N.E.2d 698, 110 Ind.App. 331.—Insurance 2044(1).

Ind.App. 1941. Under statute requiring notice to city of injury caused by defective street, if notice directs attention of officers of municipality with reasonable certainty as to place of accident, requirements of the "notice" have been met. Burns' Ann.St. § 48-8001.—Volk v. Michigan City, 32 N.E.2d 724, 109 Ind.App. 70.—Mun Corp 812(7).

Iowa 1997. "Notice," in statute requiring that employer, in order to preserve lien against claimant's recovery from third party for workers' compensation payments for which employer is liable, timely notify clerk of court of lien after receiving "notice" of suit from employee, means the original notice which employee is required to serve on employer, not actual notice. I.C.A. § 85.22, subd. 1.—Firstar Bank of Burlington, Iowa v. Hawkeye Paving Corp., 558 N.W.2d 423.—Work Comp 2252.

Iowa 1970. "Notice" is either knowledge or having means of knowledge, although such means may not be used.—Raub v. General Income Sponsors of Iowa, Inc., 176 N.W.2d 216.—Notice 1.

Iowa 1958. The statute concerning cancellation of insurance which provides for the "giving of notice" intended that "giving" means that the insured shall personally receive the notice and that the "notice" means he shall receive it so that he becomes aware of the notice, and this cannot be accomplished by depositing a document in the mail which the insured may or may not receive. I.C.A. §§ 4.1(2), 515.1 et seq., 515.81, 518.1 et seq., 518.29.—Selken v. Northland Ins. Co., 90 N.W.2d 29, 249 Iowa 1046, opinion supplemented 90 N.W.2d 388, 249 Iowa 1046.—Insurance 1929(7).

Iowa 1943. The word "notice" as used in statute invalidating unrecorded conditional sales of personality against any purchaser of the buyer without notice means either knowledge of the fact in question or information as to facts which would put a prudent man upon inquiry which, if prosecuted with reasonable diligence, would lead to actual knowledge of the fact in question. Code 1939, § 10016.—State Sav. Bank, Sharpsburg v. Universal Credit Co., 8 N.W.2d 719, 233 Iowa 247.—Sales 473(2).

Iowa 1943. Under the recording act whether information is sufficient to put a purchaser or creditor of a conditional buyer on "notice" of an unrecorded conditional sale contract is a "mixed question of law and fact", and notice is sufficient if it would put a reasonable man upon inquiry which would certainly lead to a discovery of rights under the contract. Code 1939, § 10016.—State Sav. Bank, Sharpsburg v. Universal Credit Co., 8 N.W.2d 719, 233 Iowa 247.—Sales 473(2).

Iowa 1943. Under the recording act a purchaser from a conditional buyer is not required to make inquiry or to use diligence to ascertain the facts, and if he has such notice of an unrecorded conditional sale contract as to put him on inquiry, he has actual "notice", but if he does not have actual notice, his negligence in failing to make inquiry is

immaterial unless it amounts to fraud. Code 1939, § 10016.—State Sav. Bank, Sharpsburg v. Universal Credit Co., 8 N.W.2d 719, 233 Iowa 247.—Sales 473(2).

Iowa 1943. To constitute “notice” of an unrecorded conditional sale contract within the recording act, the facts must be such as to bind the conscience of the purchaser from the conditional buyer, to alarm him and to put him upon such inquiry, as if prosecuted, would lead him to a knowledge of the prior rights. Code 1939, § 10016.—State Sav. Bank, Sharpsburg v. Universal Credit Co., 8 N.W.2d 719, 233 Iowa 247.—Sales 473(2).

Iowa 1943. Where unrecorded conditional sales contract of automobile between manufacturer and dealer which manufacturer had assigned to defendant had passed through plaintiff bank for collection of a differential payment and securing dealer’s signature, and dealer had assigned accommodation note and conditional sales contract for same automobile between dealer and salesman to plaintiff, that defendant’s contract had passed through plaintiff did not constitute “notice” to plaintiff within the recording act. Code 1939, § 10016.—State Sav. Bank, Sharpsburg v. Universal Credit Co., 8 N.W.2d 719, 233 Iowa 247.—Sales 473(2).

Iowa 1943. Due filing and recording of a fraudulent conveyance constitutes “notice” not only of conveyance but of its fraudulent character.—Olson v. Larson, 8 N.W.2d 697, 233 Iowa 1032.—Lim of Act 100(13).

Iowa 1943. Where tenant moved from county leaving son in possession of leased farm and son acted in some respects as a tenant, in some respects as an agent, and in other respects as joint tenant with father, landlord’s letter of August 27, 1941, to tenant’s son that landlord would not rent place to him for another year, constituted sufficient “notice” under statute to terminate tenancy for year beginning March 1, 1942. Code 1939, §§ 10161, 10162.—Welch v. Keeran, 7 N.W.2d 809, 233 Iowa 499.—Land & Ten 94(4).

Iowa 1940. The caption of notice of hearing on application for appointment of temporary guardian was part of “notice”, and hence statement in notice that wrong person was the plaintiff did not invalidate notice under statute providing that notice must inform defendant of name of plaintiff, where correct person was named as the plaintiff in the caption. Code 1935, § 11055.—In re Hansen’s Guardianship, 295 N.W. 429, 229 Iowa 914.—Mental H 130.

Iowa 1931. In order to constitute “notice,” possession must be adverse and hostile to holder of record title.—Clark v. Chapman, 239 N.W. 797, 213 Iowa 737.—Ven & Pur 232(2).

Iowa 1927. “Knowledge” or “notice” to employer must be of compensable injury. Code 1924, § 1383 (I.C.A. § 85.23).—Mueller v. U.S. Gypsum Co., 212 N.W. 577, 203 Iowa 1229.—Work Comp 1224.

Iowa 1915. An insurance company, which prepared a policy containing a provision that it should be void if with the knowledge of the insured foreclosure proceedings were commenced, or notice given of a sale of the property by virtue of any lien or incumbrance, must be held to have chosen the words advisedly, and to have used the word “knowledge” with intent to limit the right of a forfeiture to a case in which insured had knowledge of the commencement of the foreclosure proceedings, or actual notice, as distinguished from constructive notice; “knowledge” not being synonymous or interchangeable with “notice,” but meaning actual knowledge.—Funk v. Anchor Fire Ins. Co., 153 N.W. 1048, 171 Iowa 331.

Iowa 1905. “Knowledge” and “notice” are not synonymous, for that which does not amount to actual “knowledge” may constitute “notice.” The notice may be of such a character that its effects amount to knowledge. On the other hand, the party may be charged with notice when in utter ignorance of that of which he is presumed to be advised.—Rosenberger v. Hawker, 103 N.W. 781, 127 Iowa 521.

Iowa 1899. “Advertisement,” as used in Code 1873, § 880, I.C.A. §§ 446.13, 446.14, providing that no irregularity or informality in the “advertisement” of sales for taxes shall affect the legality of the sale, is synonymous with “notice”, and hence includes both the publication and the posting.—Davis v. Magoun, 80 N.W. 423, 109 Iowa 308.

Kan. 1943. Under statute requiring that notice of tax sale published by sheriff describe each tract to be sold and lien for which it is to be sold, “notice” which omitted amount of lien for which tracts were to be sold was insufficient for want of compliance with statute. Gen.St.Supp.1941, 79-2804.—Board of Com’rs of Mitchell County v. Allen, 137 P.2d 143, 156 Kan. 701.—Tax 658(3).

Kan. 1942. Even though recorded copy of chattel mortgage was not an exact copy of the original, it was sufficient to constitute “notice” where the difference pertained to matters other than the body of the mortgage creating the lien. Gen.St.1935, 58-301.—Hess-Herrington, Inc. v. State Exchange Bank of Yates Center, 122 P.2d 739, 155 Kan. 118.—Chat Mtg 150(1).

Kan. 1905. The word “notice,” as used in Laws 1903, c. 380, p. 583, providing that, if the party desires more than the 10 days given by statute within which to make and serve his case-made, the court or judge before whom the case was tried may on motion order an extension of that time, which notice of extension shall be filed with the clerk of the court, may well be held that the word “notice” should be read “order.”—Howard v. Carter, 80 P. 61, 71 Kan. 85.

Kan. 1904. Under the statute imposing a liability on a county for damages sustained by reason of a defective bridge constructed by the county, where the chairman of the board of county commissioners has five days’ “notice” of the defect, an actual notice is meant.—Parr v. Shawnee County Com’rs, 78 P. 449, 70 Kan. 111.

Kan.App. 1984. "Notice" means intelligence by whatever means communicated; information; knowledge.—Colorado Interstate Gas Co. v. Dufield, 681 P.2d 25, 9 Kan.App.2d 428.—Notice 2.

Kan.App. 1984. Insurance policy requiring "notice" to insured before cancellation for nonpayment of premiums becomes effective during a policy period, and stating that "proof of mailing of any notice shall be sufficient proof of notice" is construed to require actual receipt of notice by insured to make cancellation effective.—Richmeier v. Williams, 675 P.2d 372, 9 Kan.App.2d 222.—Insurance 2044(1).

Ky. 1972. "Notice," in order to prevent one from being a bona fide holder under the law merchant or a holder in due course under Commercial Code means notice at time of taking or at time instrument is negotiated and not notice arising subsequently; time when value is given for instrument is decisive. KRS 355.3-304(6).—Sullivan v. United Dealers Corp., 486 S.W.2d 699.—Bills & N 334.

Ky. 1962. Statement by underage 16-year-old employee to his coemployee admitting his age an hour before he was killed in accident was not such "notice" as would charge employer with employing a minor in wilful and known violation of law and did not permit boy's administrator to maintain death action under saving feature of workmen's compensation law. KRS 339.010, 339.240, 339.280, 342.001 et seq., 342.170, 411.130.—Campbell v. East Kentucky Beverage Co., 355 S.W.2d 291.—Work Comp 2097.

Ky. 1961. Mere fact that record title indicated that title was old and that joint owners of property had partitioned land among themselves did not constitute "notice" that any partitioned portions had been sold and did not preclude application of recording statute to protect lessees from effect of certain prior but unrecorded deeds. KRS 382.080.—Anderson v. United Fuel Gas Co., 351 S.W.2d 520.—Ven & Pur 231(5).

Ky. 1948. "Notice" is a medium of information which, if conveyed, is sufficient notice and is not a question of diligence but of knowledge of essential facts.—Jackson v. International Union of Operating Engineers, 211 S.W.2d 138, 307 Ky. 485.—Notice 1.

Ky. 1947. Generally, presence of train on road crossing is "notice" to motorist of obstruction, and railroad has no duty to station guards, place lights, or otherwise give warning of presence of train.—Louisville & N.R. Co. v. Reynolds, 202 S.W.2d 997, 305 Ky. 54.—R R 304.

Ky. 1943. Evidence that compensation claimant had notified several employees of his illness, that superior officers knew of illness, and that physician in charge examined claimant within a few days after he was stricken, showed sufficient "notice" to employer.—Black Mountain Coal Corp. v. Vickers, 171 S.W.2d 442, 294 Ky. 259.—Work Comp 1679.

Ky. 1942. Where wife acquired land before passage of Weissinger Act, and there was no issue of the marriage, so that husband inherited no curtesy interest or title in land, the recording of mortgages

and deeds executed by husband was "notice" to heirs of wife that husband was exercising rights of ownership of land adverse to such heirs.—Myers v. Bates, 165 S.W.2d 340, 291 Ky. 650.—Adv Poss 31.

Ky. 1942. Proof that plaintiffs employed attorneys solely for purpose of filing actions, that plaintiffs refused to endorse check given by defendants in settlement agreement negotiated by attorneys and that check was returned to defendants and that defendants' lawyer and plaintiffs' attorneys arranged for payment of settlement to plaintiffs' attorneys through clerk of court and for judgment dismissing the action as settled established "notice" to defendants of plaintiff's repudiation of settlement and a "prima facie case" authorizing vacation of judgment and granting of new trial to plaintiffs.—Fillhardt v. Schmidt, 165 S.W.2d 155, 291 Ky. 668.—New Tr 167(3).

Ky. 1942. The fact that federal deposit insurance corporation was insisting that bank's assets be augmented by the sum of \$20,000 before it would consider the insurance of its deposits was "notice" to one claiming to be a creditor of the bank on account of money furnished to an officer of the bank on the latter's note to be used to increase the assets of the bank, that the bank was in financial difficulty and that its capital probably was impaired.—Wood v. Wilhoit, 164 S.W.2d 478, 291 Ky. 175.—Banks 80(1).

Ky. 1942. Where life policies providing for total disability benefits specified that such benefits were payable to the insured rather than to the beneficiary, the beneficiary was chargeable with "notice" of the provisions.—Department of Welfare of Commonwealth of Kentucky v. Farmer's Committee, 162 S.W.2d 796, 290 Ky. 813.—Evid 66.

Ky. 1942. Where a judgment of sale directed that infant's share in land sold should remain a lien on land until guardian qualified and executed bond in accordance with the statute, the purchaser of the land was charged with "notice" of the judgment by virtue of his purchase and could not say that he thought the master commissioner would protect the infant's interests. Civ.Code Prac. §§ 490, 493.—Ray v. Spencer, 162 S.W.2d 789, 290 Ky. 756.—Guard & W 108.

Ky. 1942. Where a bank cashier who was also committee for an incompetent received a check payable to him as committee, endorsed it in that capacity and deposited it in his personal account, the deposit was "notice" to the bank of the misapplication, and bank, being liable to a new committee, could recover on cashier's fidelity bond.—Fidelity & Deposit Co. of Md. v. Citizens Nat. Bank of Somerset, 161 S.W.2d 62, 290 Ky. 306.—Banks 116(6); Insurance 2406(3).

Ky. 1942. Where it appeared that bank cashier acting as committee for an incompetent drew a check which he deposited to the account of stockyards company of which he was secretary-treasurer, his entry of the transaction in the books of the bank was done as cashier and imputed "notice" to the bank of the misappropriation, and permitted bank to recover upon cashier's fidelity bond amount of

its liability.—Fidelity & Deposit Co. of Md. v. Citizens Nat. Bank of Somerset, 161 S.W.2d 62, 290 Ky. 306.—Banks 116(6); Insurance 2406(2).

Ky. 1942. Where a check showed on its face that it was drawn on a fiduciary or trust fund of an incompetent for the benefit of stockyards company and the proceeds of the check were shown on the books of the bank to have been deposited to the credit of the company, the bank had "notice" from the circumstances that the funds were being misapplied, and where its cashier misapplied the funds bank could recover for its liability in action upon the cashier's fidelity bond.—Fidelity & Deposit Co. of Md. v. Citizens Nat. Bank of Somerset, 161 S.W.2d 62, 290 Ky. 306.—Banks 130(1); Insurance 2406(3).

Ky. 1942. Where the bank cashier diverted money from trust fund which he controlled as committee for an incompetent to the account of a company for which he was secretary-treasurer and the check by which he drew on the trust fund had sufficient information on its face to indicate that it was being misapplied, check was "notice" to the bank and all of its officers of the wrongful diversion for which the bank was liable to new committee for the incompetent, and surety, on cashier's fidelity bond was liable for bank's loss.—Fidelity & Deposit Co. of Md. v. Citizens Nat. Bank of Somerset, 161 S.W.2d 62, 290 Ky. 306.—Banks 130(1); Insurance 2406(3).

Ky. 1942. In action for injuries sustained by baseball patron when he fell in uncovered hole located in dirt space under grandstand which was allegedly used as a passway by patrons, testimony that on occasions prior to day of accident, witnesses had seen the hole unprotected by platform was admissible to show "notice" to the baseball club of the dangerous condition of its property.—Louisville Baseball Club v. Butler, 160 S.W.2d 141, 289 Ky. 785.—Theaters 6(24).

Ky. 1942. Evidence that one of original lessor's heirs notified holder of oil and gas lease to put down an offset gas well and that well was not drilled was sufficient "notice" to entitle all heirs to cancellation of lease on ground that it was not properly developed.—Webb v. Graf, 159 S.W.2d 433, 289 Ky. 644.—Mines 78.7(1).

Ky. 1942. Under statute requiring claimant to give notice of claimed accident and injury, physician's report, which was forwarded to employer, and which purported to state in claimant's own words that accident occurred from "pitching rock and strained self; lost consciousness until next day" was sufficient "notice" of back injury for which compensation was awarded, since report that claimant had strained himself by attempting to lift rock was notice of all complications which might reasonably be anticipated to result from the strain. Ky.St. § 4914.—Atlas Coal Co. v. Nick, 159 S.W.2d 48, 289 Ky. 501.—Work Comp 1224.

Ky. 1941. The purpose of giving "notice" to employer of an accident involving an employee is to give employer an opportunity to examine into accident and injuries while facts are accessible and to

afford medical care to employee to minimize injuries and speed employee's recovery.—American Rolling Mill Co. v. Stevens, 160 S.W.2d 355, 290 Ky. 16, 145 A.L.R. 1256.

Ky. 1941. In determining validity of father's settlement for death of son in automobile accident, check which was signed by adjuster, and on face of which appeared name of automobile insurance company, was sufficient "notice" to father that automobile was insured.—Warren's Adm'r v. Stith, 157 S.W.2d 308, 288 Ky. 833.—Death 25.

Ky. 1941. The statutory provision as amended that neither sheriff nor sureties on sheriff's bond shall be liable for sheriff's default unless notice of default giving rise to a claim on such bond should have been given to the sureties within certain time, manifests legislative intent that constructive notice is not sufficient, and hence the filing and recording of settlement showing that sheriff owed a certain balance was not "notice" to sureties that sheriff owed such balance. Ky.St. § 4134.—Russell County Bd. of Educ. v. Leach, 157 S.W.2d 70, 288 Ky. 769.—Sheriffs 162.

Ky. 1941. Where candidate for office of county judge in primary election wanted to send money to a precinct by his brother-in-law, to be used legitimately for campaign purposes, and the brother-in-law told the candidate that he would use his own funds for that purpose, that did not give the candidate "notice" that the brother-in-law was to use the money for the purpose of allegedly corrupting voters. Ky.St. § 1565b-1 et seq.—Gearheart v. Hill, 155 S.W.2d 498, 288 Ky. 12.—Elections 126(6).

Ky. 1941. The fact that property is stored in a regular warehouse which is run and operated by a warehouseman engaged in the business for profit as prescribed by statute is "notice" to one dealing in any manner with the stored property that warehouse receipts might be outstanding against the property, and such person is thereby warned of the necessity of informing himself with reference to the situation. Ky.St.Supp.1939, §§ 4767b-1 to 4767b-61.—Continental Can Co. v. Jessamine Canning Co., 150 S.W.2d 922, 286 Ky. 365.—Wareh 16.

Ky. 1941. Where son allowed father to contract with attorney in son's presence for bringing of action involving land, without intimating to attorney that he had an unrecorded deed from father, son's occupancy of such land was not inconsistent with father's title, and hence was not "notice" of the deed such as would preclude attorney from subjecting the land to judgment on note executed by father as surety. Ky.St. § 496.—Noble v. Hubbard, 149 S.W.2d 775, 286 Ky. 100.—Fraud Conv 154(2).

Ky. 1939. Knowledge, however acquired, of facts which would operate on a rational businessman's mind, and make him act with reference thereto, constitutes "notice," actual notice being unnecessary.—Sentry Safety Control Corp. v. Broadway & 4th Ave. Realty Co., 124 S.W.2d 1051, 276 Ky. 648.—Notice 6.

Ky. 1936. To constitute "notice" of defect in title of person negotiating negotiable bonds, pur-

chaser would not be required to have actual notice, but knowledge of such facts that its action in taking bonds amounted to bad faith would be sufficient. Ky.St. § 3720b-56.—Kentucky Rock Asphalt Co. v. Mazza's Adm'r, 94 S.W.2d 316, 264 Ky. 158.—Bonds 92.

Ky. 1935. “Notice” generally may be defined as that which imparts information of the fact to the one to be notified, and is divided by the law into several classes, such as actual, constructive, implied, and presumptive. Merger of two school districts held not invalid because absent member of board of education of one district was notified of meeting fifteen minutes before time such meeting was held, where absent member testified that his reason for failing to attend meeting was lack of interest. Ky.St. Supp.1934, § 4399-4, 4399-29.—Board of Educ. of Wurtland Independent School Dist. v. Stevens, 88 S.W.2d 3, 261 Ky. 475.

Ky. 1933. “Notice” which is sufficient to proceed against a contemnor is only such notice to the offending party of the grounds of complaint against him, and affording him ample opportunity of explanation and defense. Proceedings against contemnor are not restricted to methods prescribed by Constitution and Criminal Code, but contemnor may be proceeded against on notice, rule, or by indictment, and either is sufficient if it affords him opportunity to be heard. Cr.Code Prac. § 31; Const. § 10.—Henry v. Wilson, 61 S.W.2d 305, 249 Ky. 589.

Ky. 1933. Whatever puts purchaser on inquiry constitutes “notice,” provided inquiry becomes duty, and would lead to knowledge of requisite fact by exercise of ordinary intelligence.—Hutcherson v. Louisville & N. R. Co., 57 S.W.2d 12, 247 Ky. 317.—Ven & Pur 229(1).

Ky. 1930. Notice of facts putting grantee on inquiry leading to discovery of grantor’s fraudulent intent is “notice” thereof.—Campbell v. First Nat. Bank of Barbourville, 27 S.W.2d 975, 234 Ky. 697.—Fraud Conv 158(2).

Ky. 1926. “Notice” in statute giving lien priority over mortgage, executed without notice and recorded after filing of statutory statement by lienor, includes both actual and constructive notice. Ky.St. § 2463.—Ideal Supplies Co. v. Underhill, 281 S.W. 988, 213 Ky. 741.—Mtg 154(1).

Ky. 1909. “Notice” may be the existence of that which, if looked at or listened to, and then followed up by such inquiry as ordinary prudence would suggest, would result in obtaining the knowledge sought to be charged.—Warden v. Addington, 115 S.W. 241, 131 Ky. 296.

Ky. 1905. A request to the chairman of the board of trustees of a graded common school, signed by three members of the board, requesting him to call a meeting at a specified time and place, was not a “notice” to him of a meeting of the board at such time and place.—Saunders v. O’ Bannon, 87 S.W. 1105, 27 Ky.L.Rptr. 1166.

Ky. 1903. There is evidently a difference between the words “notice” and “actual knowledge” of the proceedings in bankruptcy, as used in Bankr.

Act July 1, 1898, c. 541, § 17, 30 Stat. 550, 11 U.S.C.A. § 35, providing that a discharge shall release the bankrupt, except as to such debts not scheduled, unless the creditor had notice or actual knowledge of the proceedings in bankruptcy. The notice is evidently a written notice delivered to the creditor, but the section evidently contemplates that the creditor may have actual knowledge of the proceedings from other sources than either of those provided by the statute. If it be clearly shown that the creditor had actual knowledge of the application for discharge, it makes no difference how this knowledge may have been acquired.—Jones v. Walter, 74 S.W. 249, 115 Ky. 556, 24 Ky.L.Rptr. 2459.

La. 1945. A person having such information as would put a prudent person on inquiry to ascertain the true facts is chargeable with “notice” thereof.—Dugas v. Powell, 21 So.2d 366, 207 La. 316.—Notice 6.

La. 1945. Notice of fact which ought to excite inquiry operates as “notice” of facts which such inquiry would disclose.—Dugas v. Powell, 21 So.2d 366, 207 La. 316.—Notice 6.

La. 1942. Where relators applied for alternative writ of mandamus to compel Court of Appeal to consider their application for a rehearing in a certain action, mailing of copies of the petition to the judges of the Court of Appeal and the attorney of record of the adverse party in the action was sufficient “notice” to them, and failure of relators to deliver copies of application for the writ to judges of the Court of Appeal or to the attorney before filing application in the Supreme Court was not sufficient cause to justify dismissal of the application for the writ. Rules of Supreme Court, rule 13, §§ 2, 7.—Lacaze v. Hardee, 6 So.2d 663, 199 La. 566.—Mand 157.

La. 1941. Where state’s patent to lands executed in 1862 was not recorded until 1935, the public was not charged with “notice” of the purchase under the patent until 1935, on issue whether successors of purchaser under patent could prevail in petitory action against successors of subsequent purchaser of such land from the state which sold the land in 1877 for nonpayment of taxes. Act No. 96 of 1877, Ex.Sess.—Egle v. Constantin, 5 So.2d 281, 198 La. 899.—Pub Lands 152.

La. 1941. Under Mississippi law, insurance agency, which wrote and delivered fire policy for insurer in regular course of its business, collected premium of insurance, and transmitted it to insurer, was “alter ego” or “general agent” of insurer, and hence “notice” to agency by insured of cancellation of policy was notice to insurer. Code Miss.1930, § 5196.—Eicher-Woodland Co. v. Buffalo Ins. Co. of New York, 3 So.2d 268, 198 La. 38.—Insurance 1954.

La. 1940. “Notice” in its accepted legal sense means such information on the part of the person charged with notice as would put a prudent person on inquiry to ascertain the true or actual facts, or such notice of facts which ought to excite inquiry and which if pursued would lead to knowledge of other facts. Whatever fairly puts a person on inqui-

ry is sufficient "notice" where means of knowledge are at hand and if he omits to inquire, he is then chargeable with all the facts which by a proper inquiry he might have ascertained, and means of knowledge with the duty of using them are in equity equivalent to knowledge itself, and where there is a duty of finding out and knowing, negligent ignorance has the same effect in law as actual knowledge.—*Harrill v. Pitts*, 193 So. 562, 194 La. 123.

La. 1938. "Notice" means such information as would put a prudent person on inquiry to ascertain the true or actual facts.—*Tyson v. Spearman*, 183 So. 201, 190 La. 871.—Notice 6.

La. 1934. Judgment of homologation held not res judicata as to minor without tutor because of want of legal "notice," so as to bar minor's action against tutor's administrator for misappropriating minor's funds.—*Hall v. Courtney*, 156 So. 364, 180 La. 314.—Guard & W 73.

La. 1934. "Notice" implies knowledge brought home to some person, standing in law for himself or for others, and presumed to be capable of attending to his own affairs.—*Hall v. Courtney*, 156 So. 364, 180 La. 314.—Guard & W 73.

La. 1932. "Notice" means such information as would put prudent person on inquiry to ascertain true facts.—*Maxwell v. W.B. Thompson & Co.*, 143 So. 230, 175 La. 252, certiorari denied *Hibernia Bank & Trust Co v. Maxwell*, 53 S.Ct. 119, 287 U.S. 572, 77 L.Ed. 502.—Notice 6.

La.App. 1 Cir. 1943. As respects running of one year's prescription from date knowledge of damage to property is received by the owner, whatever is notice enough to excite attention and put the owner on his guard and call for inquiry is "notice" of everything to which such inquiry might have led, and such information as ought to put the owner on inquiry is sufficient to start the running of the prescription. LSA-C.C. arts. 3536, 3537.—*Mayer v. Ford*, 12 So.2d 618.—Lim of Act 95(1).

La.App. 1 Cir. 1941. Where bridge tender on lift bridge forming part of a state highway was an employee of State Highway Commission and had charge of operation of bridge, the fact that bridge tender had observed for two or three weeks before accident that bridge was not operating properly and that there was too much slack in its cables was sufficient "notice" to commission respecting condition of bridge.—*Le Blanc v. Louisiana Highway Com'n*, 5 So.2d 204.—Bridges 42.

La.App. 1 Cir. 1941. The fact that a lift bridge forming part of a state highway was held down only by cables should have been sufficient "notice" to State Highway Commission to use great care in seeing that cables were kept in proper condition and were working properly at all times.—*Le Blanc v. Louisiana Highway Com'n*, 5 So.2d 204.—Bridges 42.

La.App. 2 Cir. 1942. Notice of facts which ought to excite inquiry, and which, if pursued, would lead to knowledge of other facts, operates as "notice" thereof.—*Dinwiddie v. Cox*, 9 So.2d 68.

La.App. 2 Cir. 1942. Generally, in absence of special statute or ordinance, presence of railroad train at crossing is "notice" to motorist of such obstruction, and if there are no unusual circumstances, railroad company's failure to give warning of presence of obstruction is not negligence.—*Domite v. Thompson*, 9 So.2d 55.—R R 304.

La.App. 3 Cir. 1964. Section of Bankruptcy Act relating to release of bankrupt by discharge in bankruptcy contemplates written or printed "notice" to creditor, but also that creditor may have "actual knowledge" of proceedings from other sources and, if creditor has knowledge or notice, however acquired, in time to prove his claim, such claim is barred by bankrupt's discharge. Bankr. Act, § 17, sub. a(3), 11 U.S.C.A. § 35, sub. a(3).—*Robinson v. Henderson*, 162 So.2d 116.—Bankr 3361.

La.App. 4 Cir. 2001. "Notice" is defined as information, an advisement, or written warning, in more or less formal shape, intended to apprise a person of some proceeding in which his interests are involved, or informing him of some fact which it is his right to know and the duty of the notifying party to communicate.—*State v. Lee*, 787 So.2d 1020, 2000-2516 (La.App. 4 Cir. 4/6/01).—Notice 1.

La.App.Orleans 1941. For notice of principal's defective title to bar broker's right to commission, the "notice" must be actual, and broker is not required to investigate records of the conveyance office to determine whether principal is the record title holder.—*Caruso-Goll v. D'Alfonso*, 1 So.2d 120.—Brok 61(4).

La.App.Orleans 1941. The placing of warning signs in hospital corridor, warning public of slipperiness of floor which was being waxed by hospital employee, was sufficient "notice" of condition of floor to hospital visitor who slipped on the floor and fell, as against contention that visitor should have been given personal notice of condition of floor or that corridor in which work was being performed should have been roped off.—*Lusk v. U. S. Fidelity & Guar. Co.*, 199 So. 666.—Char 45(2).

La.App.Orleans 1931. "Notice," within statute, means such information as would put prudent person on inquiry to ascertain actual facts (Act No. 221 of 1908, § 47, LSA-R.S. 54:47).—*Carnal v. W.B. Thompson & Co.*, 132 So. 149, 16 La.App. 192, opinion reinstated on rehearing 133 So. 449, 16 La.App. 192.—Wareh 17.

La.App.Orleans 1930. "Notice" as used in statute respecting recording of chattel mortgages means actual notice. LSA-R.S. 9:5351.—*Dainello v. McCoy*, 131 So. 608, 15 La.App. 358.—Chat Mtg 150(1).

Me. 1997. "Notice" does not mean knowledge; actual knowledge is not required.—*McNaughton v. Kelsey*, 698 A.2d 1049, 1997 ME 182.—Notice 2.

Me. 1942. "Notice" which will defeat the title of a purchaser for a valuable consideration of realty from an equitable mortgagee is either actual notice of the trust or of facts which would or ought to put the purchaser on inquiry in reference to it. Rev.St.

## NOTICE

28B W&P— 198

1930, c. 87, § 18.—*Devine v. Tierney*, 27 A.2d 134, 139 Me. 50.—Assign 41; Mtg 226.

Me. 1942. Where an intending purchaser of realty from an equitable mortgagee has actual notice of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that which he is about to purchase, he stands charged with “notice” of that which inquiry would have revealed by ordinary diligence. Rev.St.1930, c. 87, § 18.—*Devine v. Tierney*, 27 A.2d 134, 139 Me. 50.—Assign 41; Mtg 226.

Me. 1942. The fact that purchaser of realty from equitable mortgagee knew that the mortgagor and not the mortgagee was in possession of and operating the realty as a farm did not directly prove actual “notice” to the purchaser of the existence of the mortgagor’s outstanding equity or compel inquiry concerning it, but it was a circumstance to be considered in determining whether inquiry should have been made. Rev.St.1930, c. 87, § 18.—*Devine v. Tierney*, 27 A.2d 134, 139 Me. 50.—Assign 41; Mtg 226.

Me. 1942. In bill in equity by equitable mortgagee to redeem farm which had been sold by mortgagee to purchaser, evidence that purchaser knew that mortgagor and not mortgagee was in possession of and operating the farm, and that mortgagor had informed purchaser that everything that mortgagor had was in the mortgaged realty, charged purchaser with “notice” that the realty was subject to the mortgagor’s equity of redemption.—*Devine v. Tierney*, 27 A.2d 134, 139 Me. 50.—Assign 102, 137; Mtg 270.

Me. 1887. Rev.St. c. 73, § 12, which declares that the title of one who purchases property for a valuable consideration cannot be defeated by a trust affecting the property, unless the purchaser has “notice” of the trust, while it may in peculiar instances mean constructive notice, in cases generally, including a case where the trust reduces an absolute deed to a mortgage, means actual notice; and actual notice as applicable to conveyances, does not necessarily mean actual knowledge; it may be express or implied; it may be proved by direct evidence, or implied from indirect or circumstantial evidence. The statutory actual notice is a conclusion of fact capable of being established by all grades of legitimate evidence.—*Knapp v. Bailey*, 9 A. 122, 79 Me. 195, 1 Am.St.Rep. 295.

Md. 1943. Where owners of building being constructed in Dorchester county were residents of Somerset county and when owners refused to arrange meeting so that materialmen could serve notice of lien, materialmen, through their agent, attached notice to front door of building in presence of witness, the “notice” was properly given and was not objectionable because it stated that it was served on owners. Code 1939, art. 63, §§ 11, 12.—*Bounds v. Nuttle*, 30 A.2d 263, 181 Md. 400.—Mech Liens 123.

Md. 1937. Person who has actual notice of circumstances sufficient to put prudent man on inquiry as to particular facts and who omits to make such inquiry with reasonable diligence is deemed to

have “notice” of fact.—*Mayor and City Council of Baltimore v. Perticone*, 188 A. 797, 171 Md. 268.—Notice 6.

Md. 1912. One’s knowledge that he has been appointed to an office constitutes “notice” to him, within Code 1912, art. 70, § 11, which provides that an office is forfeited by failure to qualify within 30 days after receiving commission or notice of appointment.—*Little v. Schul*, 84 A. 649, 118 Md. 454.—Offic 35.

Md. 1906. Under a statute providing that a materialman shall not be entitled to a lien unless, within 60 days, he shall give notice in writing to the owner or agent of his intention to claim such lien, a “notice” given that claimants claimed and should forthwith file their claim of a mechanic’s lien in the office of the clerk of the circuit court was not fatally defective for failure to recite that they “intended” to claim such lien, as any phraseology which clearly and distinctly apprised the owner of the intention of the materialman to claim the lien will satisfy the terms of the section and effectuate its design, though the word “intention” be not used at all. The intention to claim a lien could not be more definitely expressed than by the statement that the lien is claimed and will be forthwith filed. The owner was just as fully informed by the notice given that the claimants intended to file a lien claim as she would have been had the notice specifically stated that it was the intention of the lienees to claim such a lien.—*Fulton v. Parlett & Parlett*, 64 A. 58, 104 Md. 62.

Md.App. 1995. “Notice” required as a matter of due process is notice reasonably calculated, under all the circumstances, to apprise interested parties of pendency of action and to afford them opportunity to present their objections. U.S.C.A. Const. Amend. 14.—*Castruccio v. Dr. Bruce Goldberg, Inc.*, 653 A.2d 1013, 103 Md.App. 492, certiorari denied 661 A.2d 700, 339 Md. 166.—Const Law 251.6.

Md.App. 1989. Automobile insurer satisfied its statutory obligation to make increased underinsured motorist coverage “available” to its insured when it mailed out stuffer with insurance renewal form indicating that increased coverage could be purchased in various specific amounts, up to maximum liability coverage provided by policy, at nominal cost to insured; method of giving “notice” was a “reasonable” one, notwithstanding that insured may not have behaved unreasonably in failing to read stuffers. Code 1957, Art. 48A, § 541(c)(2).—*Libby v. Government Employees Ins. Co.*, 558 A.2d 1236, 79 Md.App. 717.—Insurance 2775.

Md.App. 1973. Efforts to contact seller regarding breach of warranty through repeated telephone calls, even though unsuccessful, are sufficient to constitute “notice” within meaning of statute providing that buyer must within reasonable time after he discovers or should have discovered any breach of warranty notify seller of breach or be barred from any remedy. Code 1957, art. 95B, §§ 1-201(26), 2-607(3)(a).—*Smith v. Butler*, 311 A.2d 813, 19 Md.App. 467.—Sales 285(3).

Mass. 1993. Motorist, who struck bicyclist, and who purportedly was in state of shock after collision, had sufficient "notice" to satisfy notice purposes of statute providing that failure to give traffic citation to violator at time and place of violation is defense in any court proceeding for such violation; following accident, vehicle was damaged, bicyclist, apparently seriously injured, was lying on ground, and motorist gave his license and registration to officer before leaving the scene with a friend, but learned that evening that bicyclist's life was in danger. M.G.L.A. c. 90C, § 2.—Com. v. Cameron, 621 N.E.2d 1173, 416 Mass. 314.—Autos 351.1.

Mass. 1943. Where employer took out group insurance policy, under which certificates were issued to employees, deductions were made from employees' wages, and employer made adjustment and payment of premiums, the employer was not "agent" of insurer to receive notice of employee's disability claim, and doctor's certificate furnished to employer was not "notice" to insurer within terms of certificate.—Wing v. John Hancock Mut. Life Ins. Co., 49 N.E.2d 905, 314 Mass. 269.—Insurance 3151, 3163.

Mass. 1943. That president of corporation refused to pay architect amount requested by him for services rendered for corporation without taking the matter up with the directors was not "notice" to architect that president was not authorized to employ architect so as to preclude recovery against corporation for the services.—Jackson v. Colonial Provision Co., 49 N.E.2d 726, 314 Mass. 177.—Corp 429.

Mass. 1942. Under statute authorizing a bank's board of investment to revalue premises upon which bank holds a mortgage and to file board's statement of value with bank records, bank is charged with "notice" of such statements. G.L., Ter.Ed., c. 168, § 4, First subd., as amended by St.1937, c. 180.—Brockton Sav. Bank v. Shapiro, 42 N.E.2d 826, 311 Mass. 695.—Banks 116(1).

Mass. 1942. Where circular issued to prospective purchasers of shares of Massachusetts trust disclosed that management corporation's stock was owned by bank whose officers were officers of management corporation and trustees of the trust, and that the management corporation agreed to handle trust's affairs, shareholders were chargeable with "notice" of provisions of management contract and the connection of trustees with management corporation, on issue whether a merger between the trust and another investment trust whereby trustees obtained a certain benefit was void.—Cohen v. U.S. Trust Securities Corp., 40 N.E.2d 282, 311 Mass. 152.—Joint-St Co 17.

Mass. 1941. As regards city's liability for injuries to 3½-year-old boy who, while walking on sidewalk was burned when a gust of wind blew over him some of lighted embers of piles of leaves which had been raked into the gutter and burned, the superintendent of streets under whose direction the burning of the leaves took place had "notice" of the defect which was sufficient notice to the city. G.L.(Ter.Ed.) c. 4, § 7, subd. 34; c. 40, § 21; c. 84,

§ 15.—Bowman v. City of Newburyport, 38 N.E.2d 682, 310 Mass. 478.—Mun Corp 790.

Mass. 1941. The "notice" referred to in Rules of Supreme Judicial Court requiring petition to establish the truth of exceptions to be filed within 20 days after notice of disallowance of exceptions is a notice of the Superior Court, and under Superior Court Rule such a notice may be given by mail and is given when mailed in conformity with the rules. Rules of Superior Court (1932), rules 3 and 74; Rules of Supreme Judicial Court for the Regulation of Practice before the Full Court (1926), rule 6.—Petition of Boyajian, 38 N.E.2d 336, 310 Mass. 822.—Exceptions Bill of 55(2).

Mass. 1941. The time within which an application for abatement of taxes on realty must be made is not a mere matter of limitation but is an integral part of the right, and failure to apply within the prescribed time destroys the right, and though the application is referred to in the statutes as a request, it is in effect a "notice" to the assessors. M.G.L.A. c. 59 § 59, as amended by St.1933, c. 266, § 1, St.1935, c. 187, § 1.—Board of Assessors of Town of Brookline v. Prudential Ins. Co. of America, 38 N.E.2d 145, 310 Mass. 300.—Tax 478.

Mass. 1941. Under statute requiring an application for abatement of taxes on realty to be in writing on a form approved by the tax commissioner, the application remains a "notice" by which information is given to the assessors in reference to a possible pecuniary liability or a "claim" for reduction of taxes assessed and, as incidental thereto, for an opportunity to be heard on the propriety of the original assessment, and, if denied, is a foundation for later proceedings before an appellate board, and the application is not in its nature the presentation of evidence in support of the claim. M.G.L.A. c. 59 § 59, as amended by St.1933, c. 266, § 1.—Board of Assessors of Town of Brookline v. Prudential Ins. Co. of America, 38 N.E.2d 145, 310 Mass. 300.—Tax 483.

Mass. 1941. The "notice" referred to in rule of Supreme Judicial Court providing that a petition to establish the truth of exceptions disallowed in the superior court must be filed within 20 days after notice of refusal to allow and sign bill of exceptions, is notice in the superior court, and is notice in conformity with rules of that court. Rules of the Supreme Judicial Court, rule 6; M.G.L.A. c. 231, § 117.—In re Siegel, 37 N.E.2d 38, 309 Mass. 553.—Exceptions Bill of 55(2).

Mass. 1928. "Notice" which is required to be given defendant under due process clause of the Fourteenth Amendment to the United States Constitution is referable only to commencement of an action or suit and to an opportunity to be heard on any material question which shall arise during prosecution of action or suit.—Reale v. Judges of Superior Court of the Commonwealth, 163 N.E. 893, 265 Mass. 135.

Mass. 1913. The typewritten words, "Plaintiff claims trial by jury," on the outside of the writ in tort, and above the lines where the names of the parties are placed, together with the printed words

"From the office of," below the blanks for the steps of the progress of the action, followed by the typewritten name and address of plaintiff's attorney, are sufficient notice of a desire for trial by jury, within Rev.Laws, c. 173, § 56, providing that a case shall not be placed on the list of jury cases unless a party files a notice that he desires a trial by jury; the word "notice" not involving the idea of formality.—Higgins v. Boston Elevated Ry. Co., 101 N.E. 992, 214 Mass. 335.

Mass.App.Ct. 1994. Bank's failure to follow its usual procedures in loan transaction because of its desire to attract additional business from borrower by permitting borrower to take note out of bank to obtain signatures of comakers was not sufficient to put bank on "notice" of borrower's fraud in obtaining signature from comaker so as to preclude holder in due course status, absent circumstances revealing deliberately cultivated ignorance. M.G.L.A. c. 106, §§ 1-201(25), 3-304(1)(b).—New Bedford Inst. for Sav. v. Gildroy, 634 N.E.2d 920, 36 Mass.App.Ct. 647, review denied 639 N.E.2d 1082, 418 Mass. 1106.—Bills & N 345, 361.

Mich. 1943. General conversations between president of highway contractor and attorney in fact for surety on contractor's bond concerning several parties who had furnished materials for project with nothing specific being said as to amount or character of any of such claims did not comply with statutory requirement as to "notice" to highway department within 60 days from date of last delivery of materials. Comp.Laws 1929, § 13133.—People, for Use and Benefit of Wheeling Corrugating Co. v. W.L. Thon Co., 11 N.W.2d 886, 307 Mich. 273.—High 113(5).

Mich. 1943. In absence of statute, fact that corporate officer having authority over corporate finances deposits corporate checks in personal account is not sufficient to charge bank with "notice" of intent to misappropriate funds, or with liability for misappropriation.—Columbia Land Co. v. Empson, 9 N.W.2d 452, 305 Mich. 220.—Banks 130(1).

Mich. 1943. Where corporate officer with authority over corporate funds deposited funds in personal account and made withdrawals for corporate uses, bank had right to assume that officer was dealing honestly with corporation and such deposits and withdrawals were not "notice" to bank of intent to misappropriate funds.—Columbia Land Co. v. Empson, 9 N.W.2d 452, 305 Mich. 220.—Banks 130(1).

Mich. 1943. The object of registry laws is to protect merely subsequent purchasers and incumbancers of mortgaged personality, and filing of mortgage thereon constitutes "notice" only for purposes declared by statute. Comp.Laws 1929, § 13424.—Stamler v. Universal Ins. Co., 9 N.W.2d 33, 305 Mich. 131.—Chat Mtg 150(1).

Mich. 1943. Surviving widow's occupancy of property was "notice" to all of her homestead rights and exemptions. Comp.Laws 1929, § 14608; Const.art. 14, § 2.—Bartold v. Lewandowska, 8 N.W.2d 133, 304 Mich. 450.—Home 182.

Mich. 1942. A payee's transferee which at time of acquiring note had knowledge that at least the portion thereof representing usury was void for want of consideration had "notice" of an "infirmity in the instrument", in determining whether transferee was a "holder in due course" within statute providing in part that a holder in due course is one having no notice of any infirmity in the instrument at time it is negotiated to him. Comp.Laws 1929, § 9301.—Bird Finance Corp. v. Lamerson, 6 N.W.2d 732, 303 Mich. 422.—Bills & N 335.

Mich. 1942. The purpose of provision in Workmen's Compensation Act requiring employee to give "notice" of injury to employer within three months after the happening thereof is to give employer an opportunity to examine into alleged accident and injury while facts are accessible, and also to employ skilled physicians to care for employee or to speed his recovery and minimize the loss. Comp.Laws 1929, §§ 8431, 8432, 8434.—Henderson v. Consumers Power Co., 4 N.W.2d 10, 301 Mich. 564.—Work Comp 1216.

Mich. 1941. Where grantor conveyed an acre of land to school district and school board in attempt to define property they believed they owned fenced 1.8 acres in 1899 and continuously thereafter maintained fence and occupied land, school district acquired title by "adverse possession" to land in excess of an acre as against adjoining owner and his successors who acquired title in 1918, since district's possession of land at time successors acquired title was sufficient "notice" of district's adverse holding. Comp.Laws 1929, § 13964.—Simon v. School Bd. of Dist. No. 2 of Richland and Mills Townships, 300 N.W. 851, 299 Mich. 478.—Adv Poss 31.

Mich. 1941. Where the possession is by actual occupation of the possessor, or by his tenants under claim of title, his possession is visible, open, notorious, distinct and will be presumed to be hostile, and is sufficient to make possession "adverse", and sufficient "notice" to other claimants, or parties interested. Comp.Laws 1929, § 13964.—Simon v. School Bd. of Dist. No. 2 of Richland and Mills Townships, 300 N.W. 851, 299 Mich. 478.—Adv Poss 29, 30, 31, 35, 60(1), 85(1).

Mich. 1941. The purpose of "notice" or knowledge requirements of bankruptcy laws is to provide creditors equal opportunity to participate in administration of affairs of bankrupt's estate and obtain any dividends to which they are entitled. Bankr. Act, § 17, 11 U.S.C.A. § 35.—Katz v. Kowalsky, 295 N.W. 600, 296 Mich. 164, 134 A.L.R. 179.—Bankr 3361.

Mich. 1940. The notice of at least a week before date set for hearing by the Michigan Milk Marketing Board, acting under the Milk Marketing Act, to determine the existence of an emergency and to fix wholesale and retail prices of milk within the Detroit milk marketing area, in a newspaper or newspapers in general circulation throughout marketing area, was sufficient "notice". Pub.Acts 1939, No. 146, § 19.—Johnson v. Michigan Milk Marketing Bd., 295 N.W. 346, 295 Mich. 644.—Food 4.5(5).

Mich. 1938. The “notice” required by Workmen’s Compensation Act to be given to employer is notice of accidental injury arising out of and in the course of employment. Comp.Laws 1929, § 8431.—Clifton v. Chrysler Corp., 282 N.W. 912, 287 Mich. 87.—Work Comp 1221.

Mich. 1928. Carrier’s knowledge of loss of shipment does not excuse filing of claim for damages required by bill of lading. Transportation Act 1920; “notice”; “filing of claim.”—Douglas Shoe Co. v. Pere Marquette Ry. Co., 217 N.W. 12, 241 Mich. 297.—Carr 159(1).

Mich. 1900. The word “notice,” as used in Pub. Acts 1897, imposing a liability on a city for an injury from a defective bridge after notice of the defect, is not used as synonymous with the word “knowledge.”—Thomas v. City of Flint, 81 N.W. 936, 123 Mich. 10, 47 L.R.A. 499.

Mich. 1889. The word “notice” in Laws 1887, No. 264, providing that, in actions against municipalities for injuries caused by defective highways, it must be shown that the municipality had reasonable opportunity after “knowledge” or “notice” to repair the defect, is not synonymous with the word “knowledge,” and whatever fairly puts a party on inquiry is sufficient notice, where the means of knowledge are at hand, and, if a party omits to inquire, he is chargeable with all the facts which, by proper inquiry, he might have ascertained.—Moore v. Kenockee Tp., 42 N.W. 944, 75 Mich. 332, 4 L.R.A. 555.—Mun Corp 791(1).

Minn. 1973. Under the Uniform Commercial Code, the law on “notice,” actual or inferable is precisely the same whether the instrument is issued to a holder or negotiated to a holder. M.S.A. §§ 336.1–201(25), 336.3–302(1)(c), 336.3–304(2), (4)(e).—Eldon’s Super Fresh Stores, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 207 N.W.2d 282, 296 Minn. 130.—Bills & N 338.5.

Minn. 1947. Under statute permitting court in its discretion at any time within one year after “notice” thereof to relieve party from judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, quoted word means actual and not constructive notice. M.S.A. § 544.32.—Industrial Loan & Thrift Corp. v. Swanson, 26 N.W.2d 625, 223 Minn. 346, 171 A.L.R. 244.—Judgm 386(6).

Minn. 1942. An ineffective notice by attorney of lis pendens could not be given effect as a “notice” of intention to claim an attorney’s lien where the notice did not comply with the statutory requisites of such notice because it was not verified and did not specify the amount of the lien claimed. Mason’s Minn.St.1927, § 5695 (M.S.A. § 481.13).—Melin v. Mott, 4 N.W.2d 600, 212 Minn. 517.—Atty & C 180.

Minn. 1941. The possession by defendants of an area slightly exceeding that covered by deed erroneously establishing boundary line between defendants’ realty and that of plaintiffs’ vendor before plaintiffs purchased realty, constituted “notice” to plaintiffs of defendants’ claim of right to equitable

title to area in question, and plaintiffs, in thereafter purchasing realty including the area in question, were not “innocent purchasers”, so as to bar defendants’ right to reformation of title deeds.—Flowers v. Germann, 1 N.W.2d 424, 211 Minn. 412.—Ref of Inst 29.

Minn. 1887. Gen.St.1878, c. 53, M.S.A. § 525.03 et seq., declared that for the purpose of effecting an appeal to the district court from an order of a probate court an application for such appeal should be filed in the probate court. Held, that the word “application” as there used meant “notice,” and that the filing of a notice of appeal in the probate court was a sufficient application.—Lake v. Albert, 35 N.W. 177, 37 Minn. 453.

Minn.App. 1991. For purposes of determining whether confirming bank in letter of credit transaction was holder of due course, evidence did not establish that bank had “notice,” before it honored drafts, of injunction prohibiting issuing bank from paying confirming bank on any outstanding drafts, notwithstanding contention that, because bank and beneficiary were located in same building, bank must have known of shortage of goods in underlying transaction. M.S.A. § 336.1–201(25).—Menard, Inc. v. King De Son, Co., Ltd., 467 N.W.2d 34.—Bills & N 336.1.

Miss. 1947. Whatever fairly puts a person on inquiry is sufficient “notice” where means of knowledge are at hand, and if he omits to inquire he is then chargeable with all facts which by a proper inquiry he might have ascertained.—Stanley v. Stanley, 29 So.2d 641, 201 Miss. 545.—Notice 6.

Miss. 1943. Where record owner of land remains in possession after conveyance thereof by deed withheld from record, subsequent purchaser is not charged with “notice” nor put upon inquiry as to the true situation.—Lay v. Nutt, 11 So.2d 430, 194 Miss. 83.—Ven & Pur 232(5).

Miss. 1943. Where record owner of land remained in possession after conveyance thereof by deed withheld from record, such substantial change in occupancy as to arrest notice of prospective purchaser was necessary to charge subsequent purchaser with “notice” of true state of title.—Lay v. Nutt, 11 So.2d 430, 194 Miss. 83.—Ven & Pur 232(5).

Miss. 1943. In determining whether grantee of record owner in possession of land was chargeable with “notice” of prior unrecorded conveyance, evidence that grantor claimed land during years prior to second conveyance was relevant as indicating probable results to which an inquiry by grantee would have led.—Lay v. Nutt, 11 So.2d 430, 194 Miss. 83.—Ven & Pur 243.

Miss. 1943. Use of part of land by stepson of record owner in possession was not inconsistent with title of record owner so as to charge subsequent purchaser with “notice” of prior unrecorded conveyance.—Lay v. Nutt, 11 So.2d 430, 194 Miss. 83.—Ven & Pur 232(13).

Miss. 1943. Evidence that grandson living with record owner and stepson cultivated land and con-

flicting testimony as to whether stepson was tenant of record owner or of grantee in unrecorded deed failed to show such apparent change in ownership inconsistent with record title as would charge purchaser from record owner in possession with "notice" of prior unrecorded deed.—*Lay v. Nutt*, 11 So.2d 430, 194 Miss. 83.—*Ven & Pur* 244.

Miss. 1942. Where credit association was induced to loan money to property owner's brother by his false representations that he owned property mortgaged as security for loan and its field agent, similarly deceived, asked local storekeeper to cash loan check, storekeeper in cashing check in belief that person designated as payee in whose name check was endorsed and brother, although known by a different name, were the same person, did not act in "bad faith" so as to be chargeable under statute with "notice" of defect in title of brother, and association was precluded from setting up forgery as a defense in storekeeper's action to recover proceeds paid on check. Code 1930, §§ 2679, 2715.—*Hattiesburg Production Credit Ass'n v. McNair*, 10 So.2d 97, 193 Miss. 615.—*Bills & N* 337.

Miss. 1942. Where foreclosure sale to county did not convey title because substitution of trustee was not a matter of record and county's conveyance of land at a called special meeting of board of supervisors was void because order for the special meeting did not specify that matter of conveyance was to be considered, the grantee in the void conveyance was affected with "notice" of illegality of the foreclosure and the conveyance following it. Code 1930, §§ 203, 2168.—*Simpson County v. Floyd*, 6 So.2d 580, 192 Miss. 501.—*Schools* 18.

Miss. 1941. Where engineers to secure their note to bank assigned in writing to bank their contract with city wherein they directed city to pay to bank any amounts due them under contract, filing of assignment with city clerk constituted "notice" to governing authorities of city.—*City of Aberdeen v. Bank of Amory*, 2 So.2d 153, 191 Miss. 318.—*Mun Corp* 353.

Mo. 1947. Actual "notice" means knowledge of facts and circumstances sufficiently pertinent in character to enable reasonably prudent persons to investigate and ascertain the ultimate fact, and one who fails to investigate under such circumstances is chargeable with all the facts which might have been ascertained by a proper inquiry.—*Golden v. National Utilities Co.*, 201 S.W.2d 292, 356 Mo. 84.—*Notice* 6.

Mo. 1942. In action to cancel note and deed of trust allegedly procured by fraud in sale of stock of insurance corporation, defendant as successor corporation and holder of note and deed of trust was not shown to be innocent purchaser for value, where the affairs of original corporation and defendant corporation were completely controlled by same persons as officers and such officers had notice of the defense of fraud, since such notice was "notice" to the corporation.—*Osler v. Joplin Life Ins. Co.*, 164 S.W.2d 295.—*Insurance* 1132.

Mo. 1941. "Notice", within statute relating to recovery of compensation for improvements, does not mean direct and positive information, but anything calculated to put a man of ordinary prudence on the alert is notice. Rev.St.1939, § 1548 (V.A.M.S. § 524.160).—*Otten v. Otten*, 156 S.W.2d 587, 348 Mo. 674.—*Improv* 4(1).

Mo. 1941. Where notice as given in real estate mortgage foreclosure proceedings complied with provisions of mortgage and statute relating to such notices, "notice" was sufficient and personal notice to mortgagors respecting sale was not necessary. Rev.St.1939, §§ 3463, 3464, Mo.St.Ann. §§ 3076, 3077, pp. 1907, 1908, V.A.M.S. §§ 443.310, 443.320.—*Homan v. Connell*, 152 S.W.2d 1053, 348 Mo. 244.—*Mtg* 354, 355.

Mo. 1940. The visible indicia of possession is "notice", and notice is equivalent of knowledge of all that would be learned by reasonable inquiry.—*Johnson v. Moore*, 143 S.W.2d 254, 346 Mo. 854.—*Adv Poss* 31.

Mo. 1938. Where city ordinance provided that ellipsoidal metal "traffic buttons" not more than six inches high should be attached to surface of street to designate boundary lines of safety zones for street car passengers, which manner of designating safety zones was similar to the manner followed in other cities, the street car tracks were "notice" that such buttons would be located at all regular street car stopping places, as respects question whether city should reasonably have anticipated that injury would result from a failure to keep such buttons painted and provided with reflectors.—*Blackburn v. City of St. Louis*, 121 S.W.2d 727, 343 Mo. 301.—*Autos* 264.

Mo. 1904. The term "claim of right," as applied to adverse possession, is not synonymous with the word "notice."—*Swope v. Ward*, 84 S.W. 895, 185 Mo. 316.

Mo.App. E.D. 1979. Where Illinois traffic tickets contained name of driver, his license number, dates, location and nature of alleged violations, statutory provisions violated, signature of issuing officers and, on reverse side finding of "guilty" and fine, and Illinois orders of revocation recited statutory provisions authorizing revocation and convictions warranting the revocation and were designated at bottom as "for foreign state" and contained both signature of Secretary of State of Illinois and seal of the State of Illinois, such items constituted "notice" to Director of Revenue within meaning of statute permitting the Director to suspend or revoke license of any resident upon receiving notice of conviction of such person in another state of offense which, if committed in Missouri, would be grounds for suspension or revocation. V.A.M.S. §§ 301.430, 302.160, 490.010 et seq., 490.130; S.H.A.Ill. ch. 95½, §§ 6-117, 6-202(b, c), 6-204, 11-501(a).—*Allen v. LaPage*, 579 S.W.2d 391.—*Autos* 144.2(5.1).

Mo.App. W.D. 1996. "Notice" required for due process purposes must be reasonably calculated under all circumstances to apprise interested parties of pendency of action and afford them opportunity

## NOTICE

to present their objection. U.S.C.A. Const. Amends. 5, 14.—Forms World, Inc. v. Labor and Indus. Relations Com'n, 935 S.W.2d 680, rehearing, transfer denied, and transfer denied.—Const Law 251.6.

Mo.App. 1976. “Notice” is any fact which would put an ordinarily prudent person on inquiry. V.A.M.R. Civil Rule 44.01(d).—State ex rel. Gleason v. Rickhoff, 541 S.W.2d 47.—Notice 6.

Mo.App. 1943. A notice of hearing in insanity proceedings served on alleged incompetent on same day as hearing was not served a “reasonable time” before date set for hearing, as required by statute, and was in effect no “notice,” and order of commitment based thereon was void. V.A.M.S. § 202.140.—Ex parte Trant, 175 S.W.2d 161, 238 Mo.App. 105.—Mental H 131.

Mo.App. 1943. Where a statute requires giving of “notice” but makes no provision regarding method of service, the statute is to be construed as contemplating personal service. Mo.R.S.A. § 2971.—Kaimann v. Kaimann Bros., 175 S.W.2d 66, opinion quashed State ex rel. Kaimann v. Hughes, 181 S.W.2d 524, 352 Mo. 1187, opinion conformed to 182 S.W.2d 458.—Notice 10.

Mo.App. 1942. Any one entering into engagement for services with municipal corporation is charged with “notice” of restrictions the law imposes on power of officials to contract on behalf of the municipality and the law will not make that valid without a writing which the law requires to be in writing. Mo.R.S.A. § 3349, V.A.M.S. § 432.070.—Riley v. City of Rock Port, 165 S.W.2d 880.—Mun Corp 243.

Mo.App. 1942. The provision in life policies for “notice” to the insurance company of assignment of the policies was intended solely for the company’s benefit, and while, in the absence of notice, the assignment of the policies by the insured to a trust estate was not binding on the company, as between the insured and the named beneficiary the assignment was effective.—St. Louis Union Trust Co. v. Dudley, 162 S.W.2d 290.—Insurance 1987.

Mo.App. 1942. “Notice” to occupant of land that his title thereto is defective, so as to deprive him of right to compensation for improvements made by him thereon, does not mean direct and positive information, but anything calculated to put man of ordinary prudence on alert is notice.—Brandon v. Stone, 162 S.W.2d 83, 237 Mo.App. 671.—Improv 4(2).

Mo.App. 1942. Mortgagors’ suit to set aside trustee’s deed to mortgagee after foreclosure of trust deed and mortgagors’ appeal from judgment holding trustee’s deed valid constituted effective “notice” to mortgagee of mortgagors’ adverse claim to mortgaged premises, so that mortgagee was not entitled to lien for value of improvements made by him thereon from time of such foreclosure until date of Supreme Court decision setting aside foreclosure and canceling trustee’s deed.—Brandon v. Stone, 162 S.W.2d 83, 237 Mo.App. 671.—Mtg 540.

Mo.App. 1941. Knowledge gained by special deputy commissioner engaged in liquidation of particular bank, while acting within scope of his authority and in respect to a matter over which his authority extended, was “notice” to state commissioner of finance for all purposes affecting state commissioner’s conduct in case involving such bank. Mo.R.S.A. § 7917.—Kirkwood Trust Co. v. Joseph F. Dickmann Real Estate Co., 156 S.W.2d 54.—Banks 63.5.

Mo.App. 1941. In invitee’s action for injuries sustained in fall while descending steps leading from employees’ recreation room in defendant’s store, evidence that doorkeeper or watchman actually went over the stairs 15 minutes before accident and that it was his duty to inspect premises, and that steps were in the same condition as on night of the accident for at least 17 years prior to date of trial which was had about 13 months after accident was sufficient to show defendant had “notice” of defect in stairs.—Lewis v. National Bellas Hess, 152 S.W.2d 674.—Neglig 1670.

Mo.App. 1940. The statements in catalogue of athletic goods company which sold a vaulting pole to high school that company did not guarantee bamboo poles against splitting or breaking and that company bought the poles in large quantities and was thus assured of the best selection and that special tape of extra strength was used in wrapping the poles could not be construed as “notice” to either the school or school pole vaulter that pole was or might be defective, as regards company’s liability for injuries to vaulter caused by breaking of pole while using it in vaulting.—McCormick v. Lowe & Campbell Athletic Goods Co., 144 S.W.2d 866, 235 Mo.App. 612.—Prod Liab 60.

Mo.App. 1923. Under V.A.M.S. § 476.130, as to notice to one charged with contempt not in presence of the court, “notice” means reasonable notice; one which will fairly and fully enable the party cited to know the specific acts he is charged with and be thereby enabled to prepare his defense.—Sands v. Richardson, 252 S.W. 990.—Contempt 55.

Mo.App. 1920. Rev.St.1909, § 855, (See V.A.M.S. § 273.020), providing that owner of dog which has killed or maimed domestic animals shall forfeit specified amount for every day he shall refuse or neglect to kill the dog “after notice,” does not require that owner be given written notice, in view of section 8057 (V.A.M.S. § 1.040) and notwithstanding section 1788 (repealed Laws 1943, p. 353); the meaning of the word “notice” in a statute being governed largely by the context and purpose of the statute.—Miller v. Prough, 221 S.W. 159, 203 Mo.App. 413.—Anim 86.

Mo.App. 1911. The word “notice,” used in negotiable instrument law, must be understood as meaning actual knowledge, as distinguished from implied or constructive notice which arises when a person is put on inquiry, and knowledge is presumed.—Link v. Jackson, 139 S.W. 588, 158 Mo. App. 63.—Bills & N 337.

Mo.App. 1910. Under Rev.St.1899, § 3029, Ann.St.1906, p. 1736, providing for publication of notice of a local option election in one paper for four consecutive weeks, and for such other notice as the county court may think proper, the term "notice" as used in the latter phrase is not restricted to a publication in a newspaper, but may include other legal forms of notice, such as posting handbills, etc.—*State v. Morgan*, 128 S.W. 839, 144 Mo.App. 35.—Int Liq 33(3).

Mo.App. 1910. Plaintiff's decedent, a railroad employee, was killed in Kansas as the result of a railroad's alleged negligence, and within eight months the plaintiff filed a petition for decedent's wrongful death in the courts of Missouri, setting forth in full the negligent occurrence in Kansas resulting in decedent's death, with the time and place, etc. Summons was duly served within the eight-month period, and defendant appeared thereto. Thereafter the suit was dismissed, and another one begun. *Held*, that the first suit constituted a sufficient "notice" in writing to the railroad company to comply with the requirements of Gen.St.Kan. 1909, § 6999.—*Husted v. Missouri Pac. Ry. Co.*, 128 S.W. 282, 143 Mo.App. 623.—Emp Liab 174.

Mo.App. 1910. The word "notice," as used in Rev.St.1899, § 3017, Ann.St.1906, p. 1728, imposing a penalty for selling liquors to a drunkard after notice from his wife not to do so, is synonymous with information, intelligence, or knowledge, and oral notice to the managing agent of the dramshop keeper is sufficient.—*Jackson County v. Schmid*, 124 S.W. 1074, 141 Mo.App. 229.—Int Liq 179.

Mo.App. 1909. The terms "good faith" and "notice" are intimately related in jurisprudence, but are not of uniform meaning; the former retaining in some measure the popular sense of honest belief, but its technical significance depends largely on the doctrine of notice, as developed in the progress of the equity system. Considered with reference to and as influenced by "notice," the term "good faith" bears several legal meanings according to the subject-matter of the litigation in which it is used. As applied to the purchase of a parcel of land, the title to which passed from the grantor by a prior recorded deed or incumbrance, the constructive notice of the prior conveyance which the record imparts prevents one taking title subsequently from being a purchaser in good faith. V.A.M.S. § 524.240, permitting one who claims land in another's possession to bar the occupant from compensation for betterments by notifying him in writing of the claim and its nature, does not make an exception in favor of an occupant who believes the hostile title to be bad and makes betterments regardless of such notice, since "notice" and "good faith" cannot so exist, for it is an equity doctrine of universal recognition that he who takes with notice takes subject to the claim, and the notice which will suffice for this purpose does not mean direct and positive information, but anything calculated to put a prudent man on the alert.—*Richmond v. Ashcraft*, 117 S.W. 689, 137 Mo.App. 191.

Mont. 1979. "Notice" referred to in statute, which deals with formal proceedings involving es-

tates and which provides that " \* \* \* notice \* \* \* shall be given to every interested person \* \* \*," is notice to interested persons of pleadings filed in formal probate proceedings; will contests are "pleadings." MCA 72-1-103(21), 72-1-303, 72-3-305, 72-3-308.—*Matter of Holmes' Estate*, 599 P.2d 344, 183 Mont. 290, 6 A.L.R.4th 594.—Wills 269.

Mont. 1949. Issuance by city of permit to lay water service pipes from main in street to residence constituted actual "notice" to city of existence of excavation opened for such purpose within statute requiring actual notice to city of defect or obstruction in street or sidewalk as a prerequisite to liability for injury resulting therefrom. Rev.Codes 1935, § 8781 and § 5080, as amended, Laws 1937, c. 122.—*Ledbetter v. City of Great Falls*, 213 P.2d 246, 123 Mont. 270, 13 A.L.R.2d 903.—Mun Corp 788.1.

Mont. 1949. Paper filed with county clerk setting forth particulars as to how lien arose, reasonable and agreed value of labor, supplies and material which builder furnished defendant and description of realty to be charged was not a "pleading" but was "notice" to subsequent purchasers of assertion of mechanics' lien against described realty of sum stated, and defendant desiring particulars should have made written demand upon plaintiffs for copy of account as provided by the statute. Rev.Codes 1935, § 9167.—*Cole v. Hunt*, 211 P.2d 417, 123 Mont. 256.—Acct Action on 6(3); Mech Liens 134.

Mont. 1942. Where plaintiff's parents and sister were in possession of plaintiff's house with plaintiff's permission, and sister rented house to tenants, and sister had been paying taxes on house before renting it, her payment of taxes thereafter and collection of rent gave plaintiff no "notice" of a change in nature of sister's possession, as regards whether sister initiated a claim of adverse possession against plaintiff. Rev.Codes 1935, § 6776.—*Kelly v. Grainer*, 129 P.2d 619, 113 Mont. 520.—Adv Poss 60(4).

Mont. 1942. Where plaintiff's sister, who was in possession of plaintiff's house with her parents under plaintiff's permission, obtained a deed for house from parents when procuring a loan from a bank, the recording of such deed and of deeds incident to loan did not take place of actual "notice" to plaintiff of a change in nature of sister's possession, for purposes of determining whether sister had acquired title to house as against plaintiff by adverse possession. Rev.Codes 1935, § 6935.—*Kelly v. Grainer*, 129 P.2d 619, 113 Mont. 520.—Adv Poss 60(4).

Mont. 1942. The acquisition of knowledge by owner or occupant of land of application for tax deed in some manner other than receipt of statutory notice is not equivalent to nor effective as statutory "notice". Rev.Codes 1935, §§ 2201, 2209.—*Jensen Livestock Co. v. Custer County*, 124 P.2d 1013, 113 Mont. 285, 140 A.L.R. 658.—Tax 750.

Mont. 1942. A husband asserting that he was equitable owner of realty which was acquired dur-

ing marriage and title to which was taken in name of wife in 1911, on ground of resulting trust by way of mortgage, was put on "notice" as to wife's position regarding his claim to property, where wife manifested hostility to claim beginning in 1930 or 1931.—Lewis v. Bowman, 121 P.2d 162, 113 Mont. 68.—Trusts 365(4).

Mont. 1939. "Notice" and "proof of loss" within life policy requiring both notice and proof of loss by insured claiming disability benefits are distinct terms, proof being more formal and definite, but prompt proof of loss may answer for notice.—Conlon v. Northern Life Ins. Co., 92 P.2d 284, 108 Mont. 473.—Insurance 3163, 3164.

Mont. 1931. "Knowledge" of counsel of entry of decree without "notice" thereof held insufficient to start running of time for presentation of bill of exceptions (Rev. Codes 1921, § 9390).—Kelly v. Kelly, 297 P. 475, 89 Mont. 226.—Exceptions Bill of 41(5).

Mont. 1926. Where stockholder had not advised corporation that notices could be mailed in care of attorney, notice so mailed was not "notice" to him (Laws 1923, c. 90, § 4, adding § 6109d to Rev. Codes 1921).—Home State Bank of Manhattan v. Swartz, 252 P. 366, 77 Mont. 566.—Banks 43.

Neb. 1988. "Notice," for purpose of affording due process in proceeding which is to be accorded finality, means apprisedment of pendency of action which is reasonably calculated in circumstances to give interested parties opportunity to be heard therein. U.S.C.A. Const. Amendments 5, 14.—State ex rel. Labedz v. Beermann, 428 N.W.2d 608, 229 Neb. 657.—Const Law 251.6.

Neb. 1971. Term "notice", in statute providing that auctioneer who in good faith and without notice of a mortgage thereon sells personal property for a principal whose identity has been disclosed is not liable to mortgagor, refers to actual and not constructive notice. R.R.S.1943, § 69-109.01.—State Securities Co. v. Norfolk Livestock Sales Co., 191 N.W.2d 614, 187 Neb. 446.—Auctions 9.

Neb. 1950. Possession of realty is "notice" to the world of the rights of the person in possession thereof and all his interests of which inquiry of him would elicit knowledge.—Noetzelmann v. Noetzelmann, 43 N.W.2d 515, 153 Neb. 133.—Notice 6.

Neb. 1942. Possession of land is "notice" to the world of the possessor's rights therein and of all interests of which inquiry of the possessor would elicit knowledge.—Blum v. Poppenhagen, 5 N.W.2d 99, 142 Neb. 5.—Notice 6.

Neb. 1941. In prosecution of a mortgagor for unlawfully selling mortgaged automobile, question propounded to the mortgagor whether he had the mortgagor's oral permission to sell the automobile was, unaided by offer, sufficient "notice" to the state that the mortgagor was seeking to prove one of the components of the defense of oral permission and payment of the mortgage debt, and the sustaining of an objection to the question deprived the mortgagor of the right to make a defense to the

charge on which he was being tried.—Knapp v. State, 299 N.W. 223, 139 Neb. 810.—Crim Law 670.

Neb. 1935. Petition of residents of county asking their county board to co-operate with another county in building of bridge over boundary-line of stream held not to constitute "notice" by the other county so as to entitle it to compel contribution to cost of bridge. Comp.St.1929, § 39-1502.—Buffalo County v. Phelps County, 261 N.W. 360, 129 Neb. 268.—Bridges 10(2).

Neb. 1935. Resolution of county board, sent to county board of another county, instructing highway commissioner to make estimate of cost of bridge over boundary-line stream held not to constitute "notice" of intention to construct bridge, essential to require other county to contribute to cost of bridge. Comp.St.1929, § 39-1502.—Buffalo County v. Phelps County, 261 N.W. 360, 129 Neb. 268.—Bridges 10(2).

Nev. 1998. Automobile manufacturer's "notice" of intent to terminate dealership franchise, for purposes of triggering statutory 30-day period for dealer to appeal termination decision to Department of Motor Vehicles and Public Safety (DMV), does not contemplate those notices which are conditional notices, that is, those describing a mere potentiality. N.R.S. 482.36352, subd. 3(b).—Department of Motor Vehicles and Public Safety v. Jones-West Ford, Inc., 962 P.2d 624, 114 Nev. 766, rehearing denied.—Trade Reg 871(3).

Nev. 1942. The filing of action against Industrial Commission in district court for compensation under the Industrial Insurance Act did not constitute the statutory "notice" of accident as required by statute. Comp.Laws, § 2716.—Nevada Industrial Commission v. Demosthenes, 128 P.2d 746, 61 Nev. 355.—Work Comp 1222.

Nev. 1941. Where stipulation recited that notices were sent to creditors by mail at the address mentioned in the schedule, the presumption that a letter duly directed and mailed was received in regular course of mail had no effect to show actual "notice" of bankruptcy proceedings to creditor whose address was not mentioned in the bankruptcy schedule. Bankr. Act §§ 7, 17, 11 U.S.C.A. §§ 25, 35; Laws 1931, c. 50, p. 60, § 558g, subd. 24.—Quilici v. Thompson, 119 P.2d 710, 61 Nev. 118.—Bankr 3420(12).

Nev. 1934. Whatever puts person on inquiry is sufficient "notice" where means of knowledge are at hand.—State ex rel. Walton v. Roberts, 36 P.2d 517, 55 Nev. 415.—Notice 6.

N.H. 1960. Under Negotiable Instruments Law, "notice" of a defect in title of person negotiating such an instrument consists either of actual knowledge of defect or knowledge of such facts that taking instrument amounted to bad faith. RSA 337:52-337:59, 337:52, subds. 3, 4.—Salitan v. Tinkham, 166 A.2d 115, 103 N.H. 100.—Bills & N 332, 337.

N.H. 1943. A corporation, taking assignment of automobile conditional sale agreement from holder of lien thereof, was chargeable with "notice" of

statute requiring memorandum of agreement to be signed by owner, to validate lien as against attaching creditors without actual notice and hence with notice that the memorandum was not in fact so executed, so as to authorize maintenance of action of debt on bond given by corporation for release of attachment. Pub.Laws 1926, c. 216, § 27.—General Motors Acceptance Corp. v. Lantz, 30 A.2d 278, 92 N.H. 293.—Attach 333; Evid 65, 66.

N.H. 1939. “Notice” implies delivery and receipt of information given either actually or constructively, and if there can be no receipt of notice by reason of legal incapacity or incompetency, then there can be no notice, even by legislative fiat, in which case “due process” requires a substitution for notice through appointed representation.—Hollis v. Tilton, 5 A.2d 29, 90 N.H. 119, on rehearing 6 A.2d 753, 90 N.H. 119.—Proc 16.

N.H. 1939. “Notice” is a constitutional requirement of “due process” which includes regular allegations, opportunity to answer, and trial according to some settled course of procedure. Const. pt. 1, art. 15.—Hollis v. Tilton, 5 A.2d 29, 90 N.H. 119, on rehearing 6 A.2d 753, 90 N.H. 119.—Const Law 309(1).

N.H. 1930. “Notice” of claim which subcontractor is required to give owner is merely statutory method of protecting property owners and subcontractors. Pub.Laws 1926, c. 217, § 15.—Poirier v. East Coast Realty Co., 152 A. 612, 84 N.H. 461.—Mech Liens 125.

N.J.Err. & App. 1948. “Notice” of prior unrecorded deed, within statute providing that unrecorded deed is void as against all subsequent bona fide purchasers for value without “notice” of prior unrecorded deed, may be actual or constructive, and possession may or may not constitute “implied notice.” N.J.S.A. 46:22-1.—Hosier v. Great Notch Corp., 57 A.2d 38, 136 N.J.L. 537.—Notice 1.6.

N.J.Err. & App. 1948. The cultivation of land by grantee whose deed was unrecorded did not constitute “notice” so as to render deed valid as against subsequent bona fide purchaser for value whose deed was recorded. N.J.S.A. 46:22-1.—Hosier v. Great Notch Corp., 57 A.2d 38, 136 N.J.L. 537.—Notice 6; Ven & Pur 232(2).

N.J.Err. & App. 1947. “Notice” within concept of due process comprehends notice of nature of proceeding, as well as of time and place of hearing therein, and such principle derives from common law and is secured by constitutional guaranties.—Lommason v. Washington Trust Co., 53 A.2d 175, 140 N.J.Eq. 207.—Const Law 309(1).

N.J.Err. & App. 1942. The grantee of premises is chargeable with “notice” of existence of prior mortgage which fact might be ascertained by reference to the chain of title as set forth upon public records.—Tracy v. Costa, 28 A.2d 523, 132 N.J.Eq. 455.—Notice 12; Ven & Pur 231(17).

N.J.Err. & App. 1942. Where sister, in taking an assignment of insolvent brother’s last remaining assets as security for his indebtedness to her and future advances, had before her facts which put her

on inquiry as to purpose of assignment to divest brother of any property or property rights upon which levy could be made by judgment creditor, it was equivalent to having “notice” of fraudulent intent, as respects right of brother’s judgment creditor to set the assignment aside. N.J.S.A. 25:2-9, 25:2-10.—Equitable Life Assur. Soc. of U.S. v. Patzowsky, 23 A.2d 561, 131 N.J.Eq. 49.—Fraud Conv 158(2).

N.J.Err. & App. 1941. The fact that executor was personally indebted to trust company in a large sum and was unable to keep up his payments of interest and principal did not put trust company on “notice” that when it permitted him to withdraw estate’s money deposited in estate’s account in trust company and to deposit it in his “attorney’s account” in the trust company, that he would embezzle it, and trust company was not, for that reason, liable to estate for money embezzled. N.J.S.A. 3:44-9.—Kaufman v. Trust Co. of New Jersey, 22 A.2d 279, 130 N.J.Eq. 346.—Ex & Ad 98.

N.J.Err. & App. 1920. The word “notice” is used in a statute means knowledge or information; whatever puts one upon inquiry amounts to notice.—Boynton Real Estate Co. v. Woodbridge Tp., 109 A. 514, 94 N.J.L. 226.

N.J.Sup. 1943. In compensation proceedings, the requirement as respects “notice” to the employer is notice of injury as distinguished from notice of the accident for which compensation is to be claimed.—Cavanaugh v. Murphy Varnish Co., 31 A.2d 759, 130 N.J.L. 107, affirmed 35 A.2d 896, 131 N.J.L. 163.—Work Comp 1224.

N.J.Sup. 1942. A notice sent by registered mail by automobile liability insurer and received by person in charge of house where insured resided was sufficient proof of “notice” of disclaimer of liability.—Weller v. Atlantic Cas. Ins. Co., 26 A.2d 503, 128 N.J.L. 414.—Insurance 3110(2).

N.J.Sup. 1934. “Notice” of injury required under the Workmen’s Compensation Act is generic rather than specific, and does not require specification as to the nature and extent of the injury. N.J.S.A., 34:15-17 to 19.—Hercules Powder Co. v. Nieratko, 173 A. 606, 113 N.J.L. 195, affirmed 176 A. 198, 114 N.J.L. 254.

N.J.Super.L. 2001. Shipper’s complaint about non-delivered goods, and distributor’s acknowledgment that shipment was lost, did not constitute “notice” of a claim under the terms of the Warsaw Convention, and thus shipper’s action against distributor for damages was barred by the Convention. Warsaw Convention, Art. 26(2, 4), 49 U.S.C.A. § 40105 note.—Atlantic Merchandising Group, Ltd. v. Distribution By Air, Inc., 778 A.2d 607, 343 N.J.Super. 382.—Carr 159(1); Treaties 8.

N.J.Super.L. 1993. Difference in meanings between “notice” and “knowledge” under Uniform Partnership Act may be largely immaterial; if agency relationship exists between parties, notice to one person will ordinarily be imputed to other, and that notice, in most instances, amounts to knowledge. N.J.S.A. 42:1-12; N.Y.McKinney’s Partnership Law

## NOTICE

§ 23; Uniform Partnership Act (1914 Act) § 12 comment.—Affiliated FM Ins. Co. v. Kushner Companies, 627 A.2d 710, 265 N.J.Super. 454.—Partners 159.

N.J.Super.Ch. 1951. The word "call" in partnership contract requiring partners to contribute to capital investment of partnership in accordance with "call" of general manager was synonymous with "notice", and a "partner" was entitled to actual notice of call, whether by writing or orally, and such notice must have actually been brought to a partner's attention to result in a failure on the part of such partner to respond thereto by timely payment.—Neustadter v. United Exposition Service Co., 82 A.2d 476, 14 N.J.Super. 484.—Partners 74.

N.J.Ch. 1943. "Notice" in its legal conception does not necessarily imply actual knowledge.—Di Giovacchini v. Teich, 30 A.2d 815, 133 N.J.Eq. 107.

N.J.Ch. 1943. Public announcement at demised premises before tenant's store fixtures were offered for sale at public auction that landlord claimed lien thereon for rent put bidders upon "notice" so that they could not become "bona fide purchasers" entitled to "priority" over lien for rent.—Elkman v. Rovner, 30 A.2d 516, 133 N.J.Eq. 93.—Land & Ten 248(1), 272.

N.J.Ch. 1942. Answer of bus line, in death action, denying operation of bus colliding with deceased motorist, was "notice" to bus passengers injured in the collision that line would deny operation of bus in passenger's actions against line, so as to preclude ad interim restraint restraining line first sued, operating line, and their holding company from setting up limitations in passengers' actions against operating line on ground that after prior actions were started, settlement negotiations were had and passengers were ignorant of operating line until advised by defendants' claim agent, after the period of limitations had expired. N.J.S.A. 2:47-3.—Peters v. Public Service Corp., 29 A.2d 189, 132 N.J.Eq. 500, affirmed 31 A.2d 809, 133 N.J.Eq. 283.—Inj 138.27.

N.J.Ch. 1941. What a sister dealing with her insolvent brother should know from prior facts is a "conclusion of law" and if the sister purchasing from the insolvent brother his last remaining assets had before her facts which should put her on inquiry, it was equivalent to "notice" of facts involved, as regards right of brother's judgment creditor to set the conveyance aside. N.J.S.A. 25:2-9.—Equitable Life Assur. Soc. of U.S. v. Patzowsky, 17 A.2d 794, 128 N.J.Eq. 579, modified 23 A.2d 561, 131 N.J.Eq. 49.—Fraud Conv 158(2), 308(6).

N.J.Co. 1949. Letter to employer by attorneys for compensation claimant and others claiming compensation for chrome poisoning averred to have arisen out of and in course of their employment by addressee, was sufficient "notice" of claim. N.J.S.A. 34:15-33.—Calabria v. Martin Dennis Co., 63 A.2d 717, affirmed 68 A.2d 283, 4 N.J.Super. 528, certification granted 70 A.2d 538, 3 N.J. 377, affirmed 71 A.2d 550, 4 N.J. 64.—Work Comp 1221.

N.J.Com.Pl. 1940. Evidence that an employer had knowledge of absence of employee from his work caused by typhoid fever, which was allegedly contracted by employee as result of a compensable accidental injury, and that employer made no point on question of notice of injury in either the Workmen's Compensation Bureau or on appeal, established that employer had legal "notice" of injury within contemplation of the compensation act.—Bobertz v. Hillside Tp., 14 A.2d 495, 18 N.J.Misc. 399, affirmed 15 A.2d 796, 125 N.J.L. 321, affirmed 19 A.2d 801, 126 N.J.L. 416.—Work Comp 1676.

N.J.Dept.of Labor 1942. The purpose of statutory requirement that employer, unless it has actual knowledge thereof, be given "notice" of an injury is to give the employer the benefit of a timely investigation of the circumstances attending the alleged accident. N.J.S.A. 34:15-17.—Brown v. Brann & Stuart Co., 28 A.2d 420, 20 N.J.Misc. 405.—Work Comp 1216.

N.J.Dept.of Labor 1942. Evidence that employer's insurance carrier was investigating employee's death within two days after the occurrence of such death as the result of an accident suffered two days earlier established that employer had "knowledge" of the injury as contemplated by Workmen's Compensation Act within the time required thereby and also had sufficient "notice" as contemplated by the act. N.J.S.A. 34:15-17.—Brown v. Brann & Stuart Co., 28 A.2d 420, 20 N.J.Misc. 405.—Work Comp 1678.

N.J.Dept.of Labor 1940. An employee is merely required by Workmen's Compensation Act to prove that employer had knowledge of an injury, and knowledge of proper corporate agent of employer of occurrence of injury is sufficient "notice" within meaning of act. N.J.S.A. 34:15-17.—Golden v. C.V. Hill & Co., 13 A.2d 307, 18 N.J.Misc. 330.—Work Comp 1244, 1381.

N.J.Dept.of Labor 1940. Where employee in charge of making out reports of accidents testified that she had not received any report of an accident involving employee claiming compensation, but that she had received information that such employee had suffered a cerebral hemorrhage, employer had "notice" of employee's injuries within meaning of Workmen's Compensation Act. N.J.S.A. 34:15-17.—Golden v. C.V. Hill & Co., 13 A.2d 307, 18 N.J.Misc. 330.—Work Comp 1245.

N.M. 1966. "Notice" given by workmen's compensation claimant to his former employer which merely described nature of injury, did not state where or when accident was supposed to have happened, and contained no reference from which accident could be identified was insufficient. 1953 Comp. § 59-10-13.4.—Bell v. Kenneth P. Thompson Co., 415 P.2d 546, 76 N.M. 420.—Work Comp 1221.

N.M. 1943. A casual statement of injury by employee to employer is not sufficient "notice" thereof, but employee is not required to anticipate results which will flow when he may not know at the time what the results will be. 1941 Comp. §§ 57-913, 57-914.—Elsea v. Broome Furniture

Co., 143 P.2d 572, 47 N.M. 356.—Work Comp 1224, 1234.

N.M. 1942. A “protest” against payment does not create a lien upon money paid, or any legal impediment to its control, but rather is only “notice” to party receiving payment that, if demand is illegal in whole, or in any specified particulars, he may be subjected to an action for the recovery back of the amount to which objection is made, and, if action is brought, the protest is only available as evidence of the fact of compulsion.—*Jaynes v. Heron*, 130 P.2d 29, 46 N.M. 431, 142 A.L.R. 1191.—Paymt 88.

N.M. 1941. Where three landowners, after entering into a range agreement which was not signed by their wives, orally agreed to sell holdings and on appointed day intending purchaser met each owner separately and was unable to complete negotiations with two landowners, but entered into a separate written contract to purchase land from third land-owner and wife, who four days later in violation of contract conveyed land to wife of one of parties to range agreement and there was nothing to indicate that grantee’s husband in doing what he did in connection with wife’s purchase had knowledge of written contract, if husband’s knowledge were imputed to grantee wife, evidence was insufficient to establish that grantee had “notice” of written contract so as to invalidate conveyance and entitle intending purchaser to specific performance of contract.—*Crosby v. Helmstetler*, 123 P.2d 384, 46 N.M. 129.—Ven & Pur 244.

N.M. 1941. An automobile mechanic was charged with “notice” of recorded conditional sales contract notwithstanding he was without actual knowledge thereof, on issue whether mechanic lost his lien for repairs as against the conditional seller by consenting that truck repaired should be removed by purchaser who, upon default, gave seller right to repossess the truck. *Comp.St.1929*, §§ 82-401, 82-407.—*Universal Credit Co. v. Printy*, 119 P.2d 108, 45 N.M. 549.—Autos 381.

N.M. 1939. Whatever puts a party upon inquiry is sufficient “notice” where means of knowledge are at hand, and if party omits to inquire he is chargeable with all facts which by proper inquiry he might have ascertained.—*Johnson v. Ryan*, 86 P.2d 1040, 43 N.M. 127.—Notice 6.

N.Y. 1943. Trust company trustee’s quarterly statement to beneficiary containing notation under heading “Paid Out” of purchase of a particular mortgage at a specified rate of interest guaranteed indicated a purchase of a mortgage and not an apportioned part of a bond and mortgage and did not constitute a “notice” as contemplated by statute authorizing self-dealing by trustee and mingling of its own funds with those of its cestui que trust in a limited degree provided that prompt notification of any such investment be given. *Banking Law*, § 188, subd. 7, as amended by Laws 1917, c. 385.—*In re Ryan’s Will*, 52 N.E.2d 909, 291 N.Y. 376.—Trusts 231(2).

N.Y. 1943. Trust company trustee’s annual statement to beneficiary of securities held, which

contained a list of “Mortgages” with certain descriptive information and under the heading “Rate” contained notation “5½ Gtd” or “5½ Gtd Ctf,” was insufficient “notice” to beneficiaries that trustee individually was owner of bond and mortgage and had apportioned to itself as trustee a part interest therein and was not a compliance with statute requiring prompt notice to beneficiaries of an investment of that type. *Banking Law*, § 188, subd. 7, as amended by Laws 1917, c. 385.—*In re Ryan’s Will*, 52 N.E.2d 909, 291 N.Y. 376.—Trusts 231(2).

N.Y. 1943. Where it was found on supporting evidence that trust company trustee sent beneficiaries notices denominated statements containing wording which apprised beneficiaries that there had been apportioned to them part interest in bond and mortgages belonging to trustee, and notification was received, there was sufficient compliance with provision of Banking Law authorizing trust company trustee to engage in limited self-dealing upon giving prompt “notice” to beneficiaries. *Banking Law*, § 188, subd. 7, as amended by Laws 1917, c. 385.—*In re Ryan’s Will*, 52 N.E.2d 909, 291 N.Y. 376.—Trusts 231(2).

N.Y. 1943. Tax grievances are usually adjudicated by tax officers and statutory indication of time and place of their sessions is all in the way of “notice” that may be demanded in name of “due process of law.”—*In re 801-815 East New York Avenue, Borough of Brooklyn City of New York*, 48 N.E.2d 502, 290 N.Y. 236.—Const Law 284(2).

N.Y. 1943. The sections of municipal charter under which taxes are levied upon realty in city of New York more than satisfy taxpayer’s right to “notice” which may be demanded in the name of “due process of law”. *New York City Charter 1936*, § 151 et seq.—*In re 801-815 East New York Avenue, Borough of Brooklyn City of New York*, 48 N.E.2d 502, 290 N.Y. 236.—Const Law 284(2); *Mun Corp 957(4)*.

N.Y. 1940. The mandate for a “public hearing” and “notice” thereof imports the obligation to consider whatever testimony is given, and in order that basis for determination may be definite and certain where issues of fact are presented, and in order that determination may be reviewed, a duty is imposed upon determining body or officer to set forth factual grounds of the decision, particularly where relief sought is denied.—*New York State Guernsey Breeders Co-op. v. Noyes*, 30 N.E.2d 471, 284 N.Y. 197.—Admin Law 485.

N.Y. 1938. The provision of the Civil Practice Act authorizing vacation of judgment taken through mistake, inadvertence, surprise, or excusable neglect within one year after “notice” of judgment, refers to the usual notice of a judgment or service of copy thereof with written notice of entry. *Civil Practice Act*, § 108.—*Redfield v. Critchley*, 14 N.E.2d 377, 277 N.Y. 336, reargument denied 15 N.E.2d 73, 278 N.Y. 483, reargument denied 15 N.E.2d 77.—*Judgm 153(3)*.

N.Y. 1938. Under the Civil Practice Act, judgment, which declared that beneficiary of income from testamentary trust had waived right to receive

## NOTICE

income, and which was entered after beneficiary, who resided in another state and was served personally pursuant to order for service by publication, failed to appear, could be vacated notwithstanding that no motion to vacate was made until over five years after judgment was entered, where no "notice" of judgment was given except through service. Civil Practice Act, §§ 108, 528.—*Redfield v. Critchley*, 14 N.E.2d 377, 277 N.Y. 336, reargument denied 15 N.E.2d 73, 278 N.Y. 483, reargument denied 15 N.E.2d 77.—Judgm 153(3).

N.Y. 1938. "Notice" of defect in the title of one negotiating an instrument or of infirmity in the instrument requires that a person subsequently dealing with it must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith. Negotiable Instruments Law, § 95.—*Soma v. Handrulis*, 14 N.E.2d 46, 277 N.Y. 223, reargument denied 15 N.E.2d 71, 278 N.Y. 481.—Bills & N 337.

N.Y. 1928. Stepdaughter, having knowledge of stepmother's new will before stepmother's death, held not entitled to specific performance against stepmother's estate of contract to execute mutual wills, irrevocable without notice: 'knowledge,' 'notice.' Where stepdaughter, entering into alleged contract with stepmother to make mutual wills, irrevocable without notice, had knowledge that stepmother had made new will in ample time to change her own will, or take other action before stepmother's death, stepdaughter was not prejudiced by stepmother's failure to give notice of revocation, and therefore was not entitled to specific performance of contract against stepmother's estate; 'knowledge' being equivalent of "notice."—*Lally v. Cronen*, 159 N.E. 723, 247 N.Y. 58, reargument denied 161 N.E. 188, 247 N.Y. 575.—Spec Perf 86.

N.Y. 1928. Where stepdaughter, entering into alleged contract with stepmother to make mutual wills, irrevocable without notice, had knowledge that stepmother had made new will in ample time to change her own will, or take other action before stepmother's death, stepdaughter was not prejudiced by stepmother's failure to give notice of revocation, and therefore was not entitled to specific performance of contract against stepmother's estate; "knowledge" being equivalent of "notice."—*Lally v. Cronen*, 159 N.E. 723, 247 N.Y. 58, reargument denied 161 N.E. 188, 247 N.Y. 575.—Spec Perf 86.

N.Y.A.D. 1 Dept. 1943. Commencement of action for personal injuries arising out of breach of warranty of chinning bar sold by defendant, which did not manufacture bar, to plaintiff was sufficient statutory "notice" of breach of warranty. Personal Property Law, § 130.—*Silverstein v. R.H. Macy & Co.*, 40 N.Y.S.2d 916, 266 A.D. 5.—Sales 285(3).

N.Y.A.D. 2 Dept. 1999. Police report regarding automobile accident does not itself constitute "notice" of accident to municipality, such as may enable party injured in accident to file late notice of claim as prerequisite to pursuing tort action against

municipality. McKinney's General Municipal Law § 50-e, subd. 5.—*Continental Ins. Co. v. City of Rye*, 683 N.Y.S.2d 585, 257 A.D.2d 573.—Mun Corp 741.50.

N.Y.A.D. 2 Dept. 1996. Town's notice of, and repair of, pothole on certain avenue did not qualify as "notice" to town of another pothole on that same avenue, on which plaintiff tripped some two months later; plaintiff failed to establish that spot where she fell was close to repaired pothole, or that pothole that caused her accident was in any way related to repaired pothole. McKinney's Town Law § 65-a; Brookhaven, N.Y., Code § 84-1(B).—*Jones by Jones v. Town of Brookhaven*, 642 N.Y.S.2d 708, 227 A.D.2d 530.—Mun Corp 788.

N.Y.A.D. 2 Dept. 1996. Notice of one isolated pavement defect does not, without more, qualify as "notice" to municipality of another pavement defect just because it happens to be nearby. McKinney's Town Law § 65-a; Brookhaven, N.Y., Code § 84-1(B).—*Jones by Jones v. Town of Brookhaven*, 642 N.Y.S.2d 708, 227 A.D.2d 530.—Mun Corp 788.

N.Y.A.D. 2 Dept. 1965. The "notice" referred to in provision of Motor Vehicle Accident Indemnification Corporation Law relating to settlement of claims or actions contemplates service on Motor Vehicle Accident Indemnification Corporation of a copy of motion papers for settlement, and such service is a condition precedent for court's approval of the settlement. Insurance Law, § 613.—*Motor Vehicle Acc. Indemnification Corp. v. Marrero*, 258 N.Y.S.2d 797, 23 A.D.2d 782, motion denied 268 N.Y.S.2d 339, 17 N.Y.2d 581, 215 N.E.2d 518, reversed 271 N.Y.S.2d 193, 17 N.Y.2d 342, 218 N.E.2d 258.—Autos 251.1.

N.Y.A.D. 2 Dept. 1942. In county's action to establish regularity of tax sale and title to real estate acquired thereunder, service by publication was sufficient "notice" where there was an unpaid delinquent tax on the property. Tax Law, § 169 et seq.—*Nassau County v. Davis*, 37 N.Y.S.2d 756, 265 A.D. 856, appeal granted 39 N.Y.S.2d 605, 265 A.D. 954, appeal dismissed 52 N.E.2d 957, 291 N.Y. 736.—Tax 808.

N.Y.A.D. 2 Dept. 1940. Knowledge by city firemen of dangerous condition on sidewalk or on city property resulting from fact that metal doors covering a cellar opening, located in front of city firehouse were open, was not "notice" to city of dangerous condition so as to render city liable for injuries sustained by infant who fell down the opening.—*Haynes v. City of New York*, 19 N.Y.S.2d 164, 259 A.D. 837.—Mun Corp 790.

N.Y.A.D. 2 Dept. 1932. "Notice" required by statute as prerequisite to enjoining defendant until decision on application for injunction means formal notice of application in action pending, or bearing title of action to be brought, returnable forthwith or at such time as judge may direct in his discretion, exercise whereof and service of notice should be incorporated in order, and copy of order served with notice. Civil Practice Act, § 882, as amended

## NOTICE

28B W&P— 210

by Laws 1930, c. 378.—George F. Stuhmer & Co. v. Korman, 257 N.Y.S. 140, 235 A.D. 856.—Inj 143(1).

N.Y.A.D. 2 Dept. 1929. Record of Comptroler's Tax deed held not "notice" to mortgagee or his successors as respects right to redeem from tax sale. Laws 1855, c. 427, § 77.—Dunkum v. Maceck Bldg. Corp., 237 N.Y.S. 180, 227 A.D. 230, affirmed 176 N.E. 392, 256 N.Y. 275.—Tax 704.

N.Y.A.D. 3 Dept. 1993. "Notice" to be given in connection with proceeding to have disclosure of confidential records kept by Division for Youth, was required to be directed, at minimum, to agency involved and to Commissioner of Social Services, and to individuals, if they have attained majority, or otherwise to their guardian or parents. McKinney's Social Services Law § 372, subd. 4.—Quillen v. State, 599 N.Y.S.2d 721, 191 A.D.2d 31.—Infants 133.

N.Y.A.D. 3 Dept. 1943. Injured person's "notice" to city of intention to sue, stating that injured person had caught foot under rail of specified car tracks at specified point when injured person stepped into depression in pavement which was about four to six inches deep, was adequate.—Adelska v. City of Troy, 41 N.Y.S.2d 449, 265 A.D. 566.—Mun Corp 812(7).

N.Y.A.D. 3 Dept. 1941. The knowledge of superintendent and officer of incorporated day nursery, that cross piece in grape arbor was sagging, was not knowledge of vice president who was injured when she struck her head against crosspiece, and such knowledge was not imputable to vice president, and "notice" to superintendent and officer of such defective condition was not notice to vice president, and did not preclude vice president from suing nursery for her injuries, where superintendent and officer did not communicate their knowledge to vice president. Membership Corporation Act, § 1 et seq.—Stearns v. Schenectady Day Nursery, 31 N.Y.S.2d 277, 262 A.D. 638, affirmed 42 N.E.2d 24, 288 N.Y. 574.—Char 45(2).

N.Y.A.D. 4 Dept. 1994. Check payee did not have "notice" of account holder's claim for amount of unauthorized checks written on its account by parties' mutual accountant, as payee did not have actual knowledge of accountant's ongoing forgery and accountant's use of account holder's checks to pay accountant's personal indebtedness to payee was insufficient to place payee on notice. McKinney's Uniform Commercial Code § 3-304(7).—Dewey Development, Inc. v. AT & A Trucking Corp., 621 N.Y.S.2d 242, 210 A.D.2d 974.—Bills & N 338.5.

N.Y.A.D. 4 Dept. 1962. Automobile conditional sales contract which had not been properly filed was not "notice", within statute making reservation of property in seller void as against creditor who acquires lien by levy without notice of the provision reserving title, to conditional buyer's wife who obtained judgment against buyer for moneys due under provisions of separation agreement and for whom sheriff thereafter levied on the automobile. Personal Property Law, §§ 65, 66.—Quinn v.

Quinn, 235 N.Y.S.2d 609, 17 A.D.2d 1028.—Sales 474(1).

N.Y.A.D. 4 Dept. 1931. "Notice" which reasonably conveys to purchaser information as to time and place of sale of repossessed chattel sold conditionally is sufficient. Personal Property Law, § 79.—H.L. Braham & Co. v. Zittel, 250 N.Y.S. 44, 232 A.D. 406.—Sales 479.3.

N.Y.Sup. 1989. If psychiatric evidence which defense wishes to proffer consists of expert opinion, "notice" which defense is required to submit must include names and qualifications of each expert and must set forth substance of facts and opinions on which each expert is to testify, including basis for each expert's opinion. McKinney's CPL §§ 240.30, 240.60, 250.10 et seq., 250.10, subds. 1, 1(c), 2.—People v. Fratt, 548 N.Y.S.2d 978, 146 Misc.2d 77.—Crim Law 629(11).

N.Y.Sup. 1974. For purposes of due process requirement that persons interested in property which police department property clerk proposes to dispose of must be given meaningful "notice," notice must be reasonably calculated, under all the circumstances, to afford interested parties an opportunity to present their objections to the disposal. Administrative Code, § 435-4.0; U.S.C.A. Const. Amend. 14.—Hill v. Gold, 362 N.Y.S.2d 328, 79 Misc.2d 1055.—Const Law 303.

N.Y.Sup. 1962. Receipt by attorney, who had been retained by party injured in automobile accident to pursue party's common law negligence action against insured, of a copy of letter by which insurer had disclaimed liability for acts of its insured, did not serve as "notice" of disclaimer to attorney's client for purposes of client's statutory action against Motor Vehicle Accident Indemnification Corporation, and did not commence the running of 10-day period following the receipt of notice by claimants for filing of notices of claim. Insurance Law, §§ 167, subds. 2-a, 8, 600(2) (6), 601, sub. c, 608(c).—Application of Savoy, 232 N.Y.S.2d 396, affirmed Savoy v. Motor Vehicle Acc. Indem. Corp., 255 N.Y.S.2d 462, 22 A.D.2d 855.—Atty & C 104.

N.Y.Sup. 1951. Under statute providing that court may relieve from default judgment at any time within one year after "notice" thereof, quoted word means usual notice of judgment with written notice of entry. Civil Practice Act, § 108.—D'Auria v. D'Auria, 103 N.Y.S.2d 741, 200 Misc. 939.—Judgm 153(1).

N.Y.Sup. 1947. Letter sent by insurance carrier to sheriff's office did not constitute the "notice" required by statute of cab driver's claim against county for damages resulting from collision with county ambulance, even though the county thereby gained actual notice. General Municipal Law, § 50-e.—Broome County v. Binghamton Taxicab Co., 75 N.Y.S.2d 423, 190 Misc. 925.—Autos 230.

N.Y.Sup. 1943. The "notice" which is a prerequisite of "due process of law" is proportioned to the event and to the circumstances thereof, and the kind of notice, where and how it shall be served,

when and to what extent it may be dispensed with are within the sound discretion of the court which must be reasonably exercised to accomplish, so far as it is possible to do so, the desired result.—*In re Ryan*, 40 N.Y.S.2d 592, 180 Misc. 478, affirmed 47 N.Y.S.2d 113, 267 A.D. 861, appeal denied 48 N.Y.S.2d 324, 267 A.D. 902, appeal dismissed 56 N.E.2d 121, 292 N.Y. 715.—Const Law 251.6.

N.Y.Sup. 1942. The recording of bond and mortgage given by life tenant did not give a remainderman such "notice" that he could be chargeable with "laches" for failing to take steps for an accounting before death of life tenant.—*Manion v. Peoples Bank of Johnstown*, 38 N.Y.S.2d 484, affirmed 44 N.Y.S.2d 593, 266 A.D. 1043, reversed 55 N.E.2d 46, 292 N.Y. 317.—Remaind 17(3).

N.Y.Sup. 1942. There need not have been intentional wrongdoing or collusion on part of bank taking a mortgage from holder of only a power in trust without power to make mortgage, since one has "notice" of a breach of trust not only when he knows of the breach but also when he knows facts which should lead a reasonably diligent person to inquire whether the trustee is a trustee, whether he acts within his power and if such inquiry pursued with reasonable intelligence and diligence would give him knowledge or reason to know that a breach of trust is committed. Real Property Law, § 149.—*Manion v. Peoples Bank of Johnstown*, 38 N.Y.S.2d 484, affirmed 44 N.Y.S.2d 593, 266 A.D. 1043, reversed 55 N.E.2d 46, 292 N.Y. 317.—Trusts 357(2).

N.Y.Sup. 1942. In a proceeding to test the right of a candidate to a position upon the ballot, service of the moving papers upon a member of the committee designated in the petitions filed with the board of elections and authorized to fill vacancies was insufficient to give "notice" to the candidates directly affected.—*Application of Mucciolo*, 37 N.Y.S.2d 575.—Elections 126(5).

N.Y.Sup. 1942. Where a metal company's officers who participated in a transaction respecting development of a molybdenum corporation wrongfully diverted to their own benefit a corporate opportunity which belonged to company with respect to molybdenum venture, and officers thereafter offered to turn over their interest in venture to company but did not contemplate that offer would be submitted to company's stockholders, and company's board of directors purported to reject offer but stockholders were not informed of offer or of action taken thereon, the offer did not constitute "notice" to company and stockholders so as to relieve officers from liability in stockholders' derivative action.—*Turner v. American Metal Co.*, 36 N.Y.S.2d 356, reversed 50 N.Y.S.2d 800, 268 A.D. 239, appeal dismissed 66 N.E.2d 591, 295 N.Y. 822.—Mines 104.

N.Y.Sup. 1942. The "notice" required by statute to be filed with the municipality before bringing action for personal injuries must describe the place of injury with sufficient particularity and clearness to enable the municipality to locate the defect causing such injuries. Administrative Code,

§ 394a-1.0, subd. b.—*Kantor v. City of New York*, 34 N.Y.S.2d 652.—Mun Corp 741.50.

N.Y.Sup. 1942. Where one year lease provided for automatic extension from year to year unless tenant should give landlord written notice of termination before July 1 of any year, and gave landlord right to re-enter and re-let as tenant's agent in case of abandonment of lease, an abandonment of the lease by tenant constituted "notice" to landlord of termination of lease at end of existing term, and landlord could not re-let as agent of the tenant for subsequent years and hold the tenant liable for the difference between rent reserved in lease and that obtained on re-letting the premises.—138 19th Street, Jackson Heights v. Canaday, 34 N.Y.S.2d 453.—Land & Ten 195(2).

N.Y.Sup. 1941. In proceeding by administratrix of deceased to compel trustees, constituting village board, to pay salary allegedly due deceased as street commissioner of village, trustees' resolution that, due to deceased's illness, third person was appointed to take charge of highway department until a street commissioner was appointed, and letter from clerk to deceased that trustees had appointed the third person, were not "notice" to deceased, where there was no showing that deceased knew of the resolution or the contents of the letter, or that the letter was received by him. Civil Practice Act, § 1283 et seq.—*Furnia v. Murphy*, 31 N.Y.S.2d 875, modified 35 N.Y.S.2d 460, 264 A.D. 809.—Mun Corp 203.

N.Y.Sup. 1940. The widespread publicity of senate investigation of activities of trust company and its subsidiary, on basis of which stockholder acted in bringing action against directors for breach of duty, constituted "notice" to the stockholders as a class, as affecting running of special statute of limitations on actions against directors of moneyed corporation or bank. Civil Practice Act, § 49, subd. 4.—*Litwin v. Allen*, 25 N.Y.S.2d 667.—Lim of Act 95(18).

N.Y.Sup. 1940. The notification mentioned in civil service rule providing that an eligible certified for appointment shall be deemed to have declined by failing to accept within a certain length of time after mailing of notice of appointment means a notification which shall truly state nature of position involved, and where notice misrepresents a permanent appointment subject to the three months' probation as a temporary one, it is not sufficiently accurate so as to constitute "notice" which the rule requires. Rules for Classified Civil Service, rule 8, subd. 2, McKinney's Consol.Laws, Book 9, Appendix; Civil Service Law, § 9.—*Moreland v. Areson*, 22 N.Y.S.2d 309, 19 Misc.2d 385.—Offic 11.4.

N.Y.Sup. 1932. Any notice which under circumstances court deems sufficient to apprise defendant of pendency of application for temporary injunction is sufficient under statutory requirement for "notice". Civil Practice Act, § 882, as amended by Laws 1930, c. 378.—*George F. Stuhmer & Co. v. Korman*, 256 N.Y.S. 253, 143 Misc. 246, reversed 257 N.Y.S. 140, 235 A.D. 856.—Inj 143(1).

## NOTICE

28B W&P— 212

N.Y.Sup. 1930. Institution of action for injuries to steamship passenger within 40 days held sufficient compliance with contract requirement that no action should be "maintained" unless written "notice" of claim be delivered within 40 days after debarkation.—Rague v. Cunard S.S. Co., 249 N.Y.S. 622, 140 Misc. 419.—Ship 166(2).

N.Y.Sup. 1916. Under Negotiable Instruments Law, Consol.Laws, c. 38, § 95, providing that, in order to constitute "notice" of an infirmity in the instrument, the person to whom it is negotiated must have had actual knowledge, or knowledge of such facts that his action in taking the instrument amounted to bad faith, something more than suspicion is necessary to invalidate the title of a holder in due course.—Harford Nat. Bank of Bel Air v. Gardner, 157 N.Y.S. 849, affirmed 161 N.Y.S. 1128, 175 A.D. 955.

N.Y.Sup.App.Term 1940. In personal injury action against city, knowledge by firemen of absence of crossbar from cellar door on sidewalk in front of city firehouse was not "notice" to city of dangerous condition.—Piasecki v. City of New York, 24 N.Y.S.2d 298.—Mun Corp 790.

N.Y.Sur. 1945. "Notice" defined.—In re Weinz' Will, 59 N.Y.S.2d 576.

N.Y.Sur. 1943. Where 9 and 18 months, respectively, after investment in participating interests in bonds and mortgages, but before default, corporate trustee notified income beneficiaries that investment had been made, trustee had given statutory "notice" and could not be surcharged for any loss sustained thereafter. Banking Law, § 188, subd. 7, as amended by Laws 1917, c. 385.—In re Dodge's Estate, 39 N.Y.S.2d 186, affirmed In re Dodge's Will, 43 N.Y.S.2d 512, 266 A.D. 845, reargument denied 43 N.Y.S.2d 512, 266 A.D. 917.—Trusts 217.3(8).

N.Y.Mun.Ct. 1942. Knowledge or notice acquired by an agent while acting in the scope of his authority and in regard to a matter over which his authority extends is "notice" to the principal.—General Motors Acceptance Corp. v. Associates Discount Corp., 38 N.Y.S.2d 972, reversed 48 N.Y.S.2d 242, 267 A.D. 1032, appeal denied 50 N.Y.S.2d 336, 268 A.D. 820.—Princ & A 178(1).

N.Y.Mun.Ct. 1942. Knowledge of manager of finance company's local office and accounting clerk authorized to buy mortgages in manager's absence that delivery of certain new automobiles to dealer was financed by trust receipt transactions charged finance company with "notice" of entruster's security rights in such automobiles. Personal Property Law, § 58-a.—General Motors Acceptance Corp. v. Associates Discount Corp., 38 N.Y.S.2d 972, reversed 48 N.Y.S.2d 242, 267 A.D. 1032, appeal denied 50 N.Y.S.2d 336, 268 A.D. 820.—Corp 428(7).

N.Y.Ct.Cl. 1942. Where for a period of four years water had flowed from hill onto highway forming ice on highway during winter, state had ample "notice" of the existence of a condition dangerous to traffic imposing on state duty to prop-

erly and adequately warn traffic which duty was not discharged by the erection of a "slow" sign three-quarters of a mile away.—Goldfarb v. State, 33 N.Y.S.2d 656, 178 Misc. 180, affirmed 37 N.Y.S.2d 246, 264 A.D. 976.—High 193.

N.Y.City Ct. 1932. Statute requiring notice of sale of motor vehicle for storage charges to persons who have given "notice" of interest in property applies only to persons giving actual notice to lienor. Lien Law, §§ 184, 200, 201; Personal Property Law, §§ 65, 66.—Commercial Credit Corp. v. Moskowitz, 255 N.Y.S. 525, 142 Misc. 773, affirmed 262 N.Y.S. 973, 238 A.D. 831, appeal and reargument denied 263 N.Y.S. 936, 239 A.D. 770.—Autos 385.

N.Y.City Ct. 1917. That one's debtor has gone into bankruptcy is not "notice" or "knowledge" of the proceedings in bankruptcy within Bankruptcy Act, § 17, 11 U.S.C.A. § 35, and does not impose the duty upon the creditor of taking active steps and the creditor has a right to rely upon the provisions of the statute and to assume that no substantial right will be taken from him without notice and an opportunity to contest the question in the ordinary way.—Jenkins v. Levy, 167 N.Y.S. 847.

N.Y.Dist.Ct. 1986. Efforts of used car buyers to notify used car dealer, who was a "one man operation" and conducted his business from his home, were sufficiently reasonable and diligent to constitute "notice," for purposes of New York "Lemon Law," where buyers, immediately upon learning of defective condition of used car, went to dealer's house to notify him of that condition, made several visits to dealer's house within 30 days of date of purchase, left message on at least one such visit with dealer's mother, and, interspersed with such visits, made numerous telephone calls to dealer's house. McKinney's General Business Law § 198-b, subd. b, par. 3.—Kaltz v. Stein, 506 N.Y.S.2d 828, 133 Misc.2d 258.—Cons Prot 9.

N.C. 1984. Whatever puts person on inquiry amounts in law to "notice" of such facts as inquiry pursued with reasonable diligence and understanding would have disclosed.—Northern Nat. Life Ins. Co. v. Lacy J. Miller Mach. Co., Inc., 316 S.E.2d 256, 311 N.C. 62.—Notice 6.

N.C. 1947. Reference to "notice", in statute allowing a nonresident against whom summons has been served by publication, upon good cause shown, to defend after judgment, means actual notice, and legal right to defend may not be lost through failure to answer, unless due to neglect arising after actual notice of the proceedings. G.S. § 1-108.—Russell v. Edney, 41 S.E.2d 585, 227 N.C. 203.—Judgm 142.

N.C. 1943. Where notice of sale by mortgagee contained no specific description but recited that sale was by virtue of mortgage deed, named mortgagor, gave date and book and page of registry where mortgage deed was recorded, and described the land as lying in a certain district adjoining premises of certain persons, and containing 53 acres more or less, and described by metes and bounds in the mortgage "notice" was sufficient. C.S.

§ 2588.—*Peedin v. Oliver*, 24 S.E.2d 519, 222 N.C. 665.—Mtg 354.

N.C. 1942. In courts of chancery notice to counsel of record in an action is “notice” to the party.—*In re Gibson*, 23 S.E.2d 50, 222 N.C. 350.—Atty & C 104.

N.C. 1942. A member of the traveling public does not need notice of a known defective condition of a street, but knowledge of the danger is equivalent to prior “notice”, so that the city is not negligent in failing to give such notice when the traveler is injured by such defective condition of the street.—*Beaver v. Town of China Grove*, 22 S.E.2d 434, 222 N.C. 234.—Mun Corp 798.

N.C. 1942. Where assessment rolls showing assessments placed against each tract of land in drainage district comprising land in adjoining counties were prepared and filed in each county, but subsequently removed from county other than that in which district was established, a map remaining on file in such other county and showing that land purchased from county lay within boundaries of drainage district was sufficient to put purchaser on “notice” of all that the record of drainage proceedings in county in which district was established showed, including assessment rolls containing matured assessments as well as those to mature in the future as liens upon such land. C.S. § 5312 et seq., as amended, C.S. Supp. 1924, § 5312 et seq.; C.S. § 5361 as amended by Pub.Laws 1931, c. 273.—*Nesbit v. Kafer*, 21 S.E.2d 903, 222 N.C. 48.—Drains 84.

N.C. 1942. Evidence that wire hoop on which pedestrian tripped was imbedded in dirt thrown one or two days earlier on that portion of street used for vehicular and pedestrian traffic by a municipal employee engaged in cleaning out the drainage ditch between street and sidewalk did not establish that hoop was placed in street by such employee or was there when he was cleaning out the ditch nor did it show “notice” of the defect by municipal officers so as to render municipality liable for pedestrian’s injuries.—*Waters v. Town of Belhaven*, 21 S.E.2d 840, 222 N.C. 20.—Mun Corp 819(6).

N.C. 1942. A registered mortgage or deed of trust is “notice” to prudent examiners not only of existence of lien thus created but of remedies accruing to holder in event of default, which are primarily sale under power contained in the instrument, if any, and sale by foreclosure proceedings. C.S. § 3309.—*Massachusetts Bonding & Insurance Co. v. Knox*, 18 S.E.2d 436, 220 N.C. 725, 138 A.L.R. 1438.—Mtg 171(5).

N.C. 1942. Where deed of trust was on record and on its face was in default when land was conveyed to purchasers, purchasers were put on “notice” that rights existing in holder of lien to foreclose for a satisfaction of a debt had accrued, and such notice demanded that a prudent examiner investigate further to ascertain whether the debt had been kept in date by payment, and whether lienholder was pursuing either of the remedies available and purchasers were required to be vigilant and to make such further investigation as the

circumstances demanded.—*Massachusetts Bonding & Insurance Co. v. Knox*, 18 S.E.2d 436, 220 N.C. 725, 138 A.L.R. 1438.—Ven & Pur 231(17).

N.C. 1942. “Notice” which a recorded deed gives, includes all that reasonable inquiry may disclose, and it is “constructive notice” thereof, whether an intending purchaser sees fit to resort to the record or to ignore it. C.S. §§ 3309, 3560, and § 3561, as amended by Pub.Laws 1929, c. 327, § 2.—*Tocci v. Nowfall*, 18 S.E.2d 225, 220 N.C. 550.—Ven & Pur 231(1).

N.C. 1941. Trustees under will of deceased stockholder in corporation were not precluded from prevailing in action against corporation to have corporate reorganization declared invalid as to the trustees and to protect trustees’ rights to accrued dividends, on ground that corporation was misled because one of the trustees, who was also a director of the corporation, had actively participated in reorganization, where prior to meeting at which reorganization plan was adopted he advised corporation’s president that his cotrustees did not agree with him concerning the reorganization and that he was not going to vote the trustees’ stock in favor of reorganization, since “notice” to the president was notice to the corporation.—*Patterson v. Henrietta Mills*, 12 S.E.2d 686, 219 N.C. 7.—Corp 68, 428(7).

N.C. 1941. Where trustees under will of deceased stockholder in corporation gave notice to proxy of owners of corporate stock that they opposed adoption of reorganization plan, they were not precluded from thereafter maintaining an action to have reorganization declared invalid and to have their rights to accrued dividends on preferred stock protected, since “notice” to proxy was notice to owners of corporate stock.—*Patterson v. Henrietta Mills*, 12 S.E.2d 686, 219 N.C. 7.—Corp 68, 198(5).

N.C. 1940. In action against city for damages to plaintiffs’ land allegedly caused by city emptying raw sewage into stream flowing past land, evidence that after notice of claim was delivered to city manager, members of city council and mayor visited land and expressed opinion that claim was correct was admissible to show that mayor and members of city council had been given “notice” of claim. Priv. Laws 1931, c. 171, § 2.—*Perry v. City of High Point*, 12 S.E.2d 275, 218 N.C. 714.—Mun Corp 845(4).

N.C. 1940. Evidence that plaintiffs filed notice of claim with city manager of city of High Point for damages to plaintiffs’ land caused by city emptying raw sewage into stream flowing past land, that notice was addressed to mayor and city council, that city manager, at subsequent meeting of city council, stated that plaintiffs were claiming damage, and that after delivery of notice of claim to city manager, mayor and members of city council visited land and expressed opinion that claim was just, was sufficient for jury on issue whether plaintiffs had complied with requirement of city charter relative to giving “notice” to city council as “condition precedent” to commencement of action against city for damages. Priv. Laws 1931, c. 171, § 2.—*Perry v.*

City of High Point, 12 S.E.2d 275, 218 N.C. 714.—Mun Corp 845(5).

N.C. 1926. Party appearing or personally served, regarded as having “notice” of judgment, may have it set aside for excusable neglect, etc., within year after rendition only (C.S. § 600).—Foster v. Allison Corp., 131 S.E. 648, 191 N.C. 166, 44 A.L.R. 610.—Judgm 153(2).

N.C. 1926. Indorsee of note has burden of showing that he is holder in due course, when fraud or illegality shown. C.S. §§ 3010, 3026, 3040; “notice.”—Price Real Estate & Insurance Co. v. Jones, 131 S.E. 587, 191 N.C. 176.—Bills & N 497(5).

N.C. 1909. Revisal 1905, § 2205, provides that to constitute “notice” of an infirmity in a note or defect in the title of the person negotiating it, the person to whom it is negotiated must have had actual knowledge, or knowledge of such facts that his action in taking the instrument amounted to bad faith. Held, that when a note was transferred before maturity without recourse, it was no defense as against the indorsee that it was given under a contract for territory for the sale of a certain sash lock, and that the locks subsequently furnished pursuant to the contract were not in accordance with the representations of the payee, and that the note had been therefore obtained by fraud; there being nothing to show that the indorsee had any notice of the fraud at the time of the transfer.—Bank of Sampson v. Hatcher, 66 S.E. 308, 151 N.C. 359, 134 Am.St.Rep. 989.—Bills & N 373.

N.C.App. 1995. For purpose of Bankruptcy Code provision that debtor is not discharged from debt when creditor was unlisted unless such creditor had notice or actual knowledge of the proceeding in time to file proof of claim, verbal communication may be sufficient to constitute “notice”; written notice is not necessary. Bankr.Code, 11 U.S.C.A. § 523(a)(3)(A).—Cato v. Cato, 455 S.E.2d 918, 118 N.C.App. 569.—Bankr 3361.

N.C.App. 1984. In action to quiet title, evidence, including actual use of easement under a claim of right contained in a deed, record notice to party denying existence of the easement and their predecessors in title, and evidence that there were attempts to block the easement was sufficient to indicate that adverse party had “notice” and that use of the easement was “open and notorious.” G.S. § 1-38.—Higdon v. Davis, 324 S.E.2d 5, 71 N.C.App. 640, review allowed 329 S.E.2d 391, 313 N.C. 507, affirmed in part, reversed in part 337 S.E.2d 543, 315 N.C. 208.—Ease 36(3).

N.D. 1988. For purposes of recording act, “notice” that would impeach judgment lienor’s good faith is notice of prior, unrecorded conveyance. NDCC 47-19-41, 47-19-42.—Williston Co-op. Credit Union v. Fossum, 427 N.W.2d 804, appeal after remand 459 N.W.2d 548.—Ven & Pur 231(17).

Ohio 1945. A copy of entry denying motion to vacate and refile prior decision of Board of Tax Appeals sent to taxpayer’s then attorney of record by registered mail on following day constituted

“notice” to taxpayer within intendment of statute requiring tax commission to certify its action to person in whose name property is listed. Gen.Code, § 5611-1.—Lutz v. Evatt, 60 N.E.2d 473, 144 Ohio St. 635, 30 O.O. 223.—Tax 480.

Ohio 1942. “Notice” in its legal significance is distinguished from “knowledge” and may be actual or constructive.—Cambridge Production Credit Ass’n v. Patrick, 45 N.E.2d 751, 140 Ohio St. 521, 24 O.O. 546, 144 A.L.R. 323.—Notice 1.

Ohio 1931. “Notice” to insurer’s agent of condition of insured’s health does not necessarily constitute “knowledge” by agent, within statute providing insured’s representations shall not defeat recovery if agent knew of false or fraudulent answer. Gen. Code, § 9391.—John Hancock Mut. Life Ins. Co. v. Luzio, 176 N.E. 446, 34 Ohio Law Rep. 413, 123 Ohio St. 616, 9 Ohio Law Abs. 702.

Ohio App. 2 Dist. 1939. Under code provision that determination of probate court on settlement of an account shall have same effect as judgment at law or decree in equity as the particular case may require and shall be final as to all persons having notice of the hearing, except where the account is settled in the absence of person adversely interested, and without actual notice, word “notice” does not include notice of publication generally spoken of as constructive notice. Gen.Code, § 10506-40(e).—In re Chambers’ Estate, 36 N.E.2d 175, 16 O.O. 519, 30 Ohio Law Abs. 420, appeal dismissed 24 N.E.2d 601, 136 Ohio St. 202, 16 O.O. 535, rehearing denied 43 N.E.2d 244.—Ex & Ad 513(9).

Ohio App. 3 Dist. 1942. Possession of premises by vendor and one of his four cotenants would charge purchaser with “notice” only of such equities as such cotenant in possession might have in title to the premises by reason of her possession, and would not constitute notice of equities existing between vendor and his cotenants by reason of transactions between themselves not appearing of record.—Dietsch v. Long, 43 N.E.2d 906, 72 Ohio App. 349, 27 O.O. 294, 36 Ohio Law Abs. 360.—Ten in C 44.

Ohio App. 3 Dist. 1942. A deed whereby record owner of undivided one-fifth interest in realty for a purported valuable consideration quitclaimed the undivided one-fifth part of such realty to grantee and all right, title and interest of the grantor in and to such premises with all the privileges and appurtenances thereunto was not of such character as to charge grantee with “notice” of equities existing between grantor and his cotenants.—Dietsch v. Long, 43 N.E.2d 906, 72 Ohio App. 349, 27 O.O. 294, 36 Ohio Law Abs. 360.—Ten in C 44.

Ohio App. 8 Dist. 1941. Credits of dividends by name in a book labeled “Stock Department” and issued to plaintiffs by a savings association, which was organized under building and loan association laws, for purpose of recording sums deposited with association, was “notice” to plaintiffs that agreement between plaintiffs and association was for purchase of stock and not a deposit at interest, especially where book had been in plaintiffs’ posses-

## NOTICE

sion for several years. Gen.Code, §§ 9645, 9651, 9652, 9684.—*Allen v. Shaker Heights Sav. Ass'n*, 39 N.E.2d 747, 68 Ohio App. 445, 23 O.O. 155, 35 Ohio Law Abs. 188.—B & L Assoc 6(1).

Ohio App. 9 Dist. 1948. “Notice” in statute requiring notice of adoption hearing to be given to parent of child means advice or information in writing to apprise parent of hearing in court. Gen. Code, §§ 10512-12, 10501-21.—*In re Burdette*, 83 N.E.2d 813, 83 Ohio App. 368, 38 O.O. 429.—Adop. 12.

Ohio App. 9 Dist. 1940. Though owner of allotment has a general plan of uniform restrictions for lots in allotment and restrictions are inserted in each deed of allotment, one purchaser cannot enforce restrictions against another purchaser unless restrictions are so drawn that each purchaser covenants for benefit of every other lot owner, that he will observe restrictions, or purchaser against whom restrictions are sought to be enforced has notice of general plan and purchases lot with reference thereto, and such “notice” is shown when recorded plat contains the general plan, or when allotter in his deeds covenants that all sales of lots shall be subject to like restrictions.—*Lopartkovich v. Rieger*, 33 N.E.2d 1014, 66 Ohio App. 332, 20 O.O. 167, 34 Ohio Law Abs. 68.—Covenants 77.1.

Ohio Mun. 1994. Owner, whose “mammoth maple tree” fell, allegedly damaging adjoining landowner, did not have “notice” or “constructive notice” of tree’s dangerous condition, and, thus, adjoining landowner could not recover from owner for negligence; owner and tenant testified that they had no notice of tree’s danger, owner’s tree man testified that he had worked on property’s trees every two years and that tree in question was not unsafe two years before it fell, and adjoining landowner, who testified that tree was rotten and likely to fall, did not claim that she had warned owner.—*Nationwide Ins. Co. v. Jordan*, 639 N.E.2d 536, 64 Ohio Misc.2d 30.—Neglig 1128.

Oklahoma. 1998. “Notice,” for purposes of satisfying Due Process Clause, must be reasonably calculated to inform interested parties of pending action and of every critical stage so as to afford them opportunity to defend or to meet issues at meaningful time and in meaningful manner. U.S.C.A. Const. Amend. 14.—*PFL Life Ins. Co. v. Franklin*, 958 P.2d 156, 1998 OK 32, rehearing denied.—Const. Law 309(1).

Oklahoma. 1977. Where trial judge kept defendant under a continuous oral order, beginning eight days before scheduled trial date, to report to him daily concerning status of defendant’s efforts to retain counsel and where trial judge orally advised defendant that trial was set for certain day but these communications were not reflected in court minutes and were not made at scheduled court appearance of defendant, such oral communications to defendant did not constitute “notice” within purview of statute requiring that defendant be given “notice” of trial date when no day certain has been set. 59 O.S.1971, § 1326(b).—*Woods v. State*, 570 P.2d 1154, 1977 OK 196.—Bail 75.2(1).

Oklahoma. 1976. Where true copy of assignment of right to receive payments under contractor’s contract with the city was delivered to city, who in past had received notice of similar, though not like assignments, which were honored by city, city had “notice” of assignment which gave rise to duty upon city, i. e., account debtor, to make payments directly to assignee bank. 12A O.S.1971, §§ 1-201(26), 9-318(3).—*American Bank of Commerce v. City of McAlester*, 555 P.2d 581.—Sec Tran 188.

Oklahoma. 1941. Whatever is “notice” enough to excite attention and put party on his guard and call for inquiry is notice of everything to which such inquiry might have led.—*Rubendall v. Talla*, 119 P.2d 851, 190 Okla. 24, 1941 OK 401.—Notice 6.

Oklahoma. 1941. Under statute requiring notice of presentation of petition for annexation of territory to a town to be given by publication at least once in each week for two successive weeks, notice of such a petition published in newspaper in town, February 12th and February 19th, was sufficient “notice” to support passage of ordinance on February 26th, since, in computing time of publication, the day of first publication was required to be excluded and day of passage of ordinance was required to be included. 11 Okl.St. Ann. § 484; 12 Okl.St. Ann. § 73.—*Missouri-Kansas-Texas R. Co. v. Maltsberger*, 116 P.2d 977, 189 Okla. 363, 1941 OK 226.—Mun Corp 33(4).

Oklahoma. 1939. The service of summons on plaintiff, by defendant, within three years after rendition of judgment based on service only by publication in newspaper, was equivalent to “notice” required by the statute dealing with the opening of judgment after default on service by publication. 12 Okl.St. Ann. § 176.—*Bagsby v. Bagsby*, 89 P.2d 345, 184 Okla. 627, 1939 OK 193, 122 A.L.R. 155.—Judgm 155.

Oklahoma. 1939. Where a person has actual knowledge of facts sufficient to put a prudent man on inquiry, he has “notice” of everything which such inquiry would disclose.—*Detrick v. Kitchens*, 86 P.2d 998, 184 Okla. 293, 1939 OK 55.—Notice 6.

Oklahoma. 1939. Where actual knowledge, which is allegedly sufficient to put a prudent man on inquiry leading to notice of certain fact, is equally as well referable to a different matter as it is to that fact, it is not sufficient to constitute “notice.”—*Detrick v. Kitchens*, 86 P.2d 998, 184 Okla. 293, 1939 OK 55.—Notice 6.

Oklahoma. 1939. Presence, in small locked outbuilding, of furniture belonging to those having unrecorded contract to purchase premises was not “notice” to subsequent purchaser of their claim.—*Detrick v. Kitchens*, 86 P.2d 998, 184 Okla. 293, 1939 OK 55.—Ven & Pur 232(8).

Oklahoma. 1931. “Notice” is not a technical term, and, while it can have various meanings, meaning given by courts is to be controlled largely by context and purpose and intent of enactment, and should receive reasonable interpretation with reference to subject with which it is applied. Words “given” and

"served," in statutes relating to notice of application for appointment of guardian of incompetent Osage Indian, are used practically synonymously and interchangeably. 58 Okl.St. Ann. § 851; Act Cong. April 18, 1912, § 3, 37 Stat. 86.—Shimonek v. Tillman, 1 P.2d 154, 150 Okla. 177, 1931 OK 377.

Oklahoma. 1929. Whatever is "notice" enough to excite attention and put a reasonably prudent person on his guard and call for inquiry, is notice of everything to which inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant with it.—Dobbins v. Texas Co., 275 P. 643, 136 Okla. 40, 1928 OK 696.

Oklahoma. 1927. Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have "notice" of the fact itself.—Coleman v. Armstrong, 261 P. 228, 128 Okla. 87, 1927 OK 425.

Oklahoma. 1926. Where persons are dealing with a guardian relative to the purchaser of a minor's real estate, whatever is "notice" enough to excite attention and put a reasonably prudent person on his guard and calls for inquiry is notice of everything to which the inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant with it.—Lowery v. Richards, 248 P. 622, 120 Okla. 261, 1926 OK 148.

Oklahoma. 1925. "Notice" as used in Negotiable Instrument Law means actual knowledge as distinguished from implied or constructive notice which arises when person is put on inquiry and knowledge is presumed.—Gaither v. First Nat. Bank, 239 P. 461, 113 Okla. 111, 1925 OK 682.

Oklahoma. 1923. There is a vast difference between "notice" or knowledge and waiver. "Notice" is information of a condition affecting an existing right. Waiver is the surrender or relinquishment of an existing right. Waiver may be effected voluntarily by an affirmative act by one having authority indicating an intention to waive, and need not necessarily be preceded by notice; or waiver may be effected by the omission or failure of a party to assert in his behalf an existing right, which must be preceded by notice.—Knights and Ladies of Security v. Bell, 220 P. 594, 93 Okla. 272, 1923 OK 479.

Oklahoma. 1918. Whatever is "notice" enough to excite attention and put a reasonably prudent person on his guard and calls for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant with it.—Winsted v. Shank, 173 P. 1041, 68 Okla. 269, 1918 OK 380.

Oklahoma. 1909. "Notice" is defined by Wilson's Rev. & Ann. St. 1903, c. 28, § 10, 25 Okl. St. Ann. § 10, as either actual or constructive notice; sections 11 and 12 defining actual notice as express information of a fact, and constructive notice as that imputed by law to a person not having actual notice.—

Cooper v. Flesner, 103 P. 1016, 24 Okla. 47, 23 L.R.A.N.S. 1180, 20 Am. Ann. Cas. 29, 1909 OK 137.

Oklahoma. 1898. It is a well-settled principle of law that "notice" is the equivalent of "knowledge."—Strahorn-Hutton-Evans Com'n Co. v. Florer, 54 P. 710, 7 Okla. 499, 1898 OK 91.

Oklahoma. 1971. "Motion to strike" contained in document captioned "Notice" could be not considered "Answer" or an appropriate appearance which would prevent taking of default for want of answer, where motion to strike was not responsive to order overruling demurrer which permitted defendants "to further plead." ORS 16.030.—Colwell v. Chernabaeff, 482 P.2d 157, 258 Or. 373.—Judgm 103, 106(1).

Oklahoma. 1943. Where Multnomah county and a city received checks of Marion county drawn by its treasurer in payment of his personal tax obligations, and surety on treasurer's fidelity bond made good Marion county's loss, Multnomah county and the city could not escape liability to surety as Marion county's subrogee, on theory that Multnomah county tax collector and city treasurer were not their agents and that notice to them did not constitute "notice" to county and city of treasurer's fiduciary capacity, since county and city could not retain the money and disaffirm knowledge with which officers were chargeable, and county and city were chargeable with notice because records of officers were records of county and city. ORS 71.056.—American Surety Co. of New York v. Multnomah County, 138 P.2d 597, 171 Or. 287, 148 A.L.R. 926.—Counties 81.1; Mun Corp 169.

Oklahoma. 1943. In action by surety on fidelity bond of treasurer of Marion county who drew county check to pay personal tax obligations to Multnomah county, which loss was made good by surety, allegation that check was drawn as "county treasurer" charged Multnomah county with "notice" of source of funds. ORS 71.056.—American Surety Co. of New York v. Multnomah County, 138 P.2d 597, 171 Or. 287, 148 A.L.R. 926.—Subrog 41(5).

Oklahoma. 1943. A transferee is chargeable with "notice" of infirmity of negotiable instrument when two circumstances co-exist, namely, that name of transferor is followed by words disclosing fiduciary relationship, and that instrument is transferred in payment of private debt owed by transferor to transferee. ORS 71.056.—American Surety Co. of New York v. Multnomah County, 138 P.2d 597, 171 Or. 287, 148 A.L.R. 926.—Bills & N 340.

Oklahoma. 1943. When county treasurer in violation of his trust draws check upon county funds, affixing after his signature the words "county treasurer", and delivers check to payee in payment of private obligation, payee who accepts benefits thereof is chargeable with "notice" of trust relationship, has duty to make reasonable inquiry, and if no inquiry is made is charged with knowledge of what it would have disclosed. ORS 71.056.—American Surety Co. of New York v. Multnomah County, 138 P.2d 597, 171 Or. 287, 148 A.L.R. 926.—Mun Corp 942.

## NOTICE

Or. 1942. One dealing with a municipal corporation is charged with "notice" of every limitation on its powers contained in its charter.—Public Market Co. of Portland v. City of Portland, 130 P.2d 624, 171 Or. 522, opinion supplemented on rehearing 138 P.2d 916, 171 Or. 522.—Mun Corp 57.

Or. 1942. All persons dealing with a municipality are charged with "notice" of laws which govern municipality and are required to take notice of public documents which the laws demand that municipality's officials must prepare and file before they possess the right to act.—State ex rel. Fred J. Kiesel Estate v. Bishop, 129 P.2d 276, 169 Or. 448.—Mun Corp 57.

Or. 1942. Where report of commissioners appointed to assess benefits and damages from construction of a drainage district project, after being modified, was approved by county court, and report and county court's order approving it were filed in appropriate public offices, purchasers of bonds issued by district in connection with the project were charged with "notice" of report and order but were not chargeable with notice of contents of minutes of meetings of commissioners, especially where minutes were never filed among public records. ORS 547.225 to 547.230.—State ex rel. Fred J. Kiesel Estate v. Bishop, 129 P.2d 276, 169 Or. 448.—Mun Corp 944, 945.

Or. 1942. Under evidence establishing existence of intimate relationship between all of purchasers of realty from corporation which was record title holder but which in fact was a second mortgagee, and that all purchasers were represented by same attorney, notice to or knowledge by any of purchasers would be deemed "notice" to all, as regards mortgagor's interest in realty purchased.—Murray v. Wiley, 127 P.2d 112, 169 Or. 381, rehearing denied 129 P.2d 66, 169 Or. 381.—Ven & Pur 244.

Or. 1941. Where assignee of realty purchase contract containing self-executing provision for forfeiture of payments placed assignee's transferee in possession of premises and left the state, "notice" to the transferee would be notice to the assignee of vendors' insistence that future installments should be promptly paid.—Edwards v. Wirtz, 118 P.2d 114, 167 Or. 625.—Ven & Pur 101.

Or. 1936. To lawfully condemn property, owner must be given "notice," which means that he must be notified of time and place of hearing, and that he shall have right to be present and make objections.—Hill Military Academy v. City of Portland, 53 P.2d 55, 152 Or. 272.—Mun Corp 628.

Or. 1914. Under L.O.L. § 4194, as amended by Laws 1911, p. 78, ORS 335.215 et seq., a direction by the district boundary board to the school boards to call a special election for the formation of a union high school district is sufficient; the word "call" involving the giving of notice, and being used synonymously with "notice" in L.O.L. § 4083, ORS 331.520.—State ex rel. Birdwell v. Hall, 144 P. 475, 73 Or. 231.—Schools 42(2).

Or. 1912. Where, in an action against a county to set aside a conveyance, a decree was taken by

default, the court, under L.O.L. § 103, may, in its discretion, within one year after notice thereof, relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, and has jurisdiction to entertain a motion to set aside such decree when filed within one year after knowledge of the decree was acquired by the agents or officers of the county, though not until more than one year after the decree was entered; "notice," as used in such statute, being a synonym of "knowledge."—Chapman v. Multnomah County, 126 P. 996, 63 Or. 180.

Or. 1911. The word "notice," as used in L.O.L. § 103, ORS 16.050, 18.160, permitting a court in its discretion, at any time within a year after notice thereof, to relieve a party from a judgment taken against him by mistake, etc., means "knowledge" by the moving party of the entry of a judgment.—Evans v. Evans, 118 P. 177, 60 Or. 195.—Judgm 153(3).

Or.App. 1982. Letter which served as permanent teacher's notice to principal of her resignation and which did not state how much notice, but did tell principal that teacher would continue to teach for 60 days was sufficient, when forwarded to superintendent, to give "notice" to superintendent and, hence, to school board so as to avoid sanction of suspension required by statute for failure to give 60 days' notice. ORS 342.553(1).—Pierce v. Douglas School Dist. No. 4, 653 P.2d 243, 60 Or.App. 285, review allowed 660 P.2d 683, 294 Or. 569, reversed 686 P.2d 332, 297 Or. 363.—Schools 144(4).

Pa. 1943. That road commissioners of township within a few days after accident causing injury to minor plaintiff knew of condition of road which caused the accident and repaired the defects therein would not be the equivalent of "notice" required by the statute to be given the township. 53 P.S. § 5301.—McBride v. Rome Tp., 32 A.2d 212, 347 Pa. 228.—High 203.

Pa. 1942. Where bond and mortgage in which trustee joined contained recitals to the effect that the trustee was acting in a fiduciary capacity, the presence of such recitals was "notice" to mortgagee of the trust and of the trustee's power under which the bond and mortgage were executed.—In re Hartje's Estate, 28 A.2d 908, 345 Pa. 570.—Trusts 206(1).

Pa. 1942. Whatever puts a party on inquiry amounts in judgment of law to "notice" providing the inquiry becomes a duty, as in the case of purchasers and creditors, and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence.—Pennsylvania Range Boiler Co. v. City of Philadelphia, 23 A.2d 723, 344 Pa. 34.—Notice 6.

Pa. 1942. Where board of view, in making award for damage to property resulting from change of grade in connection with opening of the street, took into consideration future loss which would result from change of grade in connection with the opening of avenue which intersected the street, and there was nothing in the board's report as filed to indicate that the avenue improvement

was considered, or that any portion of award was based thereon, notice of the proceeding to open the street did not constitute "notice" to subsequent purchaser of part of the property that an award had been made for damages for loss to result from change of grade of the avenue.—Pennsylvania Range Boiler Co. v. City of Philadelphia, 23 A.2d 723, 344 Pa. 34.—Em Dom 243(3).

Pa. 1942. An exception, contained in deed reserving claims accruing to grantor by reason of ownership of property arising out of opening of certain street, did not constitute "notice" to a subsequent purchaser of part of the property of fact that award in proceeding for damage in connection with opening of the street included damage for future loss which would result from change of grade in connection with the opening of an avenue which intersected the street, since the deed contained nothing relative to the intersecting avenue.—Pennsylvania Range Boiler Co. v. City of Philadelphia, 23 A.2d 723, 344 Pa. 34.—Em Dom 243(3).

Pa. 1942. Evidence that because of snow followed by rain sidewalks were covered with slush, and that plaintiff, who was an employee of tenant in defendant's building, had traversed a number of blocks before entering the building and sustained injuries when she slipped and fell to floor of lobby of the building, which was covered with corrugated rubber strip, failed to establish negligence of defendant and to show that condition of which plaintiff complained had existed for such an unreasonable length of time as to put defendant on "notice" concerning it.—Gallagher v. Children's Aid Soc. of Pennsylvania and Philadelphia, 23 A.2d 452, 344 Pa. 152.—Land & Ten 169(6).

Pa. 1942. The fact that a third party slipped and fell on slush covered floor of lobby of building would not be evidence tending to show "notice" to owner of building of the condition of the floor a short time before third party's fall, when the plaintiff slipped and fell to the floor.—Gallagher v. Children's Aid Soc. of Pennsylvania and Philadelphia, 23 A.2d 452, 344 Pa. 152.—Neglig 1670.

Pa. 1940. Where account in national bank stood in depositor's name as county treasurer, the caption of the account gave bank "notice" that the funds belonged not to the depositor but to the county, and that the depositor held them merely in a fiduciary capacity.—Dunn v. Berks County, 14 A.2d 310, 339 Pa. 282.—Banks 130(2).

Pa. 1936. "Notice" is information or warning, especially of a formal nature; announcement, as theatrical notices.—Lynett v. Huester, 185 A. 835, 322 Pa. 524.

Pa. 1927. Holding over is "notice" of election to exercise option for additional term. Holding over by tenant having option for additional term is "notice" of election to exercise option.—Sloan v. Longcope, 135 A. 717, 288 Pa. 196.—Land & Ten 90(6).

Pa. 1927. Holding over is "notice" of election to exercise option for additional term.—Sloan v. Longcope, 135 A. 717, 288 Pa. 196.—Land & Ten 90(6).

Pa. 1905. The word "trustee," following the name of the grantee in a deed, constitutes "notice" and puts one on inquiry.—Flitcraft v. Commonwealth Title Ins. & Trust Co., 60 A. 557, 211 Pa. 114.

Pa.Super. 1995. Anything that proves knowledge or shows that knowledge exists can be sufficient to prove "notice" of license suspension, as required for conviction of driving after suspension.—Com. v. Crockford, 660 A.2d 1326, 443 Pa.Super. 23, appeal denied 670 A.2d 140, 543 Pa. 690.—Notice 1.6.

Pa.Super. 1943. Where purchase-money mortgage expressly mentioned mortgagees' original appeal to test validity of municipal tax lien, and mortgagees agreed to accept reduction in purchase price if city taxes should be adjudged valid lien against mortgaged property, mortgagor did not take title without "notice" of lien and subsequent proceedings thereunder. 53 P.S. §§ 4763, 4767.—City of Philadelphia v. L. Tanner & Co., 30 A.2d 216, 151 Pa.Super. 177.—Mun Corp 975, 980(4).

Pa.Super. 1942. A referee's finding that claimant testified that at time of alleged accident he was working with another and reported his injury five minutes later to his immediate superior was not a finding of the fact to which claimant testified and did not meet requirement of compensation act respecting "notice" to employer of accident. 77 P.S. § 631.—Bakaisa v. Pittsburgh & W. V. R. Co., 27 A.2d 769, 149 Pa.Super. 203.—Work Comp 1741.

Pa.Super. 1942. Foreman's actual knowledge of occurrence of claimant's injury was knowledge to the employer and the equivalent of "notice" to the employer required under the compensation act. 77 P.S. §§ 631–633.—Kennedy v. Holmes Const. Co., 24 A.2d 451, 147 Pa.Super. 348.—Work Comp 1250.

Pa.Super. 1941. Evidence that employer took place of employee in carrying stretcher containing fellow employee, after employee stated that he had received twist and had been hurt shortly before, was sufficient to sustain finding that employer was given "notice" of accident within 90 days as required by law.—Hughes v. McCartney, 23 A.2d 345, 147 Pa.Super. 44.—Work Comp 1678.

Pa.Super. 1941. Mere fact that part of rear wall of unoccupied building collapsed while children were playing on premises was not sufficient to charge owner of land on which building was located with "notice" of condition of wall so as to render owner liable to children who were struck by bricks when the wall collapsed.—Riebel v. Land Title Bank & Trust Co., 17 A.2d 742, 143 Pa.Super. 136.—Neglig 1115.

Pa.Super. 1940. That insurance agent licensed to do business in Pennsylvania forwarded to insurance company four applications from persons residing in other states did not give company "notice" that agent was illegally soliciting business in other states without license, where applications were signed and medical examinations were taken in

Pennsylvania, as affecting workmen's compensation. 40 P.S. §§ 1 et seq., 233.—Sand v. Metropolitan Life Ins. Co., 10 A.2d 820, 138 Pa.Super. 218.—Work Comp 1114.

Pa.Super. 1939. Where claimant's wife informed employer that claimant fell but nothing definite was said as to when or where, and petition for compensation which gave time, place and character of alleged injury was not filed until six months after accident, no legal "notice" of accident was given employer within 90 days after accident as required by Compensation Act. 77 P.S. §§ 631, 632.—Beck v. Franklin Glass Corp., 7 A.2d 600, 136 Pa.Super. 204.—Work Comp 1221.

Pa.Super. 1937. A buyer's oral notice of defects in merchandise, to seller's salesman who took order for merchandise, was not "notice" within statute requiring buyer to give seller notice of defects within reasonable time after sale, in absence of evidence that salesman had any authority other than to take order for merchandise (69 P.S. § 259).—Foell Packing Co. v. Harris, 193 A. 152, 127 Pa.Super. 494.—Princ & A 178(4).

Pa.Super. 1937. Notice to applicant to appear at hearing on his application for renewal of his liquor license is not "notice" required by statute providing for renewal of license unless applicant is formally notified by liquor control board of objections to renewal of his license. 47 P.S. § 744-409(b).—Neptune Club's Liquor License, Case of Appeal of Pennsylvania Liquor Control Board, 190 A. 156, 124 Pa.Super. 549.—Int Liq 102.

Pa.Cmwlth. 1987. Due process rights of "notice" and "opportunity to be heard" accrue to a parolee who is still confined in prison on "constructive parole" as well as to a parolee who is serving his parole outside of prison; however, a prisoner does not attain the status of a "parolee" until grant of parole is actually executed. U.S.C.A. Const. Amends. 5, 14.—Johnson v. Com., Pennsylvania Bd. of Probation and Parole, 532 A.2d 50, 110 Pa. Cmwlth. 142.—Const Law 272.5; Pardon 66.

R.I. 1918. Gen.Laws 1909, c. 298, § 11, as amended by Laws 1909-10, c. 426 and Rules of Practice of the Superior Court No. 30, for the giving of notice of decision, were followed by defendant, when notice of adverse decision on demurrer to the declaration was mailed to plaintiff's attorney, regardless of whether the notice was received or not, since "notice" as used in the statute, does not mean actual knowledge; "notice" and "knowledge" not being synonymous in law.—Stanton v. Hawkins, 103 A. 229, 41 R.I. 501.

S.C. 1943. As to third parties, "notice" to an agent acting within the scope of his authority is notice to the principal if such notice relates to the business or transaction in reference to which the agent is authorized to act for the principal and the matters over which his authority extends.—Hill v. Carolina Power & Light Co., 28 S.E.2d 545, 204 S.C. 83.—Princ & A 178(1).

S.C. 1943. The giving of notice of election of town officials by attaching copies of city ordinance

governing elections to telephone posts in the town was ample "notice" of the election. Code 1942, § 7446.—Killian v. Wilkins, 26 S.E.2d 246, 203 S.C. 74.—Elections 42.

S.C. 1943. Where painter became ill of lead poisoning and left his work on August 28, and died on November 1, and it was not denied that his employers had actual notice of his affliction and there was no showing that prejudice resulted to the employers or insurer for lack of prompter, more formal notice of the accident, and they combatted the claim, compensation was not denied because of lack of timely "notice" of the accident to the employers. Code 1942, §§ 7035-2(f), 7035-25, 7035-26.—Strawhorn v. J.A. Chapman Const. Co., 24 S.E.2d 116, 202 S.C. 43.—Work Comp 1253.

S.C. 1942. Notice to an attorney received while acting in and about his client's business is not "notice" to a third party or corporation of which such attorney happens to be an officer or director.—Charleston Library Soc. v. Citizens & Southern Nat. Bank, 23 S.E.2d 362, 201 S.C. 447.—Atty & C 104.

S.C. 1942. Evidence regarding warehouse foreman's knowledge of accident to an employee handling cotton who died three weeks thereafter as result of the accident, sustained finding that employer had "notice" of the accident, justifying compensation award. Act July 17, 1935, § 22; 39 St. at Large, p. 1243.—Buggs v. U.S. Rubber Co., Winnboro Mills, 22 S.E.2d 881, 201 S.C. 281.—Work Comp 1679.

S.C. 1942. Where city's notice to owners of land sought to be condemned to widen street and "to whom it may concern" was duly signed by Clerk of Court of Common Pleas and was in the language of form provided by Public Works Eminent Domain Law "notice" was in compliance with the provisions of that law. Act July 17, 1935, 39 St. at Large, p. 1271, § 7.—City of Spartanburg v. Belk's Dept. Store of Clinton, 20 S.E.2d 157, 199 S.C. 458.—Em Dom 181.

S.C. 1942. Where purported contract for sale of substantially all of corporation's property was not ratified by stockholders, and was in effect an offer, a letter to corporation expressing intending purchaser's desire to cancel contract and offering to reimburse corporation for expense, together with verbal expression of unwillingness to proceed further made to corporation's attorney and stopping of payment on a check given when purported contract was executed was sufficient "notice" of "withdrawal of offer" notwithstanding that words "revoke" or "withdraw" were not used. Code 1942, § 7705.—Masonic Temple v. Ebert, 18 S.E.2d 584, 199 S.C. 5.—Corp 439.

S.C. 1942. The financial secretary of the local camp of fraternal beneficiary society who was not only the agent to collect and remit dues of members to the home office but had other duties to perform, such as assisting in execution of papers necessary to secure a loan and similar matters, was the "agent" of the society and while acting within actual scope of his authority bound the society and

"notice" to him under such circumstances was notice to the society.—*Satcher v. Woodmen of the World Life Ins. Soc.*, 18 S.E.2d 523, 199 S.C. 59.—Insurance 1642.

S.C. 1938. A person who knows of a thing has "notice" thereof.—*Walker v. Preacher*, 194 S.E. 868, 185 S.C. 462.—Notice 2.

S.C. 1917. "Notice" is always largely a question of fact, dependent upon all the circumstances.—*Wheeler v. Corley*, 91 S.E. 307, 106 S.C. 319.—Notice 15.

S.D. 1919. Knowledge which counsel for losing party received through fact that he prepared the order denying a new trial and procured the signature of the judge thereto, and filed it in the clerk's office, was not the notice contemplated by Laws 1917, c. 201 (Rev. Code 1919, § 3147); the word "notice" in such section meaning a formal notice, and not merely knowledge.—*Braun v. Thuet*, 174 N.W. 807, 42 S.D. 491.—App & E 348(2).

S.D. 1909. In law, that is "notice" of a fact which would provoke a reasonably prudent man to such inquiries as, pursued with reasonable diligence, would lead to full knowledge; or, in other words, when a person has sufficient information to lead him to a fact, he shall be deemed conversant therewith.—*Hingtgen v. Thackery*, 121 N.W. 839, 23 S.D. 329.—Notice 6.

Tenn. 1958. Legal "notice", after case has been indefinitely continued and then re-set, is by means of "subpoena", and letter from complainants' solicitors advising witness that case had been set for hearing on certain date did not constitute such notice as would justify holding witness in contempt when he failed to appear on that date. T.C.A. § 24-207.—*Emerson v. Porter*, 314 S.W.2d 9, 203 Tenn. 492.—Witn 21.

Tenn. 1950. Whatever is sufficient to put a person upon inquiry is "notice" of all the facts to which such inquiry will lead when prosecuted with reasonable diligence and in good faith.—*Texas Co. v. Aycock*, 227 S.W.2d 41, 190 Tenn. 16, 17 A.L.R.2d 322.—Notice 6.

Tenn. 1916. Under Shannon's Code, § 6899, a sheriff who has "notice" of an offense and does not do his duty to prevent it is guilty of a misdemeanor, and any knowledge from any source is notice within the statute.—*State ex rel. Thompson v. Reichman*, 188 S.W. 225, 135 Tenn. 653, Am. Ann. Cas. 1918B, 889, rehearing denied 188 S.W. 597, 135 Tenn. 685, Am. Ann. Cas. 1918B, 889.

Tenn. 1911. Oral notice of dishonor of a check, given to a clerk of an indorsing commercial corporation, is not notice to the corporation, within Negotiable Instrument Law (Acts 1899, c. 94) § 97, authorizing the giving of "notice" to a party or to his agent.—*American Nat. Bank v. National Fertilizer Co.*, 143 S.W. 597, 125 Tenn. 328.

Tenn. 1907. Negotiable Instruments Law Tenn. § 56, provides that, to constitute "notice" of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to

whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.—*Elgin City Banking Co. v. Hall*, 108 S.W. 1068, 119 Tenn. 548.

Tenn.Ct.App. 1989. "Notice" of a lawsuit, for purposes of rule allowing relation back of amendment changing a party if party had notice of suit, means notice that lawsuit asserting legal claim has been filed, and fact that party may have had notice of incident out of which action arose is insufficient. Rules Civ.Proc., Rule 15.03.—*Smith v. Southeastern Properties, Ltd.*, 776 S.W.2d 106.—Lim of Act 124.

Tenn.Ct.App. 1940. The maintenance of a four-story building fully equipped with machinery for manufacture of meal and flour, which manufacture was entirely dependent upon right to use dam across creek, was so open and notorious as to constitute "notice" of itself that claim was "adverse" to all parties apt to be damaged by existence of the dam, as regards sufficiency of evidence to establish adverse character of claim to maintain dam.—*Smelcer v. Rippetoe*, 147 S.W.2d 109, 24 Tenn.App. 516.—Waters 160.

Tenn.Ch.App. 1900. In contemplation of law, and as applied to a purchaser with notice of right in another, "notice" is information given by one authorized or derived from some authentic source, and may be either actual or constructive.—*Kirklin v. Atlas Sav. & Loan Ass'n*, 60 S.W. 149.

Tenn.Ch.App. 1896. "Notice," in its general classification in the books, is of two kinds—actual and constructive. "Actual notice," says Prof. Pomeroy, "is information concerning the fact, \* \* \* directly and personally communicated to the party." "In short," says he, "actual notice is a conclusion of fact, capable of being established by all grades of legitimate evidence," 2 Pom.Eq.Jur. § 595. Constructive notice assumes that no information concerning the prior fact, claim, or right has been directly and personally communicated to the party, but is only inferred by operation of legal presumption. 2 Pom.Eq.Jur. § 604.—*Levins v. W. O. Peeples Grocery Co.*, 38 S.W. 733.

Tex. 1950. "Notice" is information concerning a fact actually communicated by an authorized person, or actually derived from a proper source, or else presumed by law to have been acquired, the presumed information being regarded as equivalent in legal effect to full knowledge.—*Flack v. First Nat. Bank of Dalhart*, 226 S.W.2d 628, 148 Tex. 495.—Notice 1.

Tex. 1950. "Notice" is not always synonymous with knowledge or information as commonly understood, since in law a person may be held to have notice of something about which he has no actual knowledge or information.—*Flack v. First Nat. Bank of Dalhart*, 226 S.W.2d 628, 148 Tex. 495.—Notice 5.

Tex. 1950. One who has knowledge of such facts as would cause a prudent man to make further inquiry is chargeable with "notice" of the facts

which, by use of ordinary intelligence, he would have ascertained.—*Flack v. First Nat. Bank of Dallhart*, 226 S.W.2d 628, 148 Tex. 495.—Notice 6.

Tex. 1942. Where notice of vendor's lien foreclosure sale stated that, by virtue of order of sale issued out of district court of Potter county, certain described land located in Yoakum county would be offered for sale at courthouse door of such county by Yoakum county sheriff, the "notice" was sufficient to give the public full information that sale would be held at courthouse door in Yoakum county as against contention that notice referred equally to Potter county and to Yoakum county.—*Whittenburg v. Miller*, 164 S.W.2d 497, 139 Tex. 586.—Ven & Pur 287.

Tex. 1942. Where one attempts to fix homestead rights in property of which he is not the exclusive owner, he does so with "notice" that whatever homestead rights he may acquire therein are subordinate to all rights and equitable remedies that his cotenant would have in absence of the homestead claim, including right to fix a lien for oweltly if it should be necessary to an equitable partition of the property, and a lien superior to homestead rights may also be established in a voluntary partition by agreement of the parties. Vernon's Ann.St.Const. art. 16, § 50.—*Sayers v. Pyland*, 161 S.W.2d 769, 139 Tex. 57, 140 A.L.R. 1164.—Partit 12(3).

Tex. 1942. The law gives "notice" as soon as it becomes a law.—*Anderson v. Penix*, 161 S.W.2d 455, 138 Tex. 596.—Statut 248.

Tex. 1942. Since powers of all state officers are fixed by law, all persons dealing with them are charged with "notice" of the limits of authority of the officers and are bound at their peril to ascertain whether a contemplated contract is within power conferred. Vernon's Ann.St.Const. art. 3, §§ 44, 49.—*State v. Ragland Clinic-Hospital*, 159 S.W.2d 105, 138 Tex. 393.—States 102.

Tex. 1942. Where prisoner who resisted arrest was shot through the leg by an agent of Texas Liquor Control Board, and agent took prisoner to hospital, and represented to physician in charge that agent had authority to enter prisoners at hospitals for treatment and that the board would pay the expenses of treating prisoner, the state was not liable for expenses of treatment on ground that the agent had "apparent authority" to execute contract on behalf of state, since those dealing with the agent were charged with "notice" of the limits of his authority. Vernon's Ann.P.C. arts. 666–6(c, d), 666–31; Vernon's Ann.St.Const. art. 3, §§ 44, 49.—*State v. Ragland Clinic-Hospital*, 159 S.W.2d 105, 138 Tex. 393.—States 102.

Tex. 1942. Where agent who rendered realty for taxes for owner for year 1933, was given in 1933 sufficient notice under statute that board of equalization was intending to raise valuation of realty, and notice given to owner of realty in 1934 was in substantial compliance with statute, and, though owner of realty did not receive the notice because of her absence from the state, her exclusive tax agent appeared before the board in behalf of others

and knew that the board was considering the raising of valuation of her realty, she could not claim in action by state to recover judgment for delinquent taxes and to foreclose tax liens, that she did not have "notice" of the proceedings and that she was denied the right to be heard. Vernon's Ann.Civ.St. art. 7206, subd. 5.—*Victory v. State*, 158 S.W.2d 760, 138 Tex. 285.—Tax 482(2).

Tex. 1939. The consummation of purchase of negotiable instrument with knowledge of suspicious circumstances sufficient only to put an ordinarily prudent person upon inquiry would convict purchaser of negligence, not of dishonesty, and hence would not constitute "notice" to purchaser of any defects in instrument or title. Vernon's Ann.Civ.St. art. 5935, § 56.—*American Sur. Co. of New York v. Fenner*, 125 S.W.2d 258, 133 Tex. 37.—Bills & N 337.

Tex.Com.App. 1942. It is actual possession of land that gives "notice" of possessor's adverse claim of title thereto, but recorded deed conveying it to him aids possession as means of notice and affords information as to nature and extent of his claim of possession.—*McKee v. Stewart*, 162 S.W.2d 948, 139 Tex. 260.—Adv Poss 31.

Tex.Com.App. 1942. A purchaser is charged with "notice" of all recorded instruments in his chain of title or connected therewith, and with the legal effect thereof.—*Cherry v. Farmers Royalty Holding Co.*, 160 S.W.2d 908, 138 Tex. 576.—Ven & Pur 231(3).

Tex.Com.App. 1942. A purchaser of homestead property at sale under trust deed which was void because not executed for purposes authorized by Constitution, could not recover from owners in possession for improvements made by him thereon, because owners' possession was "notice" of homestead interest of owners, and, therefore, improvements were not made in "good faith". Vernon's Ann.St.Const. art. 16, § 50.—*Burkhardt v. Lieberman*, 159 S.W.2d 847, 138 Tex. 409.—Home 129(1).

Tex.Crim.App. 1943. A proclamation of the Governor, when duly promulgated and filed, occupies a position comparable to "laws", and hence such proclamation, of and within itself, is "notice" to persons affected.—*Williams v. State*, 176 S.W.2d 177, 146 Tex.Crim. 430.—States 43.

Tex.App.-Fort Worth 1985. "Notice" of dismissal of action for want of prosecution, for purposes of rule of civil procedure barring reinstatement of case more than 30 days after its dismissal if party or his attorney had notice of dismissal, need not be actual notice. Vernon's Ann.Texas Rules Civ.Proc., Rules 165a, 306a.—*A. Copeland Enterprises, Inc. v. Tindall*, 683 S.W.2d 596, ref. n.r.e.—Pretrial Proc 698.

Tex.App.-Austin 1983. "Notice" and "hearing," both elements of procedural due process of law applicable to actions by state agencies, require previous notice and a hearing relative to the issues of fact and law which will control the result to be reached by the administrative tribunal. U.S.C.A. Const.Amend. 14.—*Madden v. Texas Bd. of Chiro-*

practic Examiners, 663 S.W.2d 622, ref. n.r.e.—Const Law 251.6.

Tex.App.—Dallas 1985. In order to constitute actual implied “notice,” communicated fact must be of a nature that would normally excite investigation, and mere rumors, vague statements and dubious or equivocal circumstances which do no more than arouse suspicion or create speculation are insufficient; whatever puts person on inquiry ordinarily amounts to notice, provided inquiry has become a duty and would lead to knowledge of facts by exercise of ordinary diligence and understanding, but duty of inquiry extends only to matters that are fairly suggested by facts actually known. V.T.C.A., Bus. & C. § 1.201(25, 26).—BarclaysAmerican/Business Credit, Inc. v. E & E Enterprises, Inc., 697 S.W.2d 694.—Notice 3.

Tex.Civ.App.—Hous. [1 Dist.] 1973. “Notice” within Uniform Commercial Code provision defining holder in due course means notice of claim to particular instrument transferred; it does not mean notice of transferor’s insolvency or notice of claims against the transferor. V.T.C.A., Bus. & C. § 3.302.—Bierschwale v. Oakes, 497 S.W.2d 506, writ granted, reversed Meadows v. Bierschwale, 516 S.W.2d 125.—Bills & N 332.

Tex.Civ.App.—Fort Worth 1948. When a party is cited by a statutory process known as a citation, he is given notice that he has been sued, but mere notice that one has been sued, irrespective of the form of such notice does not require the defendant to appear and answer, since “citation” and “notice” are by no means synonymous and notice is much less formal than a legal citation bearing a seal and is also further distinguished in the manner in which it is served.—Gilbert v. Lobley, 214 S.W.2d 646.—Proc 5.

Tex.Civ.App.—Fort Worth 1943. Where city owned water system and had exclusive control over its own streets, city was assumed to have authorized excavation causing injury to passenger in automobile and was chargeable with “notice” of manner in which excavation was filled and dangers incident thereto and city had duty to exercise reasonable diligence to protect public against injuries resulting therefrom.—City of Wichita Falls v. Geyer, 170 S.W.2d 615, writ refused w.o.m.—Autos 261, 273.

Tex.Civ.App.—Fort Worth 1942. Where notes in evidence provided for interest after maturity at 10 per cent, and the only reference as to interest was that contained in a stipulation to effect that trust deeds recited that they were given to bank to secure notes with 6 per cent. interest from date, there was sufficient “notice” to lumber company which took trust deeds that recited that they were inferior to bank’s trust deeds.—Foxworth-Galbraith Lumber Co. v. Southwestern Contracting Corp., 165 S.W.2d 221, writ refused w.o.m.—Mtg 169.

Tex.Civ.App.—Fort Worth 1941. Under act relating to certificates of title to automobiles, purchaser of automobile purchase-money note and chattel mortgage lien, which satisfied itself that the existence of the lien was recited in certificate of title issued by the Department of Public Safety, did

all that the law contemplated that it should do and there was “notice” to the public of the existing lien which continued valid until the records of the Department showed it was satisfied and a new certificate issued upon legal authority. Vernon’s Ann. P.C. art. 1436—1.—Commercial Credit Co. v. American Mfg. Co., 155 S.W.2d 834, writ refused.—Autos 20.

Tex.Civ.App.—Fort Worth 1926. Filing suit constitutes “notice” of injury to employee. Vernon’s Ann.Civ.St. art. 8307, § 4a.—Roland v. Employers’ Cas. Co., 290 S.W. 895, writ granted, affirmed 1 S.W.2d 568, writ refused.—Work Comp 1222.

Tex.Civ.App.—Fort Worth 1926. Notice of dishonor or nonpayment is waived by note providing for waiver of presentation for payment, protest, and “notice.”—Sibley v. Continental Supply Co., 290 S.W. 769, writ denied 292 S.W. 155, 116 Tex. 402.—Bills & N 422(1).

Tex.Civ.App.—Austin 1942. Where record title to land was in father after death of mother and probate of her will and father executed trust deed on land to secure note, open, actual and notorious possession of land by son not attended with any circumstances showing a transfer of possession from father and mother to son in such a way that possession itself attested that father and mother gave land by parol gift to son was not “notice” to holder of note and trust deed of son’s claim of title by parol gift.—Thornton v. Central Loan Co., 164 S.W.2d 248, writ refused.—Mtg 154(3).

Tex.Civ.App.—San Antonio 1952. The word “notice” within rule that no temporary injunction shall be issued without notice to adverse party implies an opportunity to be heard. Rules of Civil Procedure, rule 681.—Anderson v. Hidalgo County Water Imp. Dist. Number Six, 251 S.W.2d 761, ref. n.r.e.—Inj 143(1).

Tex.Civ.App.—San Antonio 1947. The rule requiring “notice” to adverse party of hearing on application for appointment of receiver of immovable property contemplates notice before property is taken over by receiver, and not a notice issued after receiver has taken possession calling upon owner or claimant to show cause why such possession and control by receiver should not be continued. Rules of Civil Procedure, rule 695.—Marion v. Marion, 205 S.W.2d 426.—Receivers 35(2).

Tex.Civ.App.—San Antonio 1943. A landowner, finding his tenant in possession of land, cannot be charged with “notice” of another’s adverse claim of title thereto, based on such tenant’s possession, in absence of showing of tenant’s repudiation of lease. Vernon’s Ann.Civ.St. art. 5510.—Holden v. Boynton, 170 S.W.2d 323, writ refused w.o.m.—Adv Poss 31.

Tex.Civ.App.—San Antonio 1941. Where a tenant having right to remove improvements under leases which were not recorded in a manner giving constructive notice to a purchaser of the premises was in open and obvious possession of the premises, such possession was “notice” to the purchaser of the rights of the tenant, and purchaser could not

take advantage of his failure to make proper inquiry to escape liability for conversion of tenant's property, the removal of which he prevented.—*Grossman v. Jones*, 157 S.W.2d 448, writ refused w.o.m.—Ven & Pur 232(9).

**Tex.Civ.App.**—San Antonio 1941. Where cestui que trust resided on realty continuously after 1933 and was in obvious possession thereof at time trustee attempted to convey the realty to third person in 1940, cestui que trust's possession was "notice" to third person of the existing trust, or at least was sufficient to put the third person on inquiry which would have led to knowledge of the true status of the title. Vernon's Ann.Civ.St. art. 7425a.—*Rodriguez v. Vallejo*, 157 S.W.2d 172.—Trusts 357(2).

**Tex.Civ.App.**—Dallas 1943. "Notice" of local option election which followed in substance order of election issued by commissioners' court and which did not confuse or prejudice any voter, in view of general publicity given election, sufficiently complied with statute relating to election notice. Vernon's Ann.P.C. art. 666-35.—*Sanford v. Commissioners' Court*, Grayson County, 170 S.W.2d 846.—Int Lq 33(3).

**Tex.Civ.App.**—Dallas 1941. Buyer of personality which was covered by a recorded chattel mortgage was charged with the "notice" of the existence of the mortgage lien and took the personality subject to all rights of the mortgagee notwithstanding that buyer had no actual knowledge of the existence of the chattel mortgage. Vernon's Ann.Civ.St. art. 5497.—*Melear v. E. A. Fretz Co.*, 155 S.W.2d 983, writ dismissed.—Chat Mtg 150(1).

**Tex.Civ.App.**—Texarkana 1949. Whatever fairly puts a person on inquiry is sufficient "notice," where means of knowledge, from which full truth may be ascertained, if pursued by proper inquiry, are at hand, so that "actual knowledge" embraces things of which one sought to be charged with knowledge has express information and also things which reasonably diligent inquiry and exercise of means of information at hand would disclose.—*O'Ferral v. Coolidge*, 225 S.W.2d 582, affirmed 228 S.W.2d 146, 149 Tex. 61.—Notice 6.

**Tex.Civ.App.**—Texarkana 1942. Where plaintiffs were in possession of land at time of sale to purchaser, plaintiffs' possession was "notice" to purchaser of all rights to the land claimed by plaintiffs and doctrine of "innocent purchaser" did not apply to protect purchaser in plaintiffs' action for title and possession of the land.—*Wiley v. Powell*, 164 S.W.2d 242, reversed 170 S.W.2d 470, 141 Tex. 74.—Ven & Pur 232(1).

**Tex.Civ.App.**—Texarkana 1942. Where deceased's children by his first wife on her death conveyed their interest in community realty and their grantee by a recorded general warranty deed purported to convey the entire and full fee title, which came to defendants through similar mesne conveyances, deceased's children by a second marriage were charged with "notice" of the repudiation of the cotenancy, if any, and hence defendants' adverse possession otherwise concededly sufficient matured entire title by limitations in defendants.

Vernon's Ann.Civ.St. arts. 5509, 5510, 5519.—Allison v. Texas Co., 161 S.W.2d 167.—Ten in C 15(7).

**Tex.Civ.App.**—Texarkana 1942. A conveyance by one cotenant to a stranger or by one or more cotenants to another cotenant purporting to convey the entire common property when followed by actual adverse possession amounts to a "disseizin" of the nonparticipating cotenant and record of such conveyance, followed by possession, constitutes "notice" of repudiation.—Allison v. Texas Co., 161 S.W.2d 167.—Ten in C 15(7).

**Tex.Civ.App.**—Texarkana 1942. Statement by vendors to purchaser before sale of realty and while they were inspecting the realty, that residence was located on the realty, when it was not so located, and admission that maybe the residence was not located on the realty when vendor disputed the statement that it was so located, did not as a matter of law charge the vendor with "notice" of alleged fraud practiced by the vendor on the vendor's grantor in procuring the deed from the vendor's grantor.—*Williams v. Rabb*, 161 S.W.2d 121, writ refused.—Ven & Pur 245.

**Tex.Civ.App.**—Texarkana 1942. The fact that purchaser took additional precaution of making a reasonable effort to learn whether the vendor, who was a stranger to the purchaser, was honest, before he purchased the realty, did not show as a matter of law that the purchaser did not rely on recorded deed which the vendor had obtained from the vendor's grantor allegedly through fraud, and did not charge the purchaser with "notice" of the alleged fraud.—*Williams v. Rabb*, 161 S.W.2d 121, writ refused.—Ven & Pur 245.

**Tex.Civ.App.**—Texarkana 1938. Generally, whatever puts a party on an inquiry amounts to "notice," provided the inquiry becomes a duty and would lead to the knowledge of the requisite fact by ordinary diligence and understanding.—*Myers v. Crenshaw*, 116 S.W.2d 1125, affirmed 137 S.W.2d 7, 134 Tex. 500.—Notice 6.

**Tex.Civ.App.**—Texarkana 1927. Where fire policy was void if insured had "information" that foreclosure proceeding had been commenced, but answer alleged "notice" merely, overruling exception to answer, if error, held harmless, under rule 62a for government of Courts of Civil Appeals, since testimony showed plaintiff was fully "informed" and no prejudice resulted; "notice" not being always equivalent to "information," for in law a person may have "notice" of fact about which he has no "information."—*Alsop v. Hawkeye Securities Fire Ins. Co.*, 300 S.W. 223, writ refused.

**Tex.Civ.App.**—Amarillo 1959. Where letter to city manager stated that plaintiff was "hurt on the job while working for one of your departments" and that city would be sued if negotiations for amicable settlement of claim were not commenced within 10 days, the letter was not the "notice" contemplated by city charter requirement that written notice of personal injury claim and a brief statement of facts upon which it is based must be filed with city within 30 days after the occasion.—

Robinson v. City of Hereford, 324 S.W.2d 313, ref. n.r.e.—Mun Corp 741.50.

Tex.Civ.App.—Amarillo 1949. Generally whatever puts a party on inquiry amounts in law to “notice”, provided the inquiry becomes a duty, and would lead to a knowledge of the facts by exercise of ordinary intelligence and understanding, but rule imputes notice only of those facts which are naturally and reasonably connected with the facts known and of which the known fact can be said to furnish a clue.—First Nat. Bank in Dalhart v. Flack, 222 S.W.2d 455, reversed Flack v. First Nat. Bank of Dalhart, 226 S.W.2d 628, 148 Tex. 495.—Notice 6.

Tex.Civ.App.—Amarillo 1949. Facts which give rise to nothing more than a mere suspicion in the mind of a prudent man are not sufficient to charge “notice”.—First Nat. Bank in Dalhart v. Flack, 222 S.W.2d 455, reversed Flack v. First Nat. Bank of Dalhart, 226 S.W.2d 628, 148 Tex. 495.—Notice 6.

Tex.Civ.App.—El Paso 1941. A principal, which would be charged with “notice” of facts learned by common agent of such principal and another if agent had acted solely for first principal, is charged with notice thereof, notwithstanding agent’s dual relationship.—U.S. Fidelity & Guaranty Co. v. San Diego State Bank, 155 S.W.2d 411, writ refused w.o.m.—Princ & A 180.

Tex.Civ.App.—El Paso 1941. Under statute requiring dental board to mail notice to dentist that if alleged violations of Dental Practice Act are not discontinued within ten days, board will proceed to suspend or revoke license, “notice” which did not specify violation and did not disclose a majority of board was of opinion that violation occurred within twelve months prior to date of order and which failed to advise dentist that he must discontinue the alleged violation or produce satisfactory evidence that violation did not occur within ten days after mailing of notice was insufficient.—Tamez v. State Bd. of Dental Examiners, 154 S.W.2d 976.—Health 215.

Tex.Civ.App.—Beaumont 1941. The sole office which possession performs in the matter of “notice” is to put a person desiring to purchase upon inquiry, and it has no effect in determining what the inquiry shall be or of whom it shall be made.—Goodrich v. Second Nat. Bank of Houston, 151 S.W.2d 276, writ refused.—Ven & Pur 232(1).

Tex.Civ.App.—Beaumont 1940. Where grantee at time it took its conveyance to land had constructive notice of contract whereby its predecessor in title had agreed to convey portion of land to attorney in consideration for services to be rendered in lawsuit involving land, and that attorney’s interest in land was in payment of his professional services as a lawyer, and where grantee had actual notice that attorney was discharging duties of his employment and that settlement of lawsuit constituted full discharge of all duties owed by him, grantee bought land with “notice” that attorney had performed all duties imposed upon him by contract and took legal title subject to attorney’s equitable title.—Olive-Sternenberg Lumber Co. v. Gordon, 143 S.W.2d

694, reversed 159 S.W.2d 845, 138 Tex. 459.—Ven & Pur 228(2).

Tex.Civ.App.—Beaumont 1938. Under accident policy, premiums of which were to be deducted from insured’s wages and paid by insured’s employer, which policy provided that policy was not to be canceled until notice was given by insurer to insured, insurer’s notification to employer to discontinue premiums was not “notice” to insured so as to cancel policy on ground insured would have knowledge premiums were no longer deducted from his wages and would have notice premiums were not being paid, since the “notice” provided by the policy was not to be an inference from some other fact, but such notice was to be in fact given to insured by insurer.—Smith v. Washington Nat. Ins. Co., 117 S.W.2d 476.—Insurance 1934.

Tex.Civ.App.—Waco 1940. Where “notice” of injuries given by city employee to city did not allege that truck causing injuries belonged to city or that its brakes were defective, but expressly charged that it belonged to named person and that injuries were caused by its driver’s starting it while employee was attempting to alight therefrom, but petition and proof in action against city indicated that truck belonged to city and moved because of defective brakes, the variance defeated purpose of the notice and precluded recovery.—City of Waco v. Landingham, 158 S.W.2d 79, writ refused w.o.m., certified question answered 157 S.W.2d 631, 138 Tex. 156.—Autos 230.

Tex.Civ.App.—Waco 1925. Inquiry of parties in possession necessary to become innocent purchaser or obtain valid attachment lien on property not in debtor’s name on record; “notice”.—Parks v. West, 274 S.W. 164.—Attach 178.

Tex.Civ.App.—Eastland 1943. In absence of specially limiting circumstances, notice to a foreman or immediate superior by employees working under him at the time of the claimed injury is “notice” to their common employer.—Texas Indem. Ins. Co. v. Arant, 171 S.W.2d 915, writ refused w.o.m.—Work Comp 1219.

Tex.Civ.App.—Eastland 1941. The fact that checks were to order of payee as guardian of minors constituted “notice” to bank that the real ownership of the checks and the proceeds thereof belonged to minors, but such fact alone was not conclusive of question of bank’s liability for alleged misappropriation of the funds by the guardian after bank deposited proceeds of checks in guardian’s personal account.—Smith v. Commercial State Bank of Ranger, 157 S.W.2d 969, dismissed.—Banks 130(1).

Tex.Civ.App.—Eastland 1934. Publication of copy of ordinance designed to initiate paving proceedings, which was signed by city secretary below and to left of mayor’s signature in form: “Attest: Marvin H. Post, City Secretary, City Seal,” held of no significance as relating to “notice”; “attest” suggesting no thought of notice. Vernon’s Ann.Civ. St. arts. 1104, 1105b, § 9.—Lindsey v. Realty Trust Co., 75 S.W.2d 322, reversed 105 S.W.2d 210, 129 Tex. 516.—Mun Corp 455.

Tex.Civ.App.—Eastland 1934. Notice which is given in name of nobody is inoperative, since “notice” required by law must be given, or caused to be given, by person authorized to do so, and by none other.—*Lindsey v. Realty Trust Co.*, 75 S.W.2d 322, reversed 105 S.W.2d 210, 129 Tex. 516.—Notice 9.

Tex.Civ.App.—Tyler 1974. Even if bank accepting check in payment of indebtedness had knowledge of “fiduciary relationship” between debtor and debtor’s employer, such knowledge was not sufficient to put bank on “notice” of employer’s claim or defense to check. V.T.C.A., Bus. & C. § 3.302(a, b).—*Richardson Co. v. First Nat. Bank in Dallas*, 504 S.W.2d 812, ref. n.r.e.—Bills & N 333.

Tex.Civ.App.—Galveston 1943. The actual possession of land by claimant is “notice” to a purchaser from a third person of possessor’s title.—*Downing v. Jeffrey*, 173 S.W.2d 241, writ refused w.o.m.—Ven & Pur 232(1).

Tex.Civ.App.—Galveston 1941. Where purchaser of lots at trustee’s sale also claimed under a conveyance from grantee of mother of heirs who sought to recover the lots, and it was shown that the heirs were in possession of lots as tenants of purchaser and were so holding at the time they filed suit to recover lots, and there was nothing to put purchaser on notice that deed from mother was claimed to have been intended as a mortgage, heirs could not defeat title of the purchaser on ground that possession and claim constituted “notice” to purchaser of any claims or rights in the property which the heirs had and that purchaser could have acquired no title under deed from mother’s grantee.—*James v. Davis*, 150 S.W.2d 326, writ dismissed, correct.—Ven & Pur 232(1).

Tex.Civ.App. 1904. The terms “notice” and “actual knowledge” are convertible, and hence actual knowledge of the proceedings must be shown when a discharge is relied on by the bankrupt.—*Fields v. Rust*, 82 S.W. 331, 36 Tex.Civ.App. 350.—Bankr 3420(12).

Tex.Civ.App. 1903. “Notice” and “citation” are not synonymous. A citation is a writ of the court, addressed to an officer of the court, and commands him to do certain things. Service by publication is a citation, and therefore may be resorted to by a justice of the peace. Inasmuch as the powers of the justice of the peace in this respect are derived from the statute, and as by no provision of the statute is that court expressly authorized to acquire jurisdiction over a defendant by issuance and service of notice as provided by statute for district and county courts, we must hold the power wanting, unless “notice” and “citation” are synonymous terms.—*Carpenter v. Anderson*, 77 S.W. 291, 33 Tex.Civ. App. 484, 33 Tex.Civ.App. 491, writ refused.

Utah 1948. A person has “notice” of facts giving rise to a constructive trust not only when he knows them, but also when he knows facts which would lead a reasonably intelligent and diligent person to inquire whether there are circumstances which would give rise to a constructive trust, and if such inquiry when pursued with reasonable intelligence and diligence would give him knowledge or

reason to know of such circumstances.—*Peterson v. Peterson*, 190 P.2d 135, 112 Utah 554.—Trusts 357(2).

Utah 1943. Where lieutenant in charge of fire station was present at time fireman sustained an injury resulting in loss of eye for which compensation was sought, and the lieutenant knew as much concerning the cause and nature of injury as did the fireman, the city had the equivalent of “notice” of the accident and some injury required by statute. Utah Code 1943, 42-1-92.—*Salt Lake City v. Industrial Commission*, 140 P.2d 644, 104 Utah 436.—Work Comp 1248.

Vt. 1953. “Knowledge” is not the same as “notice”, since to constitute “notice”, “knowledge” must be communicated in the prescribed manner.—*Chapman v. Chapman*, 100 A.2d 584, 118 Vt. 120.—Notice 2.

Vt. 1942. A contract provision for sale of specified number of chicks of certain breed, with at least 90 per cent. pullets, was sufficient “notice” to seller that buyer was demanding chicks at least 90 per cent. of which would be layers, not roosters.—*Preston v. Montgomery Ward & Co.*, 23 A.2d 534, 112 Vt. 295.—Sales 273(3).

Vt. 1908. “Knowledge” is not the same as “notice,” but to constitute “notice,” the “knowledge” must be communicated in the prescribed way.—*Wade v. Wade’s Adm’r*, 69 A. 826, 81 Vt. 275.

Va. 1942. The reference to reserve fund in life insurance certificate issued by voluntary association was insufficient to put insured on “notice” of association’s status as burial society and consequent ineligibility of his fiancee as beneficiary under certificate. Code 1936, §§ 4258(1) to 4258(15), 4258(7).—*Green v. Southwestern Voluntary Ass’n*, 20 S.E.2d 694, 179 Va. 779.—Insurance 3464.

Va. 1942. Plain, simple, and unambiguous language of application for industrial life insurance policy that no obligation should exist against insurance company, unless a policy was issued and delivered to applicant, and statement in soliciting agent’s receipt for first premium payment that money was received subject to terms of policy to be issued, negatived apparent or ostensible authority of agent to make oral insurance contract binding company and put applicant on “notice” that he was not protected until policy was issued and delivered to him.—*Peoples Life Ins. Co. v. Parker*, 20 S.E.2d 485, 179 Va. 662.—Insurance 1744.

Va. 1925. Statute regulating service of process held not to apply to service of notice; “process; ” “notice.”—*Wood v. Kane*, 129 S.E. 327, 143 Va. 281.—Notice 10.

Wash. 1957. As respects claim of purchaser in good faith, the “notice” of another’s claim need not be actual nor amount to full knowledge, but it should be such information, from whatever source derived, as would excite apprehension in an ordinary mind and prompt a person of average prudence to make inquiry.—*Paganelli v. Swendsen*, 311 P.2d 676, 50 Wash.2d 304.—Ven & Pur 229(1).

Wash. 1943. The statute providing that jurisdiction in "quo warranto" proceeding shall be obtained by service of notice, "as in other actions", means by the same process as jurisdiction is obtained in civil actions, that is by summons requiring defendant to appear and answer within 20 days, notwithstanding use of word "notice" which in Washington practice connotes something different from "summons" since both constitute "process" by which the court obtains jurisdiction and it is immaterial whether that process is called summons or notice. RCW 7.56.050.—State ex rel. Carter v. Superior Court for King County, 138 P.2d 843, 18 Wash.2d 130.—Quo W 45.

Wash. 1929. Railroad superintendent's letter to employee who had been convicted of liquor law violation, giving employee notice that he was relieved from service pending a formal investigation, held to constitute "notice" of termination of employment for purpose of canceling group insurance policy, notwithstanding subsequent hearing; such hearing being merely an opportunity for the employee to make showing for reinstatement.—Greeley v. Aetna Life Ins. Co., 274 P. 106, 150 Wash. 611.

Wash. 1918. Affidavit of one of appellant's attorneys that, shortly before procuring order of extension of time for filing statement of facts, he orally advised respondents' attorney that the extension would be applied for, and that respondents' attorney assured affiant he would interpose no objection, sets out no facts meeting the requirement of notice under Rem.Code 1915, § 393, or estopping respondents from asserting their right to such notice, since the statutory requirement of "notice" means written notice.—Siegle v. Kelley, 172 P. 203, 101 Wash. 73.

Wash. 1910. "Notice" to a purchaser of adverse interests need not be actual nor amount to full knowledge, but it should be information exciting apprehension in an ordinary mind, and prompt one of average prudence to make inquiry. Implied notice to a purchaser of adverse interests arises from knowledge of particular facts unless the law charges notice by registry or other token.—Daly v. Rizzutto, 109 P. 276, 59 Wash. 62, 29 L.R.A.N.S. 467.

Wash.App. Div. 1 1992. In context of statutory definition of "notice" of fact as "reason to know" that fact exists from facts and circumstances known to holder of instrument, holder has reason to know fact if he or she actually knows information from which person exercising reasonable care under commercially recognized standards would infer that fact exists or that there is substantial chance of its existence; "reason to know" standard is objective standard. West's RCWA 62A.1-201(25)(c).—Wesche v. Martin, 822 P.2d 812, 64 Wash.App. 1.—Bills & N 336.1.

Wash.App. Div. 1 1975. Generally, principal or master is chargeable with, and bound by, notice to his agent or servant received while the agent or servant is acting as such within the scope of his authority or employment, and for such purposes, agent or servant has "notice" of a fact if he knows

the fact, has the reason to know it, or has been given notification of it.—Zwink v. Burlington Northern, Inc., 536 P.2d 13, 13 Wash.App. 560.—Princ & A 178(1), 178(2).

W.Va. 1985. Statement made to insurance agent by insured to effect that his wife, also an insured, said there was another vehicle involved in accident in which, according to the wife, she was sideswiped by oncoming truck and went off the road, if found to have been made, would be sufficient "notice" to insurer, under ~~Code~~, 33-6-31(e)(ii), providing for notice to one's insurer of existence of cause of action for damages against owner or operator of absconding vehicle in hit-and-run accidents; formal, legalistic notice is not required.—Lusk v. Doe, 338 S.E.2d 375, 175 W.Va. 775.—Insurance 3163.

W.Va. 1983. Whatever is sufficient to direct attention of purchaser to prior rights and equities of third parties, so as to put him on inquiry into ascertaining their nature, will operate as "notice."—Bailey v. Banther, 314 S.E.2d 176, 173 W.Va. 220.—Ven & Pur 229(1).

W.Va. 1982. Even if statute did not require that notice of cancellation by a farmers' mutual fire insurer be actually received, provision of form contract stating that mailing would constitute "notice" would be construed as calling for actual notice. Code, 33-22-1 et seq., 33-22-14, 33-22-15.—Smith v. Municipal Mut. Ins. Co., 289 S.E.2d 669, 169 W.Va. 296.—Insurance 1929(2), 1929(7).

W.Va. 1942. Attorney who was present at hearing in circuit court of proceedings to enjoin holding of political convention, and who heard announcement made before convention convened, that injunction had been awarded by Supreme Court of Appeals and knew of reading by sheriff of injunction order, was charged with full "notice" of issuance of injunction and his participation in convention was "contempt."—State v. Robertson, 22 S.E.2d 287, 124 W.Va. 648.—Inj 221.

W.Va. 1942. The standard usually required in the form and substance of a written "notice" is stated in 46 C.J. at page 553: Generally speaking, when a formal notice is required to be given, it should give the necessary information. It must be clear and explicit, and not ambiguous. The notice is not clear unless its meaning can be apprehended without explanation or argument. If the statute indicates the terms to be used in the notice, a substantial compliance therewith is essential. It is the general rule that the notice should be clear and explicit in its demand that suit be brought by the creditor to enforce the obligation. A notice by the surety to the creditor, requesting or directing him to collect his claim against the principal, has in general been held to be insufficient, where it is not coupled with other language expressive of a demand that suit be brought.—Williams v. Zimmerman, 20 S.E.2d 785, 124 W.Va. 458.

Wis. 1967. "Knowledge" is equivalent to "notice" for purpose of statute providing that the court may within one year after notice relieve a party from judgment obtained through mistake, inadvert-

**NOTICE AND COMMENT**

tence, surprise, or excusable neglect. W.S.A. 269.46(1).—State Central Credit Union v. Bayley, 147 N.W.2d 265, 33 Wis.2d 367.—Judgm 386(6).

Wis. 1964. “Knowledge” is the equivalent of “notice” within statute authorizing court to relieve a party from a mistake “at any time within one year after notice”. W.S.A. 269.46(1).—Thorp Small Business Inv. Corp. v. Gass, 128 N.W.2d 395, 24 Wis.2d 279.—Judgm 297.

Wis. 1959. “Notice” means information actually communicated to a person to be notified.—Burk v. Commissioner of Motor Vehicles, 99 N.W.2d 726, 8 Wis.2d 620.—Notice 2.

Wis. 1941. The recording of deeds containing stipulation that, in event a certain road was laid out, the land conveyed would extend back from shore line of lake to road on side lines projected was “notice” of condition of title, on issue whether county condemning land for park purposes was required to pay purchasers for such land.—Application of Dane County for Condemnation of Certain Lands for Park Purposes, 298 N.W. 616, 238 Wis. 156.—Em Dom 153.

Wis. 1934. That which fairly puts a person on inquiry with respect to an existing fact is sufficient “notice” of that fact if the means of knowledge are at hand, regardless of whether an investigation is made.—Zdunek v. Thomas, 254 N.W. 382, 215 Wis. 11.—Notice 6.

Wis. 1917. Plaintiff, who received injuries in alighting from a street car operated by the corporation of which defendants were receivers, served summons upon an agent who was agent for the insolvent company, as well as another street railroad company of practically the same name. The summons and complaint, though naming the other company, also named the receivers as defendants, and showed that the insolvent company of which defendants were receivers was the one intended. Held, that in such case, service of the summons and complaint was a “notice” sufficient under St.1915, § 4222, declaring that no action to recover damages for an injury to the person shall be maintained unless, within two years after the happening of the event, notice signed by the party damaged, his agent or attorney, shall be served on the person or corporation by whom it is claimed such damages were caused, and hence an action might be instituted thereafter.—Maxwell v. Johnson, 161 N.W. 736, 165 Wis. 462.

Wis. 1907. “Notice” means information by whatever means communicated; knowledge given or received.—Metcalf v. Mutual Fire Ins. Co. of Towns of Albany, Lima, Durand, Waubeka, Waterville, and Frankfort, Pepin County, Wis., 112 N.W. 22, 132 Wis. 67.

Wyo. 1993. “Claims made” professional liability policy did not permit time of making actual claim to relate back to time that insured physician had “notice” of potential claim, despite provision that “claim will be considered as being first made when you receive notice of such demand”; policy did not equate “notice” with knowledge, and effect of quot-

ed clause was to make the policy a “claims made” policy as distinguished from a “claims made and reported” policy.—Doctors’ Co. v. Insurance Corp. of America, 864 P.2d 1018.—Insurance 2266.

Wyo. 1966. Whatever puts a party on inquiry amounts to “notice”.—Rodin v. State ex rel. City of Cheyenne, 417 P.2d 180.—Notice 6.

Wyo. 1924. The service of copy of amended petition upon defendant’s attorney on day of filing, and acknowledgment by him, *held* sufficient “notice,” within Comp.St.1920, § 5704, W.C.S.1945, § 3-1701, requiring “notice” of amendment of petition without leave to be served on defendant or his attorney.—Kelley v. Eidam, 231 P. 678, 32 Wyo. 271.—Plead 240.

**NOTICEABLE**

Pa. 1895. “Noticeable,” as used in referring to a defect in a sidewalk that it was not a question whether all passers-by actually noticed the defect, but whether it was noticeable, means capable or susceptible of being noticed.—Rosevear v. Borough of Osceola Mills, 32 A. 548, 169 Pa. 555.

**NOTICEABLY INTOXICATED**

Ohio App. 9 Dist. 1991. Evidence that patron was served 15 cans of beer over five-hour period was not sufficient to demonstrate that he was “noticeably intoxicated,” so as to permit recovery from restaurant which served him beer when patron subsequently became involved in vehicular accident; evidence of number of beers served raised only a question of constructive knowledge, which was rebuffed by uncontested accounts of patron’s appearance of sobriety. R.C. § 4399.18.—Tillett v. Tropicana Lounge & Restaurant, Inc., 610 N.E.2d 453, 81 Ohio App.3d 46.—Int Liq 310.

**NOTICE AND A HEARING**

C.A.7 (Ill.) 2002. Under the Bankruptcy Code, a requirement of “notice and a hearing” really means notice and the opportunity for a hearing. Bankr.Code, 11 U.S.C.A. § 102(1)(B).—Morlan v. Universal Guar. Life Ins. Co., 298 F.3d 609, rehearing and rehearing denied, certiorari denied 123 S.Ct. 968.—Bankr 2131.

1st Cir.BAP (Mass.) 2002. Concept of “notice and a hearing” under the Bankruptcy Code is a flexible one. Bankr.Code, 11 U.S.C.A. §§ 102(1)(A), 1307(c).—In re Cabral, 285 B.R. 563.—Bankr 2131, 2151.

**NOTICE AND COMMENT REQUIREMENTS**

CIT 1986. Standard to permit Department of Commerce to disregard dumping margins of less than .5% ad valorem as “de minimis” would not “clearly and directly” involve “foreign affairs function” and, therefore, did not fit within that exception to “notice and comment requirements” of Administrative Procedure Act. 5 U.S.C.A. §§ 551(4), 553, 553(b), (b)(3)(A), (c); Tariff Act of 1930, §§ 731, 772(d)(1)(B), 773(a)(4), as amended, 19 U.S.C.A. §§ 1673, 1677a(d)(1)(B), 1677b(a)(4).—Carlisle Tire & Rubber Co., Div. of

Carlisle Corp. v. U.S., 634 F.Supp. 419, appeal after remand 657 F.Supp. 1287.—Admin Law 394; Cust Dut 21.5(1).

**NOTICE AND COMMENT RULEMAKING**

C.A.D.C. 1977. Hearing held by Secretary of Agriculture in promulgating milk marketing order which included Mississippi in New Orleans marketing region was not a rule making required to be "on the record", within meaning of Administrative Procedure Act restriction against commingling of investigative and decision-making functions, where marketing order applied prospectively to all producers and handlers in region and was based on broad policy considerations; proceeding at issue was clearly instance of "notice and comment rulemaking". 5 U.S.C.A. §§ 554, 554(d), 556, 557.—Marketing Assistance Program, Inc. v. Bergland, 562 F.2d 1305, 183 U.S.App.D.C. 357.—Admin Law 445; Agric 3.5(2).

**NOTICE AND DEMAND**

C.A.7 (Ill.) 1995. Communication of assessment in notice of levy satisfied "notice and demand" requirements of collection statute. 26 U.S.C.A. § 6671(a).—Stevens v. U.S., 49 F.3d 331.—Int Rev 4855.

Utah 1936. Letter from Tax Commission "proposing" additional sales tax to amount shown in vendor's return, and stating that payment should be made within specified time, held "notice and demand" upon vendor within statute requiring vendor to pay additional tax found due upon recomputation within specified time after notice and demand from Commission. Laws 1933, c. 63, § 8.—State Tax Commission of Utah v. Katsis, 62 P.2d 120, 90 Utah 406, 107 A.L.R. 1477.—Tax 1331.

**NOTICE AND DEMAND FOR PAYMENT**

Bkrty.D.S.C. 2000. Notices that debtors received from Internal Revenue Service (IRS), advising debtors that they had been assessed \$500 as frivolous return penalty for each return which they filed claiming that they had no taxable income, were excepted from automatic stay, as being in nature of "notice and demand for payment" of tax assessment. Bankr.Code, 11 U.S.C.A. § 362(b)(9)(D).—In re Covington, 256 B.R. 463.—Bankr 2402(4).

Bkrty.D.S.C. 2000. Notices that debtors received from Internal Revenue Service (IRS), advising debtors of IRS's intent to levy on debtors' property and requiring immediate response, went beyond "notice and demand for payment" of tax assessment, and were in nature of attempt by IRS to collect tax debt, of kind which was not excepted from automatic stay. Bankr.Code, 11 U.S.C.A. § 362(b)(9)(D).—In re Covington, 256 B.R. 463.—Bankr 2402(4).

**NOTICE AND HEARING**

N.D.Ohio 1937. Proceedings of city council of Cleveland leading up to passage of ordinances fixing a rate for the sale of gas constituted due process

of law and sufficient "notice and hearing," within meaning of statute depriving the Federal District Court of jurisdiction to enjoin orders of any rate-making body of any political subdivision of state, where gas company had ample notice of what council proposed and full opportunity to present its objections to the ordinances. Johnson Act, 28 U.S.C.A. § 1342.—East Ohio Gas Co. v. City of Cleveland, 23 F.Supp. 965, affirmed 94 F.2d 443, certiorari denied 58 S.Ct. 761, 303 U.S. 657, 82 L.Ed. 1116.—Fed Cts 28; Gas 14.5(2); Inj 110.

Ky. 1949. "Notice and hearing", which is essence of due process, means an opportunity to present objections before tribunal authorized to give effect to those objections.—Babb v. Bullitt, 220 S.W.2d 394, 310 Ky. 211.—Const Law 309(1).

**NOTICE BEFORE TRIAL**

Fla. 1936. Where defendant pleaded guilty to armed robbery, and before sentence, was discovered to be 15 years of age and unmarried, notice to defendant's parents, who were brought to court on day of original plea and were present when boy was immediately rearraigned, again pleaded guilty, and was sentenced, held not sufficient compliance with statutory requirement of notice to defendant's parents, since requirement of "notice before trial" contemplates opportunity for infant to see and confer with his parents before entering plea. F.S.A. § 932.38.—State ex rel. Hamilton v. Chapman, 169 So. 658, 125 Fla. 235.—Infants 68.4.

**NOTICE BY MAIL**

N.D.Ill. 1984. Employee pension fund's placement of two advertisements in union newspaper which was mailed to employees and which informed employees of their right to elect coverage in fund's preretirement husband and wife pension plan, as required by Employee Retirement Income Security Act, did not constitute "notice by mail" under Treasury Department regulation, so as to permit disclosure requirements to be satisfied by one timely notice. Employee Retirement Income Security Act of 1974, § 404, 29 U.S.C.A. § 1104.—Kaszuk v. Bakery and Confectionary Union, 638 F.Supp. 365, affirmed in part and remanded 791 F.2d 548.—Pensions 47.

**NOTICE BY POSTING**

Nev. 1934. Statutory provision making property subject to lien for improvements unless owner gives "notice by posting" statement of nonliability, requires that notice be so posted that it will remain displayed for reasonable time. Comp.Laws 1929, § 3743.—Nichols v. Levy, 32 P.2d 120, 55 Nev. 310.—Mech Liens 78.

Nev. 1934. Owner's posting of notice on front door and show window frame of building disclaiming responsibility for improvements *held* insufficient "notice by posting," where, as part of improvement, entire front wall of building was torn down shortly after posting and lien claimants received no actual notice. Comp.Laws 1929, § 3743.—Nichols v. Levy, 32 P.2d 120, 55 Nev. 310.—Mech Liens 78.

**NOTICE IN WRITING**

Nev. 1934. That duplicate carbon copy of posted notices of owner's nonliability, with statutory affidavit attached, was recorded, *held* insufficient "notice by posting," where posting was not such as to give requisite notice to avoid mechanic's liens. Comp.Laws 1929, § 3743.—Nichols v. Levy, 32 P.2d 120, 55 Nev. 310.—Mech Liens 78.

**NOTICE CONTAINING SPECIFIC REFERENCES**

Tex.App.—Corpus Christi 1993. Plaintiff's statement of intent filed in response to defendant's motion for summary judgment which contained only names, citations to pages in unfiled depositions, and broad statements concerning the depositions was not sufficient to constitute a "notice containing specific references" as required by rule permitting use of discovery products not on file as summary judgment evidence if copies of material, or notice containing specific references to discovery or to other instruments are filed and served on parties. Vernon's Ann.Texas Rules Civ.Proc., Rule 166a(d).—E.B. Smith Co. v. U.S. Fidelity and Guar. Co., 850 S.W.2d 621, rehearing overruled, and writ denied.—Judgm 185(4).

**NOTICE DEFENSE RULE**

D.D.C. 1998. Under District of Columbia law, if an insurer wrongly denies its duty to defend on the grounds that a claim is outside the scope of a policy, it waives the right to assert lack of notice as a defense; this "notice defense rule" operates on the principle that it would be futile for the insured to try to meet every technical requirement, if the insurer is already planning to deny coverage.—Washington Sports and Entertainment, Inc. v. United Coastal Ins. Co., 7 F.Supp.2d 1.—Insurance 3191(7).

**NOTICE DISMISSEALS**

Ohio App. 12 Dist. 2001. Dismissals made by a plaintiff by filing notice are known as "notice dismissals." Rules Civ.Proc., Rule 41(A)(1) (2000).—Forshey v. Airborne Freight Corp., 755 N.E.2d 969, 142 Ohio App.3d 404, appeal not allowed 754 N.E.2d 263, 93 Ohio St.3d 1418.—Pretrial Proc 513.

**NOTICE FATHER**

N.Y.A.D. 1 Dept. 2001. Sufficient evidence existed to find that formerly incarcerated father of child was "notice father", meaning that his consent to child's adoption was not required and that he was entitled only to present evidence at best interests hearing; father failed to make any meaningful efforts to communicate with child for entire period of his incarceration from just after child's birth, to three years later, just prior to dispositional hearing. McKinney's DRL § 111, subds. 1(d), 2(a).—In re Tyrone Anthony H., 731 N.Y.S.2d 688, 287 A.D.2d 367.—Adop 7.8(5).

**NOTICE INCREMENT**

Me. 1989. "Notice increment" payments to teachers who gave advance notice of their intent to retire were not "earnable compensation" within

meaning of statute setting public employees' retirement pensions at percentage thereof. 5 M.R.S.A. § 17001, subd. 13.—Huard v. Board of Trustees, Maine State Retirement System, 562 A.2d 694.—Schools 146(5).

**NOTICE IN DETAIL**

Cal.App. 1 Dist. 1976. Evidence that contractor notified city at time bids were opened of error in its bid, but that contractor did not give city written notice of specific detail of mistake within five days, did not support trial court's finding that contractor had supplied "notice in detail" of mistake in bid within meaning of statute providing procedure for rectifying mistake in public bid. West's Ann.Gov. Code, § 4203.—A & A Electric, Inc. v. City of King, 126 Cal.Rptr. 585, 54 Cal.App.3d 457.—Mun Corp 335.1.

**NOTICE IN PERSON**

Iowa 1930. "Notice in person" provided for by by-laws of mutual insurance association means "actual notice."—Travelers' Ins. Co. of Hartford, Conn. v. Farmers' Mut. Fire Ins. Ass'n of Monona County, 233 N.W. 153, 211 Iowa 1051.—Insurance 1929(2).

**NOTICE IN WRITING**

Cal.App. 4 Dist. 1942. Where board of trustees unanimously adopted resolution not to re-employ probationary school teacher and authorized superintendent of high school district who was the chief executive officer of the board to send notice of termination to the teacher and superintendent wrote a letter to the teacher advising her of the action taken by the board, superintendent's letter was sufficient "notice in writing" under the Code by the governing board to the probationary school teacher that her services would not be required for the ensuing year. School Code, §§ 5.500, 5.681 (repealed. See Education Code, §§ 13081 et seq., 13582).—Knickerbocker v. Redlands High School Dist., 122 P.2d 289, 49 Cal.App.2d 722.—Schools 141(5).

Iowa 1928. Letter informing corporation's secretary of pledge of stock held not statutory "notice in writing," as respects execution lien (Code 1897, § 1626).—Reimers v. Tonne, 221 N.W. 574, 207 Iowa 1011.—Corp 123(9).

R.I. 1932. Notice by registered mail of mechanic's lien claim held sufficient to comply with statute requiring "notice in writing". Gen.Laws 1923, c. 301, § 5.—Doran v. Britto, 161 A. 141, 52 R.I. 425.—Mech Liens 122.

Tex.App.—Houston [14 Dist.] 1988. Notice of appeal that was not signed by defendant or attorney did not qualify as "notice in writing" filed with clerk of trial court. Rules App.Proc., Rule 40(b)(1).—Corbett v. State, 745 S.W.2d 933, petition for discretionary review refused.—Crim Law 1081(2).

Wash. 1949. Where copartner filed claim for workmen's compensation, reporter's shorthand notes incorporating expression of desire by partner

## NOTICE IN WRITING

28B W&P— 230

that all partners come under protection of compensation act, did not constitute "notice in writing" required where partners desire coverage. Rem. Rev.Stat. §§ 7674—1, 7675, 7676.—Johnson v. Department of Labor and Industries, 205 P.2d 896, 33 Wash.2d 399.—Work Comp 295.

### NOTICE IS GIVEN

Ohio Com.Pl. 1985. Words "notice is given," in statute allowing patient to commence medical malpractice claim against notified individuals at any time within 180 days after notice is given, if notice is given prior to expiration of one-year period, means date on which plaintiff mails notice. R.C. § 2305.11(A).—Brinson v. Bethesda Hosp., Inc., 504 N.E.2d 496, 29 Ohio Misc.2d 8, 29 O.B.R. 224.—Lim of Act 67.

### NOTICE JURISDICTION

Va. 1990. "Jurisdiction" that is necessary for court to proceed to adjudication on the merits embraces concepts of "subject matter jurisdiction," which is authority granted through constitution or statute to adjudicate class of cases or controversies; "territorial jurisdiction," which is authority over persons, things, or occurrences located in defined geographic area; "notice jurisdiction," which refers to effective notice to party or, if proceeding is in rem, seizure of res; and other conditions of fact which are demanded by unwritten or statute law as prerequisites to authority of court to proceed to judgment or decree; of several concepts, only subject matter jurisdiction cannot be waived or conferred on court by agreement of parties and can be raised at any time in proceedings, even for first time on appeal by court sua sponte. Sup.Ct.Rules, Rule 5:25.—Morrison v. Bestler, 387 S.E.2d 753, 239 Va. 166.—Courts 4, 37(1).

### NOTICE OF ACCEPTANCE

C.A.7 (Wis.) 1969. Letter sent by government to defendant stating that it had accepted defendant's bid on surplus property subject to approval of credit and antitrust clearance was at the minimum a "notice of acceptance," within terms and conditions of invitation specifying that if a bidder did not receive notice of acceptance within 90 days from opening of bid he could consider his bid rejected, so that defendant's bid was not rejected by government's failure to notify defendant of antitrust clearance until a month beyond 90-day period, but within closing deadline suggested by defendant.—U.S. v. National Optical Stores Co., 407 F.2d 759.—U S 58(4).

### NOTICE OF ACCIDENT

Ky. 1971. Term "notice of accident," within compensation statutes requiring that notice of accident be given to employer "as soon as practicable after the happening thereof," means that notice of specific injury for which employee is claiming compensation must be given. KRS 342.185, 342.190.—Reliance Diecasting Co. v. Freeman, 471 S.W.2d 311.—Work Comp 1224.

Pa.Super. 1984. Employer who had purchased manufacturer's and contractor's liability policy in which another party was one of named insureds was "reliable source" who could adequately provide notice of accident to insurer on behalf of that other party as required by "notice of accident" provision in policy.—Philadelphia Elec. Co. v. Aetna Cas. & Sur. Co., 484 A.2d 768, 335 Pa.Super. 410.—Insurance 3149.

Pa.Super. 1944. Coal loader's statement to mine boss that he injured back while lifting rock and visit to company doctor the succeeding day satisfied legal requirements as to "notice of accident". 77 P.S. § 1 et seq.—Barbaryka v. Henderson Coal Co., 36 A.2d 341, 154 Pa.Super. 402.—Work Comp 1246, 1249.

### NOTICE OF A CLAIM AGAINST THE INSTRUMENT

M.D.Ga. 1982. Having made a personal loan to general partner of limited partnership and having permitted him as a general partner and thus a fiduciary to assign promissory notes which were payable to the limited partnership as security for his personal loan, bank took each of promissory notes with "notice of a claim against the instrument" and was not a "holder in due course." West's F.S.A. §§ 673.302, 673.304–673.306.—Nashville City Bank and Trust Co. v. Massey, 540 F.Supp. 566.—Bills & N 332.

### NOTICE OF ALIBI

Miss. 1993. Written statement defendant gave to police on day following crime was not a "notice of alibi" precluded from use as impeachment or rebuttal evidence.—Conner v. State, 632 So.2d 1239, certiorari denied 115 S.Ct. 314, 513 U.S. 927, 130 L.Ed.2d 276, post-conviction relief denied 684 So.2d 608, rehearing denied.—Crim Law 683(1); Witn 392(1).

### NOTICE-OF-ALIBI RULE

C.A.9 (Or.) 1992. "Notice-of-alibi rule" normally requires defendant to inform government of intent to raise alibi defense and all information relating to defense within specified period of time prior to trial.—U.S. v. Jordan, 964 F.2d 944, certiorari denied 113 S.Ct. 478, 506 U.S. 979, 121 L.Ed.2d 384.—Crim Law 629(9).

### NOTICE OF APPEAL

C.A.9 (Cal.) 1993. Appellant's opening brief served as "notice of appeal" conferring appellate jurisdiction over appellant's challenge to amount of attorney fee award determined after appellant's notice of appeal; brief was filed within time limit for filing notice of appeal pertaining to fee award, and specified parties to appeal, designated judgment appealed from and named Court of Appeals. F.R.A.P.Rules 3, 4(a), 28 U.S.C.A.—Intel Corp. v. Terabyte Intern., Inc., 6 F.3d 614.—Fed Cts 666.

C.A.9 (Cal.) 1953. Where draft registrant was given notice of classification and he thereafter submitted written request for personal appearance be-

## NOTICE OF APPEAL

fore appeal board, the request was a “notice of appeal” not a request for a hearing before the local board. Universal Military Training and Service Act, § 6(j) as amended 50 U.S.C.A.Appendix, § 456(j).—Elder v. U.S., 202 F.2d 465, certiorari denied 73 S.Ct. 1143, 345 U.S. 999, 97 L.Ed. 1405.—Armed S 20.8(7).

C.A.5 (Tex.) 1985. Even though appellee and court were on notice of the appeal, payment of filing and docketing fees and filing of appeal information sheet did not amount to the substantial equivalent of a “notice of appeal,” in that appeal information sheet did not designate in any fashion what judgment, order, or part was appealed. F.R.A.P. Rule 3(c), 28 U.S.C.A.—Greater Houston Chapter of American Civil Liberties Union v. Eckels, 763 F.2d 180.—Fed Cts 666.

C.A.7 (Wis.) 2000. Petition to Court of Appeals for an interlocutory appeal, filed 13 days after final order, was sufficient to be a “notice of appeal” from final order, though a panel of the Court of Appeals denied the petition, where petition contained all of the essential elements of a proper notice of appeal, including identification of the final order of the district court as the judgment from which appellant was appealing, and petition was filed with the clerk of the Court of Appeals, and not the clerk of the district court. 28 U.S.C.A. § 1292; F.R.A.P.Rules 3, 3(c)(1), 4, 4(d), 28 U.S.C.A.—Remer v. Burlington Area School Dist., 205 F.3d 990, on remand 149 F.Supp.2d 665, affirmed 286 F.3d 1007.—Fed Cts 666.

Cust. & Pat.App. 1967. “Notice of appeal” within statutes concerning review by Court of Customs and Patent Appeals of patent office decisions is in the nature of advisory communication to commissioner, setting forth course of action appellant intends to take, whereas “reason of appeal” determines content of material that commissioner must furnish the court in ex parte cases and determines points to which decision of Court of Customs and Patent Appeals shall be confined. 35 U.S.C.A. §§ 141–144.—Ferree v. Shephard, 384 F.2d 1019, 55 C.C.P.A. 848.—Pat 113(4).

C.C.A.2 (N.Y.) 1946. Some paper must be filed in at least the trial court or the appellate court, to constitute a “notice of appeal” under federal rule, and a transaction in pais between parties, of which no record is made in either court, will not serve, so that notice served only upon appellee was insufficient. Fed.Rules Civ.Proc. rule 73(a), 28 U.S.C.A.—Federal Deposit Ins. Corp. v. Congregation Poiley Tzedek, 159 F.2d 163.—Fed Cts 651.

Ariz.App. Div. 1 1996. “Notice of appeal” gives adverse party notice that appeal has been taken from specific judgment and specific case.—State v. Rasch, 935 P.2d 887, 188 Ariz. 309, review denied.—Crim Law 1081(1).

Cal.App. 2 Dist. 1955. Document which convicted defendant filed in superior court and which stated that defendant declared his intention to file an appeal for a new trial, rehearing or modification but which failed to state that defendant appealed or to specify any judgment or particular part thereof

from which he appealed did not constitute a “notice of appeal”. West’s Ann.Rules on Appeal, rule 1(a).—People v. Deleaney, 283 P.2d 287, 132 Cal. App.2d 838.—Crim Law 1081(2).

Cal.App. 2 Dist. 1917. A notice, stating that plaintiff “desires and intends to appeal” from the judgment, and that he “has appealed,” closing with a request that a transcript of the testimony, etc., be made up and prepared, is not a “notice of appeal,” within West’s Ann.Code Civ.Proc. § 940, providing that an appeal is taken by a notice stating that an appeal is taken from “the judgment,” etc., or section 941b, requiring that the notice must “identify” the judgment, etc., appealed from with reasonable certainty.—Oxford v. Imperial Southside Water Co., 166 P. 1023, 34 Cal.App. 1.

Cal.App. 4 Dist. 1992. Father’s request for new trial was not “notice of appeal” from judgment terminating parental rights. West’s Ann.Cal.Civ. Code § 7006; Cal.Rules of Court, Rule 1(a).—In re Issac J., 6 Cal.Rptr.2d 65, 4 Cal.App.4th 525, review denied.—Infants 244.1.

Ill. 2001. A “notice of appeal” is a procedural device filed with the trial court, that when timely filed vests jurisdiction in the appellate court in order to permit review of the judgment such that it may be affirmed, reversed, or modified; a “motion to stay judgment pending appeal” impacts the enforcement and effect of the judgment, but does not challenge the sufficiency of that judgment.—Steinbrecher v. Steinbrecher, 259 Ill.Dec. 729, 759 N.E.2d 509, 197 Ill.2d 514, rehearing denied, certiorari denied 122 S.Ct. 2371, 153 L.Ed.2d 190, rehearing denied 123 S.Ct. 22, 153 L.Ed.2d 885.—App & E 411, 484.1.

Ill.App. 2 Dist. 1975. Document entitled “Notice of Appeal for New Trial” which was actually a posttrial motion for a new trial and sought relief, not from an Appellate Court, but from the trial court, did not constitute a “notice of appeal.” Supreme Court Rules, rule 606, S.H.A. ch. 110A, § 606.—People v. Feigleson, 321 N.E.2d 473, 24 Ill.App.3d 794.—Crim Law 1081(2).

Iowa 1936. A “notice of appeal” is not a writ or summons and is not process.—In re Sioux City Stock Yards Co., 268 N.W. 18, 222 Iowa 323.

Kan. 1942. Letter written by prisoner to county attorney containing claim that prisoner was innocent and declaration that guilty party was then in prison and could be produced and requesting warrant for such party, was not a “notice of appeal” as required to be served on county attorney to perfect an appeal from a conviction. Gen.St.1935, 60–3306.—Cochran v. Amrine, 130 P.2d 605, 155 Kan. 777.—Crim Law 1081(2).

Minn. 1960. “Notice of appeal” from probate court to district court is nothing more than actual notice that appeal has been taken, and it is not “process”. M.S.A. § 525.712.—Riener v. First Nat. Bank of Minneapolis (State Report Title: In re Estate of Nunvar), 101 N.W.2d 145, 257 Minn. 324.—Courts 202(5).

## NOTICE OF APPEAL

28B W&P— 232

Miss. 1992. Plaintiff's letter to both circuit clerk and court reporter informing them that he "desire[d] to appeal [this] cause" sufficed as "notice of appeal." Sup.Ct.Rules, Rules 3(c), 4(a).—Ivy v. General Motors Acceptance Corp., 612 So.2d 1108.—App & E 417(1).

Mo.App. 1926. Object and purpose of "notice of appeal" is not only to notify appellee that appeal has been taken, but to advise him that it will be prosecuted. Affidavit and recognizance for appeal from justice court, under Rev.St.1919, §§ 2891-2893, V.A.M.S. §§ 512.190 note, 512.200, are not notice of appeal required by section 2905, V.A.M.S. § 512.190 note.—Charles Wolff Packing Co. v. Walker, 285 S.W. 795.

Neb. 1949. Verbal statement of counsel that "in all probability there will be a notice of appeal given" was not a "notice of appeal" within meaning of statutes relating to appeals from county court to district court. R.S.1943, §§ 30-1602 to 30-1605.—In re Bednar's Estate, 37 N.W.2d 195, 151 Neb. 242.—Courts 202(5).

S.C. 1925. Service of "notice of intention to appeal" from magistrate's court to circuit court held service of "notice of appeal" required by statute.—State v. Funderburk, 126 S.E. 140, 130 S.C. 352.—Crim Law 260.4.

Tex.App.—Fort Worth 1987. Letter of clerk of appellate court to prevailing third-party defendant, stating that defendant had filed his notice of appeal, but not stating whether appeal cost bond had been filed, did not constitute "notice of appeal" to which third-party defendant was entitled under Appellate Rule 40(a)(2), as clerk's letter was only informational receipt indicating that appeal was likely; letter did not relieve appealing defendant from its responsibility to give prompt notice of posting of appeal bond. Rules App.Proc., Rules 40(a)(2), 41(a)(2), 46(d).—Hexcel Corp. v. Conap, Inc., 738 S.W.2d 359, writ denied.—App & E 387(2), 417(1).

Tex.Civ.App.—San Antonio 1968. Letter written to clerk of district court by counsel for appellants inquiring as to the amount of the bond required in order to perfect appeal did not constitute "notice of appeal," and reviewing court lacked jurisdiction to review judgment.—Werner v. Murray, 430 S.W.2d 126, writ refused.—App & E 417(1), 430(1).

Tex.Civ.App.—Waco 1968. Letter written by appellant's counsel to clerk of district court and inquiring as to an estimate of amount of costs for use in determining an appeal bond to appeal specified cases was not a "notice of appeal," and Court of Civil Appeals had no jurisdiction, and appeals would be dismissed. Rules of Civil Procedure, rule 353.—Standard Ins. Co. v. Teague Brick & Tile Co., 425 S.W.2d 63, writ refused.—App & E 417(1), 430(1).

Tex.Civ.App.—Waco 1968. Letter from appellant's counsel to trial judge which gave style number of cause and which stated an intention to appeal motion for summary judgment which was granted as to two defendants and referred to telegram

which was previously sent giving notice of intention to appeal motion for summary judgment in favor of one defendant and indicated that copy had been served upon appellees' counsel was an effective "notice of appeal," even though sent prior to final judgment. Rules of Civil Procedure, rules 74, 306c, 353.—Calame v. Prudential Ins. Co. of America, 423 S.W.2d 940.—App & E 417(1), 428(2).

Tex.Civ.App.—Corpus Christi 1979. Where writing which State identified as written notice of appeal consisting of letter addressed to district clerk, where letter contained sentence which was meant to apprise district clerk that State anticipated filing motion in Court of Civil Appeals to extend time to file record, where letter indicated that State planned to appeal judgment and primary gist of letter was to identify instruments to clerk and request that they be included in transcript, but where letter did not include statement that State desired to appeal and only mention of notice of appeal did nothing but refer to oral notice, letter did not constitute an adequate "notice of appeal." Rules of Civil Procedure, rule 354(c).—State Dept. of Highways and Public Transp. v. Douglas, 577 S.W.2d 559, ref. n.r.e.—App & E 417(1).

Wash. 1903. If to appeal is not to institute a new proceeding, a "notice of appeal" cannot be an original process by which parties are brought into court, but is a notice merely by which the parties who are already in court are notified of subsequent and further proceedings in the cause therein pending, and hence, where such notice was served on defendant's attorney and purported to be a notice of appeal as against all of the defendants originally sued, it was not objectionable by reason of the fact that all of the defendants except one were referred to by the abbreviation "et al." instead of setting out their names in full.—Philadelphia Mortg. & Trust Co. v. Palmer, 73 P. 501, 32 Wash. 455.

Wis.App. 2000. Summons and complaint challenging sanitary district's special assessment was a "notice of appeal," as required by statute governing special assessment appeals. W.S.A. 66.60(12)(a).—Mayek v. Cloverleaf Lakes Sanitary Dist. No. 1, 617 N.W.2d 235, 238 Wis.2d 261, 2000 WI App 182.—Mun Corp 500.

### NOTICE OF APPEAL CAPTION

Ohio 1988. Although phrase "against the commission," as used in statute stating that proceeding to obtain reversal, vacation, or modification of Public Utility Commission shall be by notice of appeal "against the commission," is intended to require that "notice of appeal caption" commission as "the appellee," failure to satisfy that provision did not deprive Supreme Court of jurisdiction to hear appeal. R.C. § 4903.13.—Consolidated Rail Corp. v. Public Utilities Com'n of Ohio, 533 N.E.2d 317, 40 Ohio St.3d 252.—Pub Ut 192.

### NOTICE OF APPEAL FOR NEW TRIAL

Ill.App. 2 Dist. 1975. Document entitled "Notice of Appeal for New Trial" which was actually a posttrial motion for a new trial and sought relief, not from an Appellate Court, but from the trial

## NOTICE OF CANCELLATION

court, did not constitute a "notice of appeal." Supreme Court Rules, rule 606, S.H.A. ch. 110A, § 606.—People v. Feigleson, 321 N.E.2d 473, 24 Ill.App.3d 794.—Crim Law 1081(2).

### NOTICE OF APPEARANCE

Cal.App. 2 Dist. 1954. As used in statute providing that a defendant appears in an action when he gives plaintiff written "notice of appearance", quoted phrase means a document to be drawn up specifically for the purpose of giving notice of appearance. West's Ann.Code Civ.Proc. § 1014.—Russell v. Landau, 274 P.2d 681, 127 Cal.App.2d 682.—Appear 8(1).

Wash.App. Div. 2 1991. Single telephone call from moving company's director of customer relations to customer, after customer filed summons and complaint for damage caused to computer equipment during move, was not "notice of appearance," such that moving company would be entitled to five days' written notice of motion for default, even assuming telephone call could qualify as notice of appearance under some circumstances, as there was no true intent to defend and no real recognition that case was in court. CR 4(a)(3), 55(a)(1, 3); West's RCWA 4.28.210.—Seek Systems, Inc. v. Lincoln Moving/Global Van Lines, Inc., 818 P.2d 618, 63 Wash.App. 266.—Judgm 123(1).

### NOTICE OF APPLICATION FOR HEARING

N.J.Bd.Tax App. 1943. Statement requesting Board of Tax Appeals to correct an assessment in taxes imposed against railroad property, which was contained in complaint which was filed by city with board and copy of which was purportedly served on taxpayer, did not constitute "notice of application for hearing" required by statute to be served on taxpayer to authorize city to contest the tax assessments. N.J.S.A. 54:29A-32.—City of Hoboken v. Kelly, 32 A.2d 710, 21 N.J.Misc. 193.—Tax 482(2).

### NOTICE OF ARRIVAL

C.A.2 (N.Y.) 1960. Under Marine open cargo policy that no action should be sustainable unless commenced within 12 months after notice to consignee of arrival of shipment, receipt by the insured of notice of "expected arrival" of the insured shipment, which had been lost at sea did not mean the same thing as a "notice of arrival" as used in the policy, so as to start running the policy limitations.—Purofied Down Products Corp. v. Travelers Fire Ins. Co., 278 F.2d 439.—Insurance 3564(7).

S.D.N.Y. 1942. Delivery of documents to receiving clerk at docks was not "notice of arrival" which bill of lading required to be delivered to consignee for lighter owner to have benefit of provision reducing its responsibility to that of a warehouseman, and hence owner was required to be held to its liability for damage to cargo as a carrier unless it could show that damage was caused by an act of God, and burden of making that showing was on owner.—Petition of Pennsylvania Railroad Co, 44 F.Supp. 617.—Ship 140(1), 209(3).

Mo.App. 1927. Notice to consignee before shipment reached point of delivery *held* insufficient to start 48-hour period after which carrier's liability as such ceased; "notice of arrival."—Hoyland Flour Mills Co. v. Missouri Pac. R. Co., 5 S.W.2d 125, 222 Mo.App. 599, certiorari denied Erie R Co v. Hoyland Flour Mills Co, 48 S.Ct. 433, 277 U.S. 586, 72 L.Ed. 1001.—Carr 140.

### NOTICE OF AUTHORITY AND PURPOSE

N.M.App. 1975. "Notice of authority and purpose," within meaning of rule providing, *inter alia*, that an officer, prior to forcible entry, must give notice of his authority and purpose and must be denied admittance, and that noncompliance with such standard is justified if exigent circumstances exist, means that the officer must, before entry, knock at the door or announce his presence to person in the house and wait for a person to come to the door, at which time officer must state that he is a police officer and that he has a warrant to search the premises, after which he must request permission to enter and serve the warrant.—State v. Sanchez, 540 P.2d 858, 88 N.M. 378, reversed 540 P.2d 1291, 88 N.M. 402.—Searches 143.1.

### NOTICE OF BREACH OF WARRANTY

Mass. 1941. A letter, notifying restaurateur that writer thereof had been retained by named persons in their claim for damages resulting from restaurateur's negligence in serving food which was unfit for human consumption, and specifying the day, hour, and place when and where such food was eaten, which was approximately a week prior to date of letter, was a sufficient "notice of breach of warranty" required by statute to be given to seller. G.L.(Ter.Ed.) c. 106, § 38.—Morin v. Stromberg, 34 N.E.2d 495, 309 Mass. 146.—Sales 429.

### NOTICE OF CANCELLATION

La.App. 1 Cir. 1999. Notice stating that automobile insurance policy would be cancelled for non-payment of premium if it was not paid by the due date was a "demand for payment," rather than a positive "notice of cancellation," and, therefore, was ineffective to cancel the policy; no unpaid premium balance existed when the notice was mailed. LSA-R.S. 22:636.1.—State Farm Mut. Auto. Ins. Co. v. Villeneuve, 747 So.2d 777, 1998-2421 (La.App. 1 Cir. 12/28/99), writ denied 758 So.2d 156, 2000-0273 (La. 3/24/00).—Insurance 2017, 2044(1).

La.App. 2 Cir. 1991. Notice to automobile insured unequivocally stating that if default was not cured within ten days policy would be cancelled was sufficient to constitute "notice of cancellation." LSA-R.S. 9:3550, 22:636.1.—Summerville v. Sovereign Fire and Cas. Ins. Co., 587 So.2d 715.—Insurance 1929(2).

Vt. 1995. Phrase "notice of cancellation," as used in statute establishing proper procedure for providing notice of cancellation of insurance policy, refers to unilateral action by insurer to terminate policy before end of policy period. 8 V.S.A.

## NOTICE OF CANCELLATION

28B W&P— 234

§ 3880.—Suchoski v. Redshaw, 660 A.2d 290, 163 Vt. 620.—Insurance 1929(1).

### NOTICE OF CLAIM

C.C.A.10 (N.M.) 1931. Statutory provision dispensing with “notice of claim” against carriers for damage from negligence rendered invalid stipulation requiring “notice of injury” to live stock (Interstate Commerce Act Sec. 20, as amended (49 USCA 20)). The term “notice of claim,” as used in Interstate Commerce Act Sec. 20, as amended by Act March 4, 1915 (49 USCA 20), dispensing with notice or filing of claim, if loss to goods shipped was due to delay or damage in loading or unloading, or if goods were damaged in transit by carelessness or negligence, includes “notice of injury,” since notice of injury would serve no other purpose than to apprise carrier of claim for damages. The stipulation in question required shipper, owner, consignee, or agent before removal or mingling of live stock to inform the delivering carrier in writing of any visible or manifest injury to the stock.—Louis Ilfeld Co v. Southern Pac Co-Pacific System, 48 F.2d 1056.—Carr 218(3).

C.C.A.10 (N.M.) 1931. Statutory provision dispensing with “notice of claim” against carriers for damage from negligence rendered invalid stipulation requiring “notice of injury” to live stock. Interstate Commerce Act § 20, as amended, 49 U.S.C.A. § 20.—Louis Ilfeld Co v. Southern Pac Co-Pacific System, 48 F.2d 1056.—Carr 218(3).

C.C.A.2 (N.Y.) 1936. Only reasonable distinction between “notice of claim” and “claim,” both of which were required by bills of lading in case of cargo loss or damage, is that claim should be more definite in its language as to demand for payment and as to amount demanded.—The West Arrow, 80 F.2d 853.—Ship 142.

C.C.A.2 (N.Y.) 1936. Letters to shipowner stating that cargo owners would hold vessel responsible for damage, without stating amount of claim, held sufficient “notice of claim” within bills of lading requiring “notice of claim” and subsequent written claim.—The West Arrow, 80 F.2d 853.—Ship 142.

D.Md. 1939. A letter of a compensation insurance carrier for an employer of an injured employee notifying vessel owner of such carrier’s right of subrogation to such claims as the injured employee might have against vessel owner constituted a sufficient “notice of claim” within statute requiring vessel owner to institute proceeding for limitation of liability within six months after a “claimant” shall have given to or filed with such owner written “notice of claim”, since a “notice of claim” contemplates something less definite as to amount demanded than the claim itself. 46 U.S.C.A. § 185.—The Maine, 28 F.Supp. 578, affirmed Standard Wholesale Phosphate & Acid Works v. Travelers Ins. Co., 107 F.2d 373.—Ship 209(1.2).

E.D.N.Y. 1988. Letter by attorneys informing ferry owner of representation of swimmer in connection with his personal injuries and requesting owner to refer letter to insurance and/or legal representative was sufficient “notice of claim” with-

in meaning of statute, which requires filing of ship-owner’s petition to limit liability within six months of owner’s receipt of written notice of claim, even though letter contained no threat that failure to respond within 20 days would lead to commencement of legal proceedings, and even though investigation continued after letter was written; letter informed owner of incident and possibility of liability for injuries. 46 U.S.C.A.App. §§ 183, 183(a), 185.—Complaint of Bayview Charter Boats, Inc., 692 F.Supp. 1480.—Ship 209(1.1).

S.D.N.Y. 1939. A letter, addressed to owner of fishing vessel which had foundered with loss of all on board, reciting that attorneys by whom letter was sent had been retained by the families of certain of the members of the crew to prosecute their claims for damages, was not a sufficient “notice of claim” within statute requiring that petition by vessel owner for limitation of liability be made within six months after a claimant shall have filed with owner written “notice of claim,” in absence of indication therein of what crew members were referred to or anything therein to identify them with a fair degree of accuracy, and hence letter did not start the running of the six months’ period. 46 U.S.C.A. § 185.—The Ariel, 30 F.Supp. 110.—Ship 209(1).

S.D.N.Y. 1939. The statute requiring vessel owner to petition for limitation of liability within six months after a claimant shall have filed written notice of claim with such owner should be given a reasonable interpretation, but more than “notice of claim” from anonymous claimants is required. 46 U.S.C.A. § 185.—The Ariel, 30 F.Supp. 110.—Ship 209(1).

Idaho 1930. “Notice of claim” of equitable mortgage for drilling wells *held* not instrument affecting title to or possession of realty, and could not be recorded as constructive notice of equitable mortgage (C.S. § 5413).—Maxwell v. Twin Falls Canal Co., 292 P. 232, 49 Idaho 806.—Records 6.

Minn.App. 1992. “Notice of claim” presented to municipality was “retained in anticipation of pending civil legal action,” and thus, qualified as “protected nonpublic data” under section of Government Data Practices Act protecting data retained by government in anticipation of pending civil legal action; *in camera* review of document by trial judge provided critical check on discretion of municipality’s attorney to declare that notice of claim was “retained in anticipation of a pending civil legal action.” M.S.A. §§ 13.39, subd. 2, 466.05, subd. 1.—St. Peter Herald v. City of St. Peter, 481 N.W.2d 405, review granted, reversed 496 N.W.2d 812, rehearing denied.—Records 57.

N.M. 1994. “Notice of claim” is not substantive right, and is instead analogous to statute of limitations or statutory period for filing notice of appeal; rather than being protected right, it is similar to mandatory precondition to exercise of jurisdiction.—Marrujo v. New Mexico State Highway Transp. Dept., 887 P.2d 747, 118 N.M. 753.—Action 11.

N.Y.A.D. 2 Dept. 1965. “Notice of claim” against Motor Vehicle Accident Indemnification

## NOTICE OF CONTEST

Corporation is completely different from “demand for arbitration”; the notice is merely a notification to the Corporation that a claim exists whereas the demand is a direct positive announcement that arbitration is sought. Insurance Law, § 167.—Motor Vehicle Acc. Indemnification Corp. v. McDonnell, 258 N.Y.S.2d 735, 23 A.D.2d 773.—Autos 251.6, 251.7.

N.Y.Sup. 1969. “Within 90 days thereafter” as used in standard uninsured motorist provision relates to occurrence of “hit-and-run” accident and not to time of filing of required police report and filing of “notice of claim” subsequent to 90 days after accident, even though it is as soon as practicable, is not compliance with such condition. Insurance Law §§ 167, subd. 2-a, 608.—Shamrock Cas. Co. v. Mack, 305 N.Y.S.2d 525, 61 Misc.2d 240.—Insurance 3153.

S.D. 1960. In action against city for injuries sustained in fall on icy sidewalk, service of complaint on mayor did not constitute “notice of claim” to city official designated by statute within contemplation of statute, providing that no action for negligence shall be maintained against a municipality unless written notice of time, place, and nature of injury is given to auditor or clerk within 60 days after injury. SDC 45.1409.—Brandner v. City of Aberdeen, 105 N.W.2d 665, 78 S.D. 574.—Mun Corp 812(6.1).

Tex.Civ.App.—San Antonio 1950. Notation that it was consignee’s claim for stated amount contained in statement of protest prepared by private inspection service, addressed to terminal carrier, and delivered to railroad perishable inspection agency did not constitute “notice of claim” within provision of uniform straight bill of lading making filing of written claim within nine months after delivery a condition precedent to recovery against carrier.—James G. McCarrick Co. v. Thompson, 227 S.W.2d 832.—Carr 180(1).

Utah 1984. Under the Workers’ Compensation Act, employer’s first report of injury, first surgical report, and application for medical examination constituted “notice of claim” to the Industrial Commission. U.C.A.1953, 35-1-99.—Mecham v. Industrial Com’n of Utah, 692 P.2d 783.—Work Comp 1262, 1263.

Wis.App. 1989. “Notice of injury” statutes allow governmental authorities opportunity to investigate matter, whereas “notice of claim” statutes perform entirely different function of providing government authorities with opportunity to effect compromise short of lawsuit and alerting them of possible expenses so that appropriate review of budget can be made for settlement or litigation purposes.—Van v. Town of Manitowoc Rapids, 442 N.W.2d 557, 150 Wis.2d 929.—Mun Corp 741.15.

Wyo. 2001. Document presented by city in negligence action, brought by married couple on behalf of themselves, child, and unborn child, seeking damages for injuries sustained in vehicle accident against city and driver of city vehicle was not “notice of claim” for purposes of constitutional notice of claim requirement, or for purposes of

statute of limitations requiring that suit be filed within one year after filing notice of claim, where no evidence indicated when, by whom, or to whom notice was presented, and notice was neither signed, nor verified, by injured persons. Const. Art. 16, § 7; Wyo.Stat.Ann. §§ 1-39-113, 1-39-114.—Beaulieu v. Florquist, 20 P.3d 521.—Autos 230; Lim of Act 66(3).

### NOTICE OF CLAIM FOR DAMAGES

Tex. 1982. Theft policy’s provision, which stated that insured was to “report \* \* \* WITHIN 24 HOURS every loss which may become a claim under this policy,” did not impose a “notice of claim for damages” requirement within meaning of statute providing in effect that any stipulation fixing the time for giving notice of a claim for damages at less than 90 days was void. Vernon’s Ann.Civ.St. art. 5546(a).—St. Paul Mercury Ins. Co. v. Tri-State Cattle Feeders, Inc., 638 S.W.2d 868.—Insurance 3153.

Tex.Civ.App.—Galveston 1930. Notice of automobile theft held not “notice of claim for damages” within statute relating to notice as condition precedent to right to sue on contract, Vernon’s Ann.Civ. St. art. 5546.—Lone Star Finance Co. v. Universal Auto. Ins. Co., 28 S.W.2d 573.—Insurance 3546.

### NOTICE OF CLAIM OR DEFENSE

Bkrcty.E.D.N.Y. 2002. Under New York law, existence of suspicious circumstances does not qualify as “notice of claim or defense,” of kind sufficient to prevent party from qualifying as “holder in due course.” N.Y.McKinney’s Uniform Commercial Code § 3-302(2).—In re AppOnline.com, Inc., 285 B.R. 805.—Bills & N 336.1.

### NOTICE OF CLAIMS

C.A.10 (Okla.) 1992. Under Oklahoma law, notice of occurrence or potential claim given during discovery period of officers and directors liability policy could not trigger coverage of policy; phrase “during the policy period” in “Notice of Claims” clause referred only to period prior to cancellation or nonrenewal, not to extended discovery period.—American Cas. Co. of Reading, Pennsylvania v. Federal Deposit Ins. Corp., 958 F.2d 324.—Insurance 2266.

### NOTICE OF CONTEST

Mo. 1942. The “notice of contest” in an election contest serves the dual purpose of bringing contestee into court and of setting forth and advising him and the court of the grounds of complaint or contest so that it may be decided summarily. R.S.1939, §§ 11632, 11636.—Armantrout v. Bohon, 162 S.W.2d 867, 349 Mo. 667.—Elections 285(1).

Tex.Civ.App.—Fort Worth 1968. Copy of petition, which was served on defendants in suit to have election held for purpose of authorizing issuance of independent school district bonds declared illegal or, in the alternative, for recount and other relief, did not constitute a “notice of contest” required by statute so that sustaining of plea in abatement and

## NOTICE OF CONTEST

28B W&P— 236

dismissal of suit was not error. V.A.T.S. Election Code, arts. 9.01 et seq., 9.03, 9.30, 13.01 et seq., 13.30.—Bruhn v. Azle Independent School District, 423 S.W.2d 617, writ dismissed.—Schools 97(4).

## NOTICE OF COPYRIGHT

S.D.N.Y. 1941. Where copyright owner printed and sold 3,000 copies of verse entitled "Remember This" on card containing word "copyright" but without giving date of copyright, it amounted to publication without "notice of copyright," and the effect was a "dedication" to the public so that copyright owner could not maintain an action for infringement of copyright. Copyright Act §§ 9, 18, 20, 17 U.S.C.A. §§ 10, 19, 21.—Wildman v. New York Times Co, 42 F.Supp. 412.—Copyr 50.1(1).

## NOTICE OF DECISION

Ariz.App. Div. 1 1995. So-called "Arbitration Award" which did not provide for costs to prevailing party was "notice of decision," rather than "final award," for purposes of determining when time for filing notice of appeal began to run; accordingly, time for filing notice of appeal did not begin to run until arbitrator filed amended arbitration award providing for costs. 17B A.R.S. Uniform Arbitration Rules, Rules 5(a), 7(a).—Bittner v. Superior Court In and For County of Maricopa, 897 P.2d 736, 182 Ariz. 434, corrected.—Arbit 73.5.

## NOTICE OF DEFAULT

C.A.8 (Minn.) 1991. Acceleration notice sent by lender to farmers was "notice of default" for purposes of Minnesota Farmer-Lender Mediation Act provision that would authorize release, pending mediation, of necessary farm operating expenses for those operations that had been commenced before notice of default, even if acceleration notice would not have been sufficient to allow lender to proceed with foreclosure. M.S.A. § 583.22, subd. 7a.—Wieweck v. U.S. Dept. of Agriculture, 930 F.2d 619.—Mtg 413.9.

E.D.Pa. 1982. Where what parties intended as "event of default" for nonpayment of rent for crane was clearly expressed in agreement as failure to pay rent persisted in for ten days following written notice, lessor's complaint alleging that lessee was in default in his rental obligation and that lessor was entitled to back rent was not "notice of default" bargained for by parties, therefore, "event of default" giving rise to lessor's right of termination under lease did not occur.—Medspan Shipping Service, Ltd. v. Prudential Lines, Inc., 541 F.Supp. 1076.—Bailm 22.

Or. 1962. Letter advising lessee that lessors had not been receiving rental payments for all gasoline delivered to leased premises was not "notice of default" within lease provision authorizing lessors to terminate lease for default in payment of rent at expiration of 30 day period following notice of default by lessors.—Moore v. Richfield Oil Corp., 377 P.2d 32, 233 Or. 39.—Land & Ten 94(3), 108(1).

## NOTICE OF DEFICIENCY

C.A.2 1996. Proposed individual income tax assessment sent to taxpayer by Commissioner of Internal Revenue did not constitute "notice of deficiency" necessary to confer jurisdiction upon tax court to hear taxpayer's refund claim, where letter was merely preliminary, pre-filing notification letter of estimated tax assessment and penalties, rather than final determination of such liability. 26 U.S.C.A. § 6212(a).—Moretti v. C.I.R., 77 F.3d 637.—Int Rev 4647.

C.A.6 1986. Prefiling notification letter informing taxpayers that Internal Revenue Service believed that purported deductions and/or credit attributable to tax shelter were not allowable was not equivalent of "notice of deficiency," and thus did not entitle taxpayers to petition tax court for redetermination of deficiency, where letter clearly indicated that no deficiency had yet been assessed and did not specify amount of potential deficiency. 26 U.S.C.A. § 6213(a); Tax Court Rule 13, 26 U.S.C.A. foll. § 7453.—Gaska v. C.I.R., 800 F.2d 633.—Int Rev 4542.1, 4635.

C.A.8 1986. Letter notifying taxpayers of Internal Revenue Service's belief that any deductions or credits derived from investments in tax shelter would not be allowable was not "notice of deficiency" sufficient to give rise to tax court jurisdiction.—Spector v. C.I.R., 790 F.2d 51, certiorari denied 107 S.Ct. 274, 479 U.S. 884, 93 L.Ed.2d 250.—Int Rev 4545.

C.A.11 1993. Notice of deficiency sent by Internal Revenue Service (IRS) to taxpayers indicating that IRS was disallowing deduction for tax shelter on 1971 tax return, identifying source of deduction, and recomputing tax liability using taxpayers' rate, met minimum requirements for "notice of deficiency," even though IRS had not audited tax shelter's partnership return at time of notice of deficiency. 26 U.S.C.A. §§ 6212, 6212(a).—Bokum v. C.I.R., 992 F.2d 1136.—Int Rev 4545.

C.C.A.2 1935. That Commissioner had sent to petitioner notice of liability, as transferee of liquidated corporation, for additional tax for 1922 assessed against the corporation, and that proceeding for redetermination of such liability was pending before Board of Tax Appeals, held not to preclude Commissioner from mailing to petitioner notice of deficiency as to his individual income tax liability was not "notice of deficiency" mailed to 'taxpayer' within statute prohibiting Commissioner from determining 'additional deficiency' in respect of same taxable year (Revenue Act of 1926, Sec. 2(a)(9), 274(a, e, f), 280(a)(1), 26 USCA 1262(a)(9), 1048, 1048c, 1048d, 1069(a)(1).—Michael v. Commissioner of Internal Revenue, 75 F.2d 966, certiorari denied 56 S.Ct. 89, 296 U.S. 579, 80 L.Ed. 409.—Int Rev 4542.1.

S.D.N.Y. 1934. Waiver extending time for making assessment of taxes "until" December 31st held to include all of day specified, notwithstanding subsequent provision for sending deficiency notice to taxpayer "before" such date. The waiver recited that "time for making any assessment as aforesaid

## NOTICE OF DISHONOR

shall remain in effect until December 31, 1926, and shall then expire, except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals, then said date shall be extended 60 days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision of said Board." "Notice of deficiency" is not definite action on part of government, but a statement of government's position which is open to attack by negotiation or by appeal to Board of Tax Appeals.—William C. Atwater & Co. v. Bowers, 5 F.Supp. 916, reversed 74 F.2d 253.

### **NOTICE OF DEMAND FOR PAYMENT**

CIT 1986. Letter and accompanying computer printout which did not contain any information from which surety could ascertain that demand was being made on bond in question did not constitute "notice of demand for payment" against surety's bond and, therefore, surety was not required to file its protest of customs classification within 90 days of mailing of that letter. Tariff Act of 1930, § 514(c), 19 U.S.C.A. § 1514(c).—Old Republic Ins. Co. v. U.S., 625 F.Supp. 983.—Cust Dut 82.

### **NOTICE OF DESIRED CHANGE**

Mo. 1916. The expressions "notice of required change," "notice of desired change," and "notice of proposed change" are practically equivalent.—State ex rel. Hilbert v. Glaves, 186 S.W. 685, 268 Mo. 100.—Schools 42(2).

### **NOTICE OF DISAGREEMENT**

C.A.Fed. 1991. Veteran's February 6, 1990 letter requesting reopening of his disability pension claim was not a "notice of disagreement," and thus Court of Veterans Appeals did not have jurisdiction, under statute limiting its jurisdiction to cases in which such notice is filed on or after November 18, 1988; veteran had filed in 1985 a notice of disagreement addressed to rating board's denial of disability benefits pension, and his February 6, 1990 letter did not contest the Veterans Administration's January 5, 1990 benefits reduction. 38 U.S.C.A. § 4051 note.—Prenzler v. Derwinski, 928 F.2d 392.—Armed S 156.

### **NOTICE OF DISALLOWANCE**

C.C.A.9 (Cal.) 1940. A claim for refund of capital stock taxes was "disallowed", so as to begin the running of two-year limitations on action to recover the taxes, from the date of mailing notice of rejection, not from the signing of rejection schedule, and hence letter indicating rejection was sufficient "notice of disallowance" though sent before signing of rejection schedule. National Industrial Recovery Act, § 215(a), 48 Stat. 207; Rev.St. § 3226, as amended by Revenue Act 1932, § 1103, 26 U.S.C.A. Int.Rev.Acts, page 652.—Carter v. Farmers Underwriters Ass'n, 115 F.2d 302, certiorari

denied 61 S.Ct. 613, 312 U.S. 686, 85 L.Ed. 1124.—Int Rev 5042.

E.D.Mich. 1950. Where letter of September 2, 1944, by Commissioner to executor of estate of decedent purported to disallow claim for refund of alleged overpayment of Federal estate tax which would arise in event executor was required to pay alleged deficiency in federal income tax of decedent, without awaiting disposition of the income tax case, the letter did not constitute a "notice of disallowance" within statute, and hence, suit for refund of estate tax was not barred because not brought within two years from date of such letter. 26 U.S.C.A. 3772(a)(2).—Schmitt v. Kavanagh, 91 F.Supp. 659.—Int Rev 4880.

### **NOTICE OF DISCONTINUANCE OF REGISTERED EMPLOYEE**

C.A.4 (N.C.) 1979. At best, securities brokerage firm, which had directed commodities broker to stop making referrals of its customers or other persons to rancher, was guilty of simple negligence in failing to submit a more complete form entitled "Notice of Discontinuance of Registered Employee," and thus could not be held liable on theory that negative answers given to one question on form prompted continuation of broker as registered representative when, had investigation been conducted, he would have been deprived of his privileges as registered representative, thereby possibly averting losses on cattle and grain contracts purchased from rancher's companies after broker left firm's employ.—Carpenter v. Harris, Upham & Co., Inc., 594 F.2d 388, certiorari denied 100 S.Ct. 143, 444 U.S. 868, 62 L.Ed.2d 93.—Sec Reg 60.45(3).

### **NOTICE OF DISHONOR**

N.Y.Sur. 1940. Mere knowledge of dishonor is not equivalent to "notice of dishonor", which must come from the one who is entitled to look to the party for payment and must inform him that the note has been duly presented for payment, that it has been dishonored, and that the holder looks to him for payment. Negotiable Instruments Law, §§ 4, 131.—In re Taylor's Estate, 21 N.Y.S.2d 245, 174 Misc. 457.—Bills & N 394.

Pa. 1906. If the holder of negotiable paper desires to charge antecedent parties with its payment, it is incumbent on him to give them "notice of dishonor." The notice may be either written or verbal, or it may be written and supplemented by verbal testimony. All that is necessary, says Byles, is to apprise the party liable of the dishonor of the bill in question and to intimate that he is expected to pay it. It is sufficient if, under all the circumstances, the language of the notice imports that the indorser is looked to for payment, and it would seem not unfair to imply such intention from the very fact of sending "notice of dishonor." The weight of authority is that a notice of dishonor is sufficient to charge an indorser if it comes from the holder or his agent and notifies the indorser that the note was presented and payment was refused. Notice of nonpayment, however, is not sufficient; nor is mere knowledge of protest all that is required to charge the

## NOTICE OF DISHONOR

28B W&P— 238

indorser. “Notice does not mean mere knowledge, but an actual notification. For a man who can be clearly shown to have known beforehand that the bill would be dishonored is, nevertheless, entitled to notice.” “Notice means something more than knowledge, because it is competent to the holder to give credit to the maker. It is not enough to say that the maker does not intend to pay, but that the holder does not intend to give credit to such maker.”—Marshall v. Sonneman, 64 A. 874, 216 Pa. 65.

Pa.Super. 1936. Mere knowledge of nonpayment of note is not “notice of dishonor” within Negotiable Instruments Law. 56 P.S. § 211.—Harr v. Edsall, 183 A. 67, 121 Pa.Super. 19.—Bills & N 419.

## NOTICE OF DISMISSAL

D.Mass. 1968. Document, which as filed by plaintiffs after adding party defendant through filing of amended complaint, and which was filed before any answer, motion for summary judgment, or any other responsive pleading had been filed by or on behalf of added defendant in response to amended complaint, was “notice of dismissal” within Rule that action may be dismissed by plaintiff without order of court by filing notice of dismissal at any time before service by adverse party of answer or motion for summary judgment, whichever first occurs, and effect of such document was to terminate litigation without prejudice and without any action whatsoever by court. Fed.Rules Civ. Proc. rule 41(a) (1), 28 U.S.C.A.—Sanchez v. Vaughn Corp., 282 F.Supp. 505.—Fed Civ Proc 1708.

## NOTICE OF ELECTION

Ill. 1928. Newspaper items held not “notice of election” required to render statute authorizing municipal hall valid (Cahill’s Rev. St. 1927, c. 34, pars. 123[1] to 123[7]). Fact that newspapers carried news items of election on proposition for tax and bonds for municipal hall for five days before election took place did not constitute “notice of election” required to render Cahill’s Rev. St. 1927, pars. 123(1) to 123(7), authorizing proposition, valid, since where notice is required only legal notice is contemplated.—Campe v. Cermak, 161 N.E. 761, 330 Ill. 463.—Counties 192.

Ill. 1928. Newspaper items held not “notice of election” required to render statute authorizing municipal hall valid. S.H.A. ch. 34, §§ 147a to 147g.—Campe v. Cermak, 161 N.E. 761, 330 Ill. 463.—Counties 192.

## NOTICE OF ELECTION CONTEST

Tex.Civ.App.—Corpus Christi 1969. Original petition for “declaratory judgment and injunctive relief” in respect to newly created hospital district was not “notice of election contest” within statute requiring contestants to give notice in writing within 30 days of return date of election of their intention to contest and to give notice in writing of grounds relied upon to sustain the contest. V.A.T.S. Election Code, art. 9.03.—Moore v. Edna Hospital

Dist., 449 S.W.2d 508, ref. n.r.e.—Elections 280, 285(1).

## NOTICE OF ENTRY

C.A.2 (N.Y.) 1999. Attorney’s in-hand receipt of copy of judgment from clerk’s office, marked to indicate day of judgment, was “notice of entry,” for purposes of rule requiring that motion to reopen time to file appeal be filed within seven days after moving party receives notice of entry, notwithstanding that such document was obtained through attorney’s efforts rather than those of clerk or opposing party. Fed.Rules App.Proc.Rule 4(a)(6), 28 U.S.C.A.—Ryan v. First Unum Life Ins. Co., 174 F.3d 302.—Fed Cts 669.

## NOTICE OF ENTRY OF JUDGMENT

Cal.App. 4 Dist. 2000. The 60-day jurisdictional period for granting a new trial motion was triggered by plaintiff’s service of file-stamped copies of the judgment on defense counsel, despite claim that plaintiff failed to comply with the statutory requirement of serving defendants with a “notice of entry of judgment”; service of file-stamped copies of the judgment unequivocally conveyed to defendants the fact and date of entry of the judgment against them, and was the legal equivalent of “service on the moving party . . . of written notice of the entry of judgment.” West’s Ann.Cal.C.C.P. § 660.—Dodge v. Superior Court, 91 Cal.Rptr.2d 758, 77 Cal.App.4th 513.—New Tr 155.

## NOTICE OF FACTS

Conn. 1886. “Notice of facts” which impeach the validity of a negotiable instrument means knowledge of those facts, and by “facts” it is intended facts which of themselves impeach the transaction, and not other facts which tend to prove fraud, or which excite suspicion.—Credit Co. v. Howe Mach. Co., 8 A. 472, 54 Conn. 357, 1 Am.St. Rep. 123.

## NOTICE OF FAILURE OF MEDIATION

C.C.A.2 (Vt.) 1940. Where Railway Labor Act precluded carrier from imposing wage cut until after National Mediation Board had given notice that its mediatory efforts had failed, board’s letter stating that mediation could not proceed until legality of wage deductions, involved in court litigation, had been determined and purporting to retain jurisdiction to resume mediation as soon as pending action had been decided or settled did not operate as a “notice of failure of mediation.” Railway Labor Act § 5, 45 U.S.C.A. § 155.—Grand Intern. Broth. of Locomotive Engineers v. Morphy, 109 F.2d 576, certiorari denied 60 S.Ct. 1078, 310 U.S. 635, 84 L.Ed. 1404.

## NOTICE OF FILING

Minn.App. 1994. “Notice of filing” which limits appeal time must at a minimum be a separate document that calls recipient’s attention to what was filed and when; copy of appealable order or judgment must accompany notice of filing. 51 M.S.A., Rules Civ.App.Proc., Rule 104.01.—Duluth

## NOTICE OF INJURY

Ready-Mix Concrete, Inc. v. City of Duluth, 520 N.W.2d 775.—App & E 348(2).

### **NOTICE OF FINAL ACTION**

E.D.Ark. 1987. Letter specifically setting forth how reinstated postal employee's remedial back pay would be computed constituted "notice of final action" for purposes of 30-day limitation period for filing of civil suit attacking that computation after receipt thereof. Civil Rights Act of 1964, § 717(c), 42 U.S.C.A. § 2000e-16(c).—Faulkner v. Bolger, 655 F.Supp. 712.—Civil R 373.

### **NOTICE OF FINAL DENIAL**

D.Kan. 1990. Failure of agency to issue decision within six months after administrative claim was filed under the Federal Tort Claims Act could not be deemed "notice of final denial" of the claim, triggering requirement that action be filed within six months. 28 U.S.C.A. §§ 2401(b), 2675(a).—Stahl v. U.S., 732 F.Supp. 86.—Lim of Act 67.

### **NOTICE OF FINAL DENIAL OF CLAIM**

C.A.9 (Wash.) 1969. Letter from Air Force communicating reasons for disapproving claim for damage to airplane and stating that if claimant was dissatisfied it might file suit not later than six months after date of notice constituted "notice of final denial of claim" within statute requiring that suit be instituted within six months after such notice and courtesy of Air Force in supplying subsequent oral and written explanation did not vitiate such final denial or permit filing of suit more than six months after it was mailed. 28 U.S.C.A. §§ 2401(b), 2671-2680.—Claremont Aircraft, Inc. v. U.S., 420 F.2d 896.—U S 133.

### **NOTICE OF HARM**

D.Mass. 1993. Under Massachusetts law, trust administering corporation's legal malpractice claim based on assessment of additional inheritance taxes accrued no later than date it received letter from tax auditor informing it that inheritance taxes had yet to be assessed on future interest of estate; "notice of harm" occurred when it had knowledge of exposure to liability, not when it was required to actually write check. M.G.L.A. c. 260, § 4.—Key Trust Co. of Maine v. Doherty, Wallace, Pillsbury and Murphy, P.C., 811 F.Supp. 733.—Lim of Act 95(11).

### **NOTICE OF HEARING**

Ind.App. 3 Dist. 1993. Document entitled "Notice of Hearing" was "summons" which tolled period of probation for 42 days until final determination of charge respecting summons and, thus, petition to revoke probation, which was filed 18 days after probation would have otherwise expired, was timely; document was addressed to defendant and set forth nature of offense as petition to revoke probation, document commanded defendant to appear before superior court and was signed by clerk of court, document warned defendant that failure to appear at hearing could result in bench warrant for defendant's arrest, and there was re-

turn of service, completed by sheriff's department, at bottom of document. West's A.I.C. 35-33-4-1(a, e), 35-38-2-3(c).—Phillips v. State, 611 N.E.2d 198.—Sent & Pun 2010, 2011, 2012.

Pa.Cmwth. 1984. "Notice of hearing," as used in rule allowing Unemployment Compensation Board of Review to determine issues not indicated in the notice of hearing under certain circumstances, refers to the notice required to be sent to the parties when, upon appeal to the Board from a referee's decision, the Board determines that a further hearing is necessary.—Torsky v. Com., Unemployment Compensation Bd. of Review, 474 A.2d 1207, 81 Pa.Cmwth. 642.—Social S 620.20.

### **NOTICE OF INFRINGEMENT**

N.D.Ill. 1969. Fact that allegedly infringing manufacturer saw trade brochure advertising patented item was not adequate "notice of infringement" within meaning of patent marking statute. 35 U.S.C.A. § 287.—Briggs v. Wix Corp., 308 F.Supp. 162.—Pat 222.

### **NOTICE OF INJURY**

U.S.Tex. 1953. Where injury to illiterate employee of defendant by flash fire on ship was known by gang foreman and walking foreman who drove employee home and informed defendant's time-keeper of the injury, and accepted practice was for injured employee to report fact of injury to his immediate supervisor, defendant employer had "notice of injury" within meaning of provision of Longshoremen's and Harbor Workers' Compensation Act declaring in substance that failure to give written notice shall not bar claim if employer had knowledge of the injury and was not prejudiced by failure to give written notice.—Voris v. Eikel, 74 S.Ct. 88, 346 U.S. 328, 98 L.Ed. 5.

C.C.A.10 (N.M.) 1931. Statutory provision dispensing with "notice of claim" against carriers for damage from negligence rendered invalid stipulation requiring "notice of injury" to live stock (Interstate Commerce Act Sec. 20, as amended (49 USCA 20)). The term "notice of claim," as used in Interstate Commerce Act Sec. 20, as amended by Act March 4, 1915 (49 USCA 20), dispensing with notice or filing of claim, if loss to goods shipped was due to delay or damage in loading or unloading, or if goods were damaged in transit by carelessness or negligence, includes "notice of injury," since notice of injury would serve no other purpose than to apprise carrier of claim for damages. The stipulation in question required shipper, owner, consignee, or agent before removal or mingling of live stock to inform the delivering carrier in writing of any visible or manifest injury to the stock.—Louis Ilfeld Co v. Southern Pac Co-Pacific System, 48 F.2d 1056.—Carr 218(3).

C.C.A.10 (N.M.) 1931. Statutory provision dispensing with "notice of claim" against carriers for damage from negligence rendered invalid stipulation requiring "notice of injury" to live stock. Interstate Commerce Act § 20, as amended, 49 U.S.C.A. § 20.—Louis Ilfeld Co v. Southern Pac Co-Pacific System, 48 F.2d 1056.—Carr 218(3).

## NOTICE OF INJURY

28B W&P— 240

Fla.App. 2 Dist. 1991. “Notice of injury” triggering two-year statute of limitations for medical malpractice action includes at least notice of incident involving defendant resulting in the injury. West’s F.S.A. § 95.11(4)(b).—Rogers v. Ruiz, 594 So.2d 756.—Lim of Act 95(12).

Mich.App. 1988. Employee’s notice of claim for workers’ compensation benefits, made to employer’s workers’ compensation insurer, constituted “notice of injury” within meaning of No-fault Act’s provision excusing commencement of suit more than one year after accident if such notice is given to no-fault insurer; employer’s workers’ compensation insurer was also employer’s no-fault insurer, and Act does not require that notice of injury be addressed to particular department of insurer. M.C.L.A. § 500.3145(1).—State Farm Mut. Auto. Ins. Co. v. Insurance Co. of North America, 420 N.W.2d 120, 166 Mich.App. 133.—Insurance 3163.

Okla. 1967. Claimant’s “notice of injury” is sufficient if it states nature and extent of contended injury in ordinary language. 85 O.S.1961, §§ 24, 43.—Guy James Const. Co. v. Harris, 434 P.2d 150, 1967 OK 169.—Work Comp 1224.

Tex.Civ.App.—Eastland 1932. Notice to employer that employee sustained injury to foot held sufficient “notice of injury” to invoke jurisdiction to award compensation for injuries to back. Vernon’s Ann.Civ.St. art. 8307, § 4.—Texas Indem. Ins. Co. v. Bridges, 52 S.W.2d 1075, writ refused.—Work Comp 1224.

Wis. 1968. Document filed with county in regard to claim for injuries received in county park was a “notice of injury” required by statutes to be filed within 30 days as prerequisite to maintaining action, not a “claim” within statute requiring “claim” to be presented for allowance or disallowance by county before action can be brought and requiring action to be brought within six months after disallowance, and, therefore, action was not barred by six months’ limitation, where document was denominated a “notice of injury”, was treated as such by county officials, and was intended to give notice. W.S.A. 59.76, 59.79, 81.15, 895.43.—Colburn v. Ozaukee County, 159 N.W.2d 33, 39 Wis.2d 231.—Counties 216.

Wis.App. 1989. “Notice of injury” statutes allow governmental authorities opportunity to investigate matter, whereas “notice of claim” statutes perform entirely different function of providing government authorities with opportunity to effect compromise short of lawsuit and alerting them of possible expenses so that appropriate review of budget can be made for settlement or litigation purposes.—Van v. Town of Manitowoc Rapids, 442 N.W.2d 557, 150 Wis.2d 929.—Mun Corp 741.15.

## NOTICE OF INSTITUTION OF ACTION

D.Mont. 1969. Notice of existence of claim is not “notice of institution of action” within rule governing relation back of amendments. Fed.Rules Civ.Proc. rule 15(c), 28 U.S.C.A.—Wentz v. Alber-to Culver Co., 294 F.Supp. 1327.—Lim of Act 127(1).

## NOTICE OF INTENTION TO APPEAL

S.C. 1925. Service of “notice of intention to appeal” from magistrate’s court to circuit court held service of “notice of appeal” required by statute.—State v. Funderburk, 126 S.E. 140, 130 S.C. 352.—Crim Law 260.4.

## NOTICE OF INTENTION TO ARBITRATE

N.Y.A.D. 1 Dept. 1962. The phrases “notice of intention to arbitrate” and “demand for arbitration” in statute providing for stay of arbitration if at time of giving of notice of intention to arbitrate or of making of demand for arbitration the claims sought to be arbitrated would be barred by existing statute of limitations refer to proceedings taken pursuant to agreement for arbitration of future disputes and have no application to proceedings under agreement for submission of existing controversies to arbitrators. Civil Practice Act, § 1458-a.—Cohen v. Cohen, 233 N.Y.S.2d 787, 17 A.D.2d 279, modified 285 N.Y.S.2d 261, 28 A.D.2d 1099.—Arbit 23.5(1).-

N.Y.Sup. 1963. Filing of notice of intention to make claim against Motor Vehicle Accident Indemnification Corporation on behalf of insured motorist who was killed in collision with uninsured motorist constituted the giving of “notice of intention to arbitrate” within Civil Practice Act arbitration provision requiring the giving of such notice within limitation period applicable to an action based upon the claim sought to be arbitrated, even though no motion to compel arbitration was made until after lapse of two year period following collision. Civil Practice Act § 1458-a; Insurance Law, §§ 167, subd. 2-a, 601, 606, subd. (b).—Motor Vehicle Acc. Indemnification Corp. v. McDonnell, 243 N.Y.S.2d 229, 40 Misc.2d 657, affirmed 258 N.Y.S.2d 735, 23 A.D.2d 773.—Autos 251.7.

## NOTICE OF INTENTION TO NEGOTIATE INTERNATIONAL AGREEMENT OR PROTOCOL

Cust. & Pat.App. 1958. “Notice of intention to negotiate international agreement or protocol” is not “international agreement” or “protocol” within provision in Federal Register Act that act does not apply to a treaty, convention, protocol and other international agreement, and therefore the act applies so as to require the publication in the Federal Register of the notice which the Trade Agreements Act requires must be given before the negotiating of such an agreement is concluded. Trade Agreements Act, § 4 as amended 19 U.S.C.A. § 1354; Federal Register Act, §§ 8, 12, 44 U.S.C.A. §§ 308, 312.—Aris Gloves, Inc. v. United States, 281 F.2d 954, certiorari denied 82 S.Ct. 398, 368 U.S. 954, 7 L.Ed.2d 387.—Cust Dut 10.1.

## NOTICE OF INTENTION TO PLEAD NOT GUILTY

Fla.App. 4 Dist. 1972. “Request” for speedy trial embodied within written instrument entitled “Notice of Intention to Plead Not Guilty” did not constitute a proper “demand” within meaning, spirit and intention of rule requiring speedy trial upon demand. 33 F.S.A. Rules of Criminal Procedure,

**NOTICE OF MOTION**

rule 3.191.—*Harris v. Tyson*, 267 So.2d 390.—Crim Law 577.10(10).

**NOTICE OF ITS LIABILITY**

C.A.6 1987. Black Lung Disability Trust Fund was not liable for attorney fees incurred by successful claimant after 30 days of Department of Health, Education and Welfare's disapproval of claim, as Department of Health, Education and Welfare's finding of nonliability in transfer of claim to Department of Labor was not "notice of its liability" within meaning of regulation governing attorney fees in black lung cases. Federal Mine Safety and Health Act of 1977, § 422(a), as amended, 30 U.S.C.A. § 932(a); Longshore and Harbor Workers' Compensation Act, § 28(a), 33 U.S.C.A. § 928(a).—Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor v. Poyner, 810 F.2d 99.—Labor 29.

**NOTICE OF LANDLORD'S BREACH OF OBLIGATION**

Ohio Mun. 1978. Where tenant, through counsel, sent to landlord "Notice of Landlord's Breach of Obligation" specifying 11 violations that the landlord should correct within 30 days, the tenant, following expiration of more than 30 days without the landlord making any corrections as specified, deposited her money into escrow account in Municipal Court, and the landlord, in subsequent 11 months, complied with only five of 11 items complained of, landlord's subsequent action for possession of the premises was not "retaliatory action." R.C. § 5321.02(A)(1, 2).—*Ewert v. Basinger*, 392 N.E.2d 911, 59 Ohio Misc. 43, 11 O.O.3d 171, 13 O.O.3d 146.—Land & Ten 284(1).

**NOTICE OF LIABILITY**

C.A.6 1985. Black Lung Disability Trust Fund's receipt of miner's notice of claim for black lung benefits was not a "notice of liability" within meaning of regulation governing attorney fees in black lung cases, which provides that 30-day period for attorney fees is triggered by coal mine operator's receipt of "notice of its liability," absent any initial finding or preliminary determination of disability. Federal Coal Mine Health and Safety Act of 1969, §§ 401 et seq., 422(a), as amended, 30 U.S.C.A. §§ 901 et seq., 932(a); Longshoremen's and Harbor Workers' Compensation Act, § 28(a), 33 U.S.C.A. § 928(a).—Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor v. Bivens, 757 F.2d 781.—Labor 27.1.

**NOTICE OF LIS PENDENS**

Colo. 1893. The distinction between the term "lis pendens" and the phrase "notice of lis pendens" is not always observed. The former is a common-law term; the latter is regulated by statute. At common law the general rule is that all persons are bound to take notice, at their peril of suits affecting the title to property, and purchasers *pendente lite*, either with or without notice, take no better title than their grantor shall be adjudged to have. The hardship of this rule in cases of certain

equitable liens and secret thust estates led to the adoption of statutes providing for the registry of the notice of the pendency of certain actions. This, it seems, is the statutory notice of *lis pendens*.—*Empire Land & Canal Co. v. Engley*, 33 P. 153, 18 Colo. 388.

La.App. 4 Cir. 1996. "Notice of *lis pendens*" may be recorded to give notice of pendency of action affecting title to, or asserting mortgage or privilege on, immovable property; recordation of notice of *lis pendens* makes outcome of suit as to which notice is given binding on third parties. LSA-C.C.P. art. 3751.—*Ducote v. McCrossen*, 675 So.2d 817, 1995-2072 (La.App. 4 Cir. 5/29/96).—Lis Pen 15.

**NOTICE OF LOSS**

W.D.La. 1962. The object of filing of "proof of loss" is to furnish fire insurer with particulars of loss and all data necessary to determine its liability and the extent of that liability; "notice of loss" acquaints fire insurer with occurrence of loss.—*Mier v. Niagara Fire Ins. Co.*, 205 F.Supp. 108.—Insurance 3142.

La.App.Orleans 1937. Where employer bought fidelity bonds on cashier from different companies during successive years and discovered possible discrepancies in cashier's accounts early in January of second year, letter sent January 23d to agent through which employer had bought both bonds saying that "discrepancies that may finally result in considerable loss" had been found and that cashier was bonded in both companies, but not mentioning during term of which bond loss occurred, and letter of May 25th giving fuller details, held not to comply with provision in bond covering first year, that notice of loss be given immediately as condition precedent to recovery, since first letter was not "notice of loss" and second letter was not "immediate."—*George J. Ricau & Co. v. Indemnity Ins. Co. of North America*, 173 So. 217.—Insurance 3154, 3163.

Tenn.Ct.App. 1939. A written notice of fire damage to automobile covered by fire policy, given by insurance company's local agent to home office of company, on day automobile burned, was a sufficient compliance with policy requirement of immediate "notice of loss."—*Georgia Home Ins. Co. v. Jones*, 135 S.W.2d 947, 23 Tenn.App. 582.—Insurance 3154.

Tenn.Ct.App. 1939. Under provisions of automobile fire policy requiring "notice of loss" and formal "proof of loss" clause requiring "notice of loss" contemplates nothing more than information to insurer of loss of, or damage to, property insured, whereas the "proof of loss" clause specifically requires a statement, signed and sworn to by the assured containing specified information.—*Georgia Home Ins. Co. v. Jones*, 135 S.W.2d 947, 23 Tenn. App. 582.—Insurance 3163.

**NOTICE OF MOTION**

C.C.A.2 (N.Y.) 1931. Serving notice of motion for order vacating decree was neither 'making' nor

## NOTICE OF MOTION

28B W&P—242

“filing” of motion within term. A “notice of motion” is but a private paper in the hands of the party who gives it, and does not belong to the court until the motion is made.—Ayer v. Kemper, 48 F.2d 11, certiorari denied Union Trust Co of Rochester v. Ayer, 52 S.Ct. 20, 284 U.S. 639, 76 L.Ed. 543.—Judgm 342(3).

Cal.App. 6 Dist. 1994. Child support may not be made retroactive to informal request in papers prepared in anticipation of settlement conference; “position statement” prepared in anticipation of conference is not “notice of motion” or “order to show cause” within meaning of statute permitting child support order to be retroactive to date of filing of notice of motion or order to show cause. West’s Ann.Cal.Fam.Code §§ 3651 et seq., 4009.—In re Marriage of Goosmann, 31 Cal.Rptr.2d 613, 26 Cal.App.4th 838.—Child S 364.

N.Y.Sup. 1947. Request in affidavit in opposition to motion for temporary injunction that affidavit also be used as basis to dismiss complaint for failure to state a cause of action for declaratory judgment was not such a “notice of motion” specifying objection to pleading as is required under Civil Practice Act as a prerequisite to dismissal of complaint. Civil Practice Act, § 280.—Standish Mfg. Corp. v. Maxnat Realty Corp., 77 N.Y.S.2d 699, 191 Misc. 346.—Inj 129(1).

Va. 1934. “Notice of motion,” which is substitute for writ and declaration in common-law actions, notifies defendant when and where he is to appear and sets forth cause of complaint.—Baldwin v. Norton Hotel, 175 S.E. 751, 163 Va. 76.—Proc 12.

### NOTICE OF MOTION FOR JUDGMENT

W.Va. 1943. Generally, the basis for “assumpsit” is not recovery under a contract, but recovery of damages for a contract’s breach, while a “notice of motion for judgment” is for recovery of money due under and by virtue of a contract. Code 1931, 56-2-6.—City of Moundsville v. Brown, 25 S.E.2d 900, 125 W.Va. 779.—Assumpsit 6(1); Judgm 184.

### NOTICE OF NEGLIGENCE

Ark. 1906. There is a clear distinction between a “notice of negligence” and a claim for damages. A mere notice to a telegraph company that its employees have been negligent in the transmission of a message, together with the circumstances of the negligence, is not a presentment of a claim for damages, based on such negligence, within the contract for the transmission of the message providing that the company shall not be liable for damages where the claim is not presented within a specified time, etc.—Western Union Telegraph Co. v. Moxley, 98 S.W. 112, 80 Ark. 554.

### NOTICE OF PAYMENT OF CLAIM

Tex.App.—Houston [14 Dist.] 1998. Automobile insurer’s telephone call telling insured’s bookkeeper that loss was almost \$6,000 less than amount claimed was not “notice of payment of claim” for purposes of statute and policy provision requiring

payment within five business days after insurer notifies insured that it will pay claim; notice needed to be written, not oral. V.A.T.S. Insurance Code, art. 21.55, §§ 3(a), 4.—Daugherty v. American Motorists Ins. Co., 974 S.W.2d 796.—Insurance 3395. Judgm 342(3).

### NOTICE OF PENDENCY OF ACTION

N.Y.A.D. 3 Dept. 1932. Materialman’s filing with state comptroller of copy of summons in action to foreclose lien against money due on public improvement contract held not filing “notice of pendency of action” within statute. Lien Law, §§ 18, 21, subd. 2; Civil Practice Act, § 120.—National Lumber Co. v. F. Braun & Son, 261 N.Y.S. 715, 237 A.D. 426.—States 108.5.

### NOTICE OF PROGRAM REIMBURSEMENT

S.D.Fla. 1987. Each “notice of program reimbursement” issued is final determination as to amount of payment of medicare reimbursement. Social Security Act, § 1878(a)(1)(A)(i), (a)(3), as amended, 42 U.S.C.A. § 1395oo (a)(1)(A)(i), (a)(3).—South Miami Hosp. v. Bowen, 658 F.Supp. 544.—Health 556(2).

### NOTICE OF PROPOSED CHANGE

Mo. 1916. The expressions “notice of required change,” “notice of desired change,” and “notice of proposed change” are practically equivalent.—State ex rel. Hilbert v. Glaves, 186 S.W. 685, 268 Mo. 100.—Schools 42(2).

### NOTICE OF PURCHASE BY THE CORPORATION OF ITS OWN STOCK

C.A.2 (N.Y.) 1976. Notice provided by filing of financing statement in connection with agreement whereby corporation granted an interest to individual in all of the assets owned by the corporation as security for the payment of the balance of the purchase price for stock owned by individual, though operating to perfect individual’s security interest as required by New York Uniform Commercial Code, did not constitute “notice of purchase by the corporation of its own stock” to subsequent creditors in absence of an indication that agreement secured was a stock repurchase agreement. Uniform Commercial Code N.Y. §§ 9-402, 9-403; Business Corporation Law N.Y. § 513(a); Bankr.Act, § 301 et seq., 11 U.S.C.A. § 701 et seq.—Matter of Flying Mailmen Service, Inc., 539 F.2d 866.—Corp 545(1).

### NOTICE OF REDEMPTION

Cal.Super. 1956. The written “notice of redemption” required to be filed by Code Civ.Proc. § 703 is not the “notice” mentioned in § 705, which is notice by one entitled to redeem, but has reference to notice to be given subsequent to time that redemption is effective and is designed to give notice to sheriff and others entitled to redeem of any sum expended by redemptioner for purposes stated and any lien held by him other than that upon which redemption was made. West’s Ann. Code Civ.Proc., §§ 703, 705.—Ritter v. Salsbury, 28B W&P—242

## NOTICE OF TAX

298 P.2d 166, 142 Cal.App.2d Supp. 847.—Execution 298.

### **NOTICE OF REQUIRED CHANGE**

Mo. 1916. The expressions “notice of required change,” “notice of desired change,” and “notice of proposed change” are practically equivalent.—State ex rel. Hilbert v. Glaves, 186 S.W. 685, 268 Mo. 100.—Schools 42(2).

### **NOTICE OF RESCISSION**

Or.App. 1995. Building contractor’s letter to clients, accompanied by refund check, was not legally effective “notice of rescission”, but rather, was “offer to rescind” construction contract, and thus, contractor’s breach of contract action against clients was not precluded, as clients’ actions in cashing check but continuing to pursue their claim for damages before Construction Contractors Board demonstrated that they did not agree with contractor’s proposed terms; contractor’s offer specified that rescission, to be accepted by clients’ negotiation of check, was conditioned on clients’ waiver of their right to sue contractor for damages “for any act or omission so far.”—Phillips v. Gibson, 893 P.2d 574, 133 Or.App. 760.—Contracts 271; Elect of Rem 3(3).

### **NOTICE OF RIGHT TO FILE CIVIL ACTION**

Tex.App.—Dallas 2001. Equal Employment Opportunity Commission (EEOC) right to sue letter was not “notice of right to file civil action” that triggered 60-day limitations period for filing action against employer under Texas Commission on Human Rights Act (TCHRA), even though TCHRA used phrase “a notice” in limitations section and phrase “the notice” in other sections, TCHRA required election of remedies, and TCHR and EEOC had reciprocal relationship, given that election of remedies precluded only multiple state court actions, TCHRA did not mention EEOC procedures or notice, relationship did not extend to right to sue letters, TCHRA precluded actions brought later than second anniversary of filing of complaint, and TCHRA did not require complainant to file suit within 180 days of unlawful practice, but rather to bring initial complaint to TCHR within 180 days of unlawful practice. V.T.C.A., Labor Code §§ 21.202, 21.211, 21.252(a, b), 21.253, 21.254, 21.256.—Ledesma v. Allstate Ins. Co., 68 S.W.3d 765.—Civil R 448.1.

### **NOTICE OF RIGHT TO SUE WITHIN THIRTY DAYS**

D.Del. 1973. Where plaintiff was represented by privately retained counsel during entire 30-day period following receipt from the Equal Employment Opportunity Commission of “Notice Of Right To Sue Within Thirty Days,” and suit under the Civil Rights Act of 1964 against plaintiff’s former employer and union on ground of racial discrimination by employer and acquiescence by union was not instituted until 112 days after receipt of such notice, such suit was barred. Civil Rights Act of 1964, §§ 701 et seq., 703(a, c), 706(a, e), 42

U.S.C.A. §§ 2000e et seq., 2000e-2(a, c), 2000e-5(a, e) and § 1981.—Jenkins v. General Motors Corp., 354 F.Supp. 1040.—Civil R 373.

### **NOTICE OF SALE**

Mass. 1901. In case of a sale under execution, the words “notice of sale,” appearing in the return of the officer making the sale, mean notice of the time and place of sale.—Frazee v. Nelson, 61 N.E. 40, 179 Mass. 456, 88 Am.St.Rep. 391.

### **NOTICE OF SUCH SERVICE**

Fla.App. 3 Dist. 1960. The forwarding to non-resident defendant motorist copies of summons before it was served on the Secretary of State with no notice as to the fact of service was not a substantial compliance with the statutory requirement for “notice of such service” of process on the Secretary of State. F.S.A. § 47.30.—Conway v. Spence, 119 So.2d 426.—Autos 235(4).

### **NOTICE OF SUSPENSION**

Mo.App. S.D. 1995. To extent that notice from director of revenue purported to deny driving privileges for ten years because of multiple driving while intoxicated (DWI) convictions, notice was unauthorized by statute and would constitute neither “notice of suspension” or “revocation” of driving privileges nor denial of application for license. V.A.M.S. § 302.060(9).—Von Filer v. Director of Revenue, State of Mo., 893 S.W.2d 850.—Autos 144.1(3), 144.2(1).

### **NOTICE OF TAKING**

E.D.N.Y. 1962. Act of United States, which was lessee of office space, in holding over was not “notice of taking,” and hence first notice received by owners of intention of United States to take was afforded by declaration of taking filed on September 26, 1961 along with complaint seeking to condemn leasehold estate in office space for term of years commencing July 1, 1961 and ending June 30, 1963, and part of complaint seeking possession from July 1, 1961 through September 26, 1961 was required to be stricken as surplusage. Declaration of Taking Act, § 1, 40 U.S.C.A. § 258a; Fed.Rules Civ.Proc. rule 71A, 28 U.S.C.A.—U.S. v. 284,392 Square Feet of Floor Space in 227-237 Schermerhorn St., and 240-252 Livingston St., Borough of Brooklyn, County of Kings, City and State of N. Y., 203 F.Supp. 70.—Em Dom 181; Fed Civ Proc 1140.

### **NOTICE OF TAX DEFICIENCY**

Bkrcty.W.D.N.C. 1988. Tax notices sent by South Carolina Tax Commission to debtors did not fall within exception from automatic stay for “notice of tax deficiency,” where notices contained strong language threatening issuance of warrant of distraint and seizure of wages, bank accounts and other property, and last notice advised that warrant of distraint had been issued. Bankr.Code, 11 U.S.C.A. § 362(b)(9).—In re Shealy, 90 B.R. 176.—Bankr 2402(4).

## **NOTICE OF TERMINATION**

28B W&P— 244

### **NOTICE OF TERMINATION**

Ark. 1977. Written notice of union's desire to revise and/or change terms and/or conditions of contract with employer was not a "notice of termination" of such contract which contained automatic renewal provision requiring that notice of party's desire to terminate contract be served on other party at least 60 days before expiration date and contained provision requiring that notice of party's desire to revise or change terms or conditions of contract be served at least 60 days prior to expiration date or expiration date anniversary.—Valmac Industries, Inc. v. Chauffeurs, Teamsters and Helpers Local Union No. 878, 547 S.W.2d 80, 261 Ark. 253.—Labor 261.

### **NOTICE OF THE APPEAL**

N.D. 1910. The words "notice of the appeal," as used in Rev.Codes N.D. § 7221, refers to notice or knowledge of a perfected appeal as furnished by service of a copy of the undertaking and not merely to the notice in writing provided for by section 7205.—Beddow v. Flage, 126 N.W. 97, 20 N.D. 66.

### **NOTICE OF THE AWARD**

Ga.App. 1979. Date of proper posting of worker's compensation award, not date of its receipt or date appearing on face of award, was date of "notice of the award" within 30 days of which application for review was required to be filed with state board. Code, §§ 114-706, 114-707, 114-707(f, i), 114-708.—Favors v. Travelers Ins. Co., 258 S.E.2d 554, 150 Ga.App. 741.—Work Comp 1809.

### **NOTICE OF THE FACTS**

C.A.8 (N.D.) 1960. Under North Dakota statute providing that a cause of action in law or equity for relief of fraud shall not accrue until "discovery" by the aggrieved party of the facts constituting the fraud, the word "discovery" means "notice of the facts". NDRC 1943, 28-0116, subd. 6.—Linke v. Sorenson, 276 F.2d 151.—Lim of Act 100(12).

### **NOTICE OF THE INJURY**

C.A.1 (Puerto Rico) 2000. "Notice of the injury," for purposes of triggering Puerto Rico one-year period of limitations for civil tort actions, occurs when there exist some outward or physical signs through which the aggrieved party may become aware and realize that he has suffered an injurious aftereffect, which when known becomes a damage even if at the time its full scope and extent cannot be weighed. 31 L.P.R.A. § 5298.—Torres v. E.I. Dupont De Nemours & Co., 219 F.3d 13.—Lim of Act 95(1).

C.A.1 (Puerto Rico) 1997. "Notice of the injury," for purposes of Puerto Rico's one-year statute of limitation for tort actions, is established by proof of physical or outward signs through which plaintiff may become aware of injurious aftereffect, even if plaintiff does not at that time know its full scope and extent; these circumstances need not be known, because scope, extent and weight of injury may be

established later on during prosecution of remedial action. 31 L.P.R.A. § 5298.—Rodriguez-Suris v. Montesinos, 123 F.3d 10, rehearing and suggestion for rehearing denied.—Lim of Act 95(3).

D.Puerto Rico 1997. "Notice of the injury" on part of tort plaintiff, showing of which is required to establish knowledge of action and thus begin operation of one-year limitations period under Puerto Rico law, occurs when some outward or physical sign exists which permits aggrieved party to realize that he has been injured. 31 L.P.R.A. § 5298.—Vazquez Morales v. Estado Libre Asociado de Puerto Rico, 967 F.Supp. 42.—Lim of Act 95(3).

### **NOTICE OF THE INSTITUTION OF THE ACTION**

C.A.3 (Del.) 1989. "Notice of the institution of the action," within meaning of federal rule regarding relation back of amendment to time of original filing, does not mean mere notice of event giving rise to cause of action. Fed.Rules Civ.Proc.Rule 15(c), 28 U.S.C.A.—Bechtel v. Robinson, 886 F.2d 644, on remand 1990 WL 82363.—Lim of Act 124.

Ariz. 1990. In determining whether amended complaint adding party relates back to original filing for limitations purposes, required "notice of the institution of the action" means notice that action has been filed, not merely informal notice of underlying claim. 16 A.R.S. Rules Civ.Proc., Rule 15(c).—Ritchie v. Grand Canyon Scenic Rides, 799 P.2d 801, 165 Ariz. 460.—Lim of Act 124.

### **NOTICE OF THE OMISSION**

N.Y.Sup. 1969. Phrase "notice of the omission" contained in provision relating to title of purchaser at execution sale not being affected by failure to give notice to every judgment creditor means actual notice. CPLR 5236(c).—First Federal Sav. & Loan Ass'n of Port Washington v. McKee, 305 N.Y.S.2d 589, 61 Misc.2d 693.—Execution 275(3).

### **NOTICE OF THE PROCEEDINGS**

N.Y.A.D. 1 Dept. 1914. Where a judgment creditor employed another attorney to collect the judgment, and the attorneys of record had no connection with the judgment or its collection at the time bankruptcy proceedings were instituted by the debtor, notice to them was not required; but the judgment having been duly scheduled, and notice having been duly given to the attorney employed to collect the judgment, there was sufficient "notice of the proceedings" within Bankruptcy Act, § 17, 11 U.S.C.A. § 35, providing that a discharge in bankruptcy shall release the bankrupt from all his old debts except (3) such as have not been duly scheduled, unless the creditor had notice or actual knowledge of the proceedings.—Keefauver v. Hevenor, 148 N.Y.S. 434, 163 A.D. 531.

### **NOTICE OF THE SAME**

Tex.App.—Corpus Christi 1985. Letters to state legislators which complained of county's failure to provide lifesaving facilities on beach below which

## NOTICE OR AGREEMENT

swimmer drowned but which did not complain of any fault by state did not provide notice of claim as required by statute [Vernon's Ann.Texas. Civ.St. art. 6252-19, § 16] which imposes duty on person making claim against state to give "notice of the same" to state in order to recover from state.—*Vela v. Cameron County*, 703 S.W.2d 721, ref. n.r.e.—States 197.

### **NOTICE OF TRIAL**

Mo.App. 1910. A letter, sent by defendant to plaintiff's attorney giving notice of appeal from the judgment of a justice, but not shown to have been received, nor served as required by statute, did not constitute a "notice of trial" within Rev.St.1899, § 4074, V.A.M.S. § 512.190 note, providing that, in order that such an appeal be triable at the first term, if not appealed on the day the judgment was rendered, appellant, 10 days before such term, must give the opposite party notice of the appeal.—*Lombard v. Urban*, 126 S.W. 221, 142 Mo.App. 282.—J P 160(3).

### **NOTICE OF USE**

C.A.2 (N.Y.) 1961. Under the statute requiring copyright owner, if he uses musical compositions for recording, or licenses others to so do, to file "notice" thereof, the "notice of use" provision is designed to notify all other persons that a musical composition has become available for mechanical reproduction. 17 U.S.C.A. §§ 1(e), 101(e).—*Norbury Music, Inc. v. King Records, Inc.*, 290 F.2d 617.—Copyr 48.

### **NOTICE OF VIOLATION**

C.A.4 (S.C.) 1993. "Notice of violation" issued by county environmental agency to purchaser of property following detection of groundwater contamination at site containing underground storage tanks was "claim, demand or action," within meaning of provision of purchase agreement requiring vendor to indemnify purchaser for claims, demands and actions arising out of or connected with ownership or operation of property prior to closing.—*Burris Chemical, Inc. v. USX Corp.*, 10 F.3d 243.—Ven & Pur 79.

### **NOTICE OF VOUCHING-IN**

N.Y.Sup. 1965. "Notice of vouching-in" is notice that action is pending and offer to vouchee to come in and defend and notice that, in default thereof, voucher will hold vouchee liable.—*Urbach v. City of New York*, 259 N.Y.S.2d 975, 46 Misc.2d 503.—Judgm 699(2); Parties 54.

### **NOTICE OR ACTUAL KNOWLEDGE**

E.D.Mich. 2000. Debtor's oral notice to creditors that a bankruptcy case is filed constitutes "notice or actual knowledge" of the case, as required for 60-day deadline for filing nondischargeability complaints to apply to them. Bankr.Code, 11 U.S.C.A. § 523(a)(3)(B).—*Rowe v. Steinberg*, 253 B.R. 524.—Bankr 2131, 3382.1.

Bkrcty.W.D.Okla. 2001. Creditors not originally listed on debtors' Chapter 7 schedules did not have "notice or actual knowledge" of bankruptcy case in time to permit timely filing of nondischargeability complaint, and thus could file complaint after bar date had passed, though debtors had specifically advised them, prior to commencement of Chapter 7 case, of their intent to file for bankruptcy; creditors' knowledge of debtors' intent to file for bankruptcy in future could not be equated with actual knowledge of case. Bankr.Code, 11 U.S.C.A. § 523(a)(3).—*In re Brown*, 267 B.R. 877.—Bankr 3383.

Bkrcty.D.Or. 1993. Debtor's statement to creditor of intent to commence bankruptcy case in future is not sufficient to constitute "notice or actual knowledge" of the case that would preclude application of discharge exception for unscheduled, unlisted debts. Bankr.Code, 11 U.S.C.A. § 523(a)(3)(A).—*In re Ford*, 159 B.R. 590.—Bankr 3361.

N.Y.Sup.App.Term 1924. The "notice or actual knowledge," referred to in Bankruptcy Act, § 17, subd. 3 (U.S.Comp.St. § 9601), providing that debts not duly scheduled, if known to bankrupt, are not affected by discharge, unless creditor had "notice or actual knowledge" of bankruptcy proceedings, a matter which may be proved by admissions or other proof, without records from the bankruptcy court.—*S. Denier & Son v. Suderman*, 205 N.Y.S. 169, 123 Misc. 303.—Bankr 3361.

Tex.Civ.App.—Dallas 1919. Under Bankruptcy Act § 17a, (U.S.Comp.St. § 9601), declaring that a discharge shall release the bankrupt of all of his provable debts except such as have not been scheduled unless the creditor had notice of actual knowledge of the proceedings in bankruptcy, the term "notice or actual knowledge" contemplates in every case actual personal notice of some sort to the creditor, as distinguished from mere imputed knowledge; hence constructive notice of bankruptcy proceedings is not sufficient to discharge an unscheduled debt.—*Lynch v. McKee*, 214 S.W. 484, writ dismissed w.o.j.—Bankr 3361.

### **NOTICE OR ADVERTISEMENT**

C.A.11 (Ga.) 1999. Cross-reference in Sentencing Guidelines providing for higher base offense level in child pornography cases if defendant sought by "notice or advertisement" to induce a minor to engage in child pornography was properly applied to defendant who used electronic mail to solicit teenage boys to engage in sexual activity; by posting information on Internet newsgroups, defendant's messages amounted to a "notice or advertisement." U.S.S.G. § 2G2.2(c)(1), 18 U.S.C.A.—*U.S. v. Miller*, 166 F.3d 1153.—Sent & Pun 653(8).

### **NOTICE OR AGREEMENT TO TERMINATE**

N.Y.A.D. 1 Dept. 1958. Covenant to vacate contained in lease executed within three months following commencement of term of lease was not a "notice or agreement to terminate" within statute to effect that no tenant shall be removed from business space unless tenant in possession under

## NOTICE OR AGREEMENT

28B W&P— 246

lease not yet expired agrees not less than three months after commencement of term thereof to terminate his occupancy at any time before or after expiration of term thereof. McK.Unconsol.Laws, §§ 8554, subd. 3, 8558(g).—Midboro Management v. Scal, 180 N.Y.S.2d 338, 6 A.D.2d 637.—Land & Ten 278.4(8).

## NOTICE OR DISMISSAL PAYMENTS

Conn. 1953. Under statute providing that individual shall be ineligible for unemployment compensation benefits during week with respect to which individual has received or is about to receive remuneration in form of wages in lieu of notice or dismissal payments, “notice or dismissal payments” are usually associated with termination of employment relationship for reasons primarily beyond control of employee. Gen.St.1949, § 7508(4).—Brannigan v. Administrator, Unemployment Compensation Act, 95 A.2d 798, 139 Conn. 572.—Social S 731.

## NOTICE OR KNOWLEDGE

Mich. 1939. A corporation, engaged in manufacture of rock wool by process requiring melting of limestone by burning coke in cupola in which incomplete combustion of coke would generate carbon monoxide gas, had “notice or knowledge” of injury to employee in cupola who was overcome by gas, where, after light-colored gas was observed coming out of cupola door, two other employees were overcome by gas to extent that medical attention was necessary and, while corporation’s physician was working on such other employees, superintendent received report that employee had been sick and was at home, and was going to employee’s home was told by him that he was sick to his stomach. Comp.Laws 1929, § 8434.—Vestal v. Therminisul Corp., 288 N.W. 336, 291 Mich. 64.—Work Comp 1249.

## NOTICE OR OTHER PAPER

Cal.App. 2 Dist. 1975. Where defendant served answers to plaintiffs’ interrogatories by mail, answers were “notice or other paper” within meaning of statute providing that where notice or other paper is served by mail and right may be exercised or act done by adverse party in response thereto, time within which such right may be exercised or act done is extended five days if place of address is within State of California, and service by plaintiff of motion to compel further answers to interrogatories, served and filed 32 days after service of answers, was therefore timely. West’s Ann.Code Civ. Proc. §§ 1003–1005.5, 1010–1013, 1094.5, 2030(a); Cal. Rules of Court, rule 232(b).—California Accounts, Inc. v. Superior Court, 123 Cal.Rptr. 304, 50 Cal.App.3d 483.—Pretrial Proc 304.

## NOTICE OR OTHER PROCESS IN AN ACTION

Oklahoma. Notice to terminate tenancy and three-day notice to vacate, which notices are required to be served upon tenant as condition precedent to institution of action for unlawful detainer, are not “notice or other process in an action” of

which proof of service may be made by affidavit as authorized by statute, over objection of opposite party, and hence must be proved by competent evidence unless such proof of waived. 12 O.S.1951 § 431; 39 O.S.1951 § 395; 41 O.S.1951 §§ 4–8.—Bonewitz v. Home Owners Loan Corp., 132 P.2d 644, 191 Okla. 654, 1942 OK 431.—Land & Ten 291(12).

## NOTICE OR PROOF OF CLAIM

C.A.D.C. 1991. Presentment of administrative claim, as necessary prerequisite to suit under Federal Tort Claims Act, is more analogous to filing of “notice or proof of claim” than to prosecution of “action,” so that statute of limitations on claim was tolled for only 60 days by claimant’s bankruptcy filing. Bankr.Code, 11 U.S.C.A. § 108(a, b); 28 U.S.C.A. §§ 1346(b), 2671 et seq.—Eagle-Picher Industries, Inc. v. U.S., 937 F.2d 625, 290 U.S.App. D.C. 307, rehearing denied, on remand GAF Corp. v. U.S., 1996 WL 422491.—U.S 127(2).

## NOTICE OR REASONABLE CAUSE FOR INQUIRY

N.D.Ga. 1930. Words “notice or reasonable cause for inquiry,” as applied to purchaser of bankrupts’ property, held to refer to notice of pending or impending bankruptcy (Bankr.Act § 67c and § 67f, 11 U.S.C.A. § 107(c)(f)).—In re Moore, 42 F.2d 475.—Bankr 2586.1.

## NOTICE PLEADING

C.A.11 (Fla.) 1983. “Notice pleading” means that complaint need only give defendant fair notice of what plaintiff’s claim is and grounds upon which it rests. Fed.Rules Civ.Proc.Rule 8(a)(2), 28 U.S.C.A.—Quality Foods de Centro America, S.A. v. Latin American Agribusiness Development Corp., S.A., 711 F.2d 989.—Fed Civ Proc 672.

N.D.Ill. 1991. “Notice pleading” required by Federal Rules of Civil Procedure need only apprise party of nature of claim or defense.—Carpenter v. Ford Motor Co., 761 F.Supp. 62.—Fed Civ Proc 731.

S.D.N.Y. 1997. For plaintiff’s pleadings to be sufficient under the federal rules, all that is required is that defendant be on notice of the claim being asserted, which is known as “notice pleading.” Fed.Rules Civ.Proc.Rule 8(e)(1), 28 U.S.C.A.—Lugo v. Milford Management Corp., 956 F.Supp. 1120.—Fed Civ Proc 673.

S.D.N.Y. 1964. Federal Rules of Civil Procedure apply with equal force to suits under antitrust laws and to other civil actions, and complaints in antitrust cases are no different from those in other civil litigation but are to be merely “notice pleading,” i. e., in essence skeletal. Fed.Rules Civ.Proc. rule 1 et seq., 28 U.S.C.A.—U. S. v. West Virginia Pulp & Paper Co., 36 F.R.D. 250.—Monop 24(7.1), 24(10.1), 28(1), 28(6.2).

Bkrcty.N.D.Ill. 1996. “Notice pleading” merely requires that plaintiff give notice to defendant of theory behind claims alleged and basic facts supporting those allegations. Fed.Rules Civ.Proc.Rule

## NOTICE REQUESTING TRIAL

8(a), 28 U.S.C.A.; Fed.Rules Bankr.Proc.Rule 7008, 11 U.S.C.A.—*In re Allard*, 198 B.R. 715.—Bankr 2162; Fed Civ Proc 674.

Ariz.App. Div. 2 1984. Practice of permitting pleadings based on good-faith speculation, that is, “notice pleading,” requires liberal discovery to determine whether valid case or defense in fact exists.—*U-Totem Store v. Walker*, 691 P.2d 315, 142 Ariz. 549.—Pretrial Proc 14.1.

Fla.App. 4 Dist. 2001. Pleading of the basis for long-arm jurisdiction, under state statute authorizing jurisdiction over nonresidents, is essentially “notice pleading”; it is enough for the pleader to indicate the statutory provision under which the action is traveling. West’s F.S.A. § 48.193; West’s F.S.A. RCP Rule 1.070(h).—*McCarter v. Bigfoot Industries, Inc.*, 805 So.2d 1028.—Courts 15.

Ind. 1996. Whereas theory pleading required complaint to delineate specific legal theory to which plaintiff would adhere throughout trial, “notice pleading” in effect under current rules merely requires pleading the operative facts so as to place defendant on notice as to evidence to be presented at trial. Trial Procedure Rule 8(A).—*Noblesville Redevelopment Com’n v. Noblesville Associates Ltd. Partnership*, 674 N.E.2d 558.—Plead 48.

Ind.App. 1 Dist. 1993. “Notice pleading” means that plaintiff essentially need plead only the operative facts involved in the litigation.—*South Eastern Indiana Natural Gas Co., Inc. v. Ingram*, 617 N.E.2d 943.—Plead 48.

Ohio Mun. 1995. Ohio civil rules require “notice pleading,” rather than fact pleading; notice pleading merely requires that claim concisely set forth only those operative facts sufficient to give fair notice of nature of action, and, except in very narrow circumstances, plaintiff is not required to plead operative facts of his or her case with particularity. Rules Civ.Proc., Rule 8(A, E).—*Columbia Gas of Ohio, Inc. v. Robinson*, 673 N.E.2d 701, 81 Ohio Misc.2d 15.—Plead 1, 18.

### NOTICE PREJUDICE RULE

C.A.D.C. 1998. Under California law’s “notice-prejudice rule,” defense based on an insured’s failure to give timely notice of a claim requires the insurer to prove that it suffered substantial prejudice; prejudice is not presumed from delayed notice alone.—*O’Connor v. UNUM Life Ins. Co. of America*, 146 F.3d 959, 331 U.S.App.D.C. 18.—Insurance 3168, 3195.

C.A.9 (Cal.) 1991. California Supreme Court would conclude that “notice-prejudice rule,” under which breach of policy provision by insured cannot provide valid defense to insurer unless insurer was substantially prejudiced by breach, did not apply to claims-made policies.—*Burns v. International Ins. Co.*, 929 F.2d 1422.—Insurance 2266.

C.A.9 (Cal.) 1990. Under California law, “notice-prejudice rule,” requiring insurer to prove prejudice due to breach of notice of claim provision to be relieved of liability to insured, applies to contracts of reinsurance.—Insurance Co. of State of

Pennsylvania v. Associated Intern. Ins. Co., 922 F.2d 516.—Insurance 3624.

C.A.10 (Okla.) 1999. “Notice-prejudice rule” provides, with some minor state-to-state variations, that insurance company may not avoid liability on basis of insured’s filing of untimely notice and proof of claim without showing of actual prejudice by the delay.—*Dang v. UNUM Life Ins. Co. of America*, 175 F.3d 1186.—Insurance 3168.

Cal.App. 2 Dist. 1990. “Notice prejudice rule” which bars insurer from disavowing coverage on basis of lack of timely notice unless insurer can show actual prejudice from delay, was not applicable to “claims made” professional errors and omissions policy.—*Pacific Employers Ins. Co. v. Superior Court*, 270 Cal.Rptr. 779, 221 Cal.App.3d 1348.—Insurance 3168.

### NOTICE REASONABLY CALCULATED

C.A.7 (Wis.) 1999. By reason of their designation of registered agents for service of process, retrocessionaires listed in caption of motion to compel arbitration served on agents were deemed to have actual notice, for purposes of federal due process standard of “notice reasonably calculated.” U.S.C.A. Const.Amend. 14.—*Employers Ins. of Wausau v. Banco De Seguros Del Estado*, 199 F.3d 937, rehearing and rehearing denied, certiorari denied 120 S.Ct. 2218, 530 U.S. 1215, 147 L.Ed.2d 251.—Const Law 309(3); Insurance 3626.

C.A.7 (Wis.) 1999. Federal due process standard of “notice reasonably calculated” requires only that notice provided be of such nature as reasonably to convey required information. U.S.C.A. Const.Amend. 14.—*Employers Ins. of Wausau v. Banco De Seguros Del Estado*, 199 F.3d 937, rehearing and rehearing denied, certiorari denied 120 S.Ct. 2218, 530 U.S. 1215, 147 L.Ed.2d 251.—Const Law 251.6.

### NOTICE RELIEF

C.A.1 (Me.) 1991. “Notice relief” is explanatory notice to members of plaintiff class advising them that there are state administrative procedures available by which they may receive determination of whether they are entitled to past welfare benefits.—*Doucette v. Ives*, 947 F.2d 21.—Social S 8.20.

C.A.10 (Utah) 1995. “Notice relief,” in general, is simply notice to members of a class of the outcome of litigation.—*Johns v. Stewart*, 57 F.3d 1544.—Inj 189.

### NOTICE REQUESTING TRIAL

Or.App. 1979. Defendant’s letter which informed district attorney that defendant was an inmate of Oregon state penitentiary and which requested that case be disposed of did not constitute a “notice requesting trial” so as to require trial of defendant within 90 days of district attorney’s receipt of letter. ORS 135.760(1), 135.763(1), 135.765.—*State v. Williams*, 592 P.2d 226, 39 Or. App. 223.—Crim Law 577.10(10).

**NOTICE REQUIRED BY LAW**

Cal.App. 3 Dist. 1999. Phrase "notice required by law", as used in section of California Environmental Quality Act (CEQA) providing exception to exhaustion of administrative remedies requirement if public agency failed to give the notice required by law, includes both notice to public and notice of proposed negative declarations to trustee agencies. West's Ann.Cal.Pub.Res.Code § 21177(e); Cal. Code Regs. title 14, § 15072(a).—Fall River Wild Trout Foundation v. County of Shasta, 82 Cal. Rptr.2d 705, 70 Cal.App.4th 482.—Environ Law 665.

**NOTICES**

Ariz. 1962. Activities of Planned Parenthood Association consisting of referrals by doctors and nurses to the association are not "advertising" or "notices" within the statute prohibiting advertising to produce abortion or prevent conception when they are made with persons who have of their own accord sought birth control information from the referring party, nor are such referrals "advertising" when they are made by the referring party in the course of his professional treatment of his patient, but if the association were to aggressively solicit "referrals," such activity would fall within the statutory prohibition. A.R.S. § 13-213.—Planned Parenthood Committee of Phoenix, Inc. v. Maricopa County, 375 P.2d 719, 92 Ariz. 231.—Abort 0.5.

Cal.App. 2 Dist. 1942. The section of the Code of Civil Procedure providing for service of "notices" by mail and granting extension of time for exercise of right or doing of an act relates only to notices and filing and service of papers and does not apply to notices generally which are required to be given under Civil Code sections independently of pending actions to notices called for by private contracts failing to provide for service by mail. Code Civ. Proc. § 1013.—Alphonzo E. Bell Corp. v. Listle, 130 P.2d 251, 55 Cal.App.2d 300.—Notice 10.

**NOTICES AFFECTING COUNTY AFFAIRS**

Ind. 1905. The lists of allowances made by the judges of the several courts, required by Acts 1899, p. 415, c. 186 (Burns' Ann.St. § 26-816), to be published in one newspaper at a cost not exceeding a fixed sum for each allowance, are required to be published in two newspapers by Acts 1903, p. 360, § 1 (superseded), providing that, where the law requires the publication of "notices affecting county affairs," the same shall be published in two newspapers.—Cheney v. State, 74 N.E. 892, 165 Ind. 121.—Newsp 3(1); Notice 11.

**NOTICES OF CONVICTION**

Tex.Civ.App.—Eastland 1965. Exhibits were not admissible as "notices of conviction" in Department of Public Safety's proceeding for finding that licensee was habitual reckless or negligent driver as predicate for license suspension where they were not certified by judge of Corporation Court involved. Vernon's Ann.Civ.St. arts. 3731a, § 1, 6687b, § 22, 6701d, § 152.—Darrow v. Texas Dept. of Public Safety, 392 S.W.2d 785.—Evid 340(1).

**NOTICES TO MARINERS**

S.D.N.Y. 1954. In suits in admiralty between United States, as time charterer of vessel, and the bareboat charterer thereof, arising out of stranding of vessel upon reef, evidence established that certain "Notices to Mariners", the alleged absence of which was relied upon by United States as a specific point of unseaworthiness, were aboard the vessel at time of stranding, and that the Light List in use had not been brought up to date with the corrections published in such notices.—U.S. v. Wessel, Duval & Co, 123 F.Supp. 318.—Ship 58(2.5).

**NOTICE THEREOF**

Ill.App. 1 Dist. 1975. Words "notice thereof" within Unemployment Compensation Act provision, which states that "Unless the claimant or any other party entitled to notice of the claims adjudicator's 'finding' or 'determination' \* \* \* or the Director, within seven days after the delivery of \* \* \* notification of such 'finding' or 'determination,' or within nine days after such notification was mailed to his last known address, files an appeal therefrom, such 'finding' or 'determination'" shall be final as to all parties given notice thereof." means notice of the finding or determination and not notice of the appeal rights. S.H.A.Const.1970, art. 6, § 9; S.H.A. ch. 48, § 470; ch. 110, §§ 264 et seq., 265.—Gutierrez v. Board of Review, Dept. of Labor, 341 N.E.2d 115, 35 Ill. App.3d 186.—Social S 619.5, 620.25.

Mass. 1940. The words "notice thereof" as used in statute providing that exceptions shall be filed and "notice thereof" shall be given to the adverse party mean notice that the filing has actually taken place, and hence the filing must in truth have taken place before the notice is given. M.G.L.A. c. 231, § 113.—Checkoway v. Cashman Bros. Co., 26 N.E.2d 374, 305 Mass. 470.—Exceptions Bill of 48.

**NOTICE TO ADVERSE PARTY**

S.C. 1945. In action on default judgment, an order nisi requiring defendant to show cause why default judgment should not be renewed was not a substantial compliance with section 354 providing that no action shall be brought on judgment without "leave of the court" for good cause shown on "notice to adverse party", where order nisi did not purport to authorize bringing of action under section 354, but proceeded on theory that plaintiff sought revival of its judgment under section 743(2). Code 1942, §§ 354, 743(2).—American Agr. Chemical Co. v. Thomas, 34 S.E.2d 592, 206 S.C. 355, 160 A.L.R. 594.—Judgm 905.

**NOTICE TO ALL PARTIES**

Mass. 1936. Requirement of "notice to all parties" in statute providing for order of court prescribing form of memorandum to be made in pursuance of deed, mortgage, or other voluntary instrument held to contemplate notice to any party in interest, including assistant recorder, and not notice to all the world. M.G.L.A. c. 185 § 60.—New York Life Ins. Co. v. Embassy Realty Co., 200 N.E. 3, 293 Mass. 352.—Records 9(7).

## NOTICE TO QUIT

### **NOTICE TO APPEAR**

S.D.Fla. 1997. Order to show cause is not identical to "notice to appear"; thus, service upon alien of order to show cause is insufficient to trigger "transition provision" of Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which, as exception to general rule that IIRIRA applies prospectively only, provides that service upon alien of "notice to appear" at any time before or after effective date of IIRIRA cuts off any period of continuous physical presence. Immigration and Nationality Act, § 240A(d)(1), as amended, 8 U.S.C.A. § 1229b(d)(1).—Tefel v. Reno, 972 F.Supp. 623, vacated 180 F.3d 1286, rehearing and suggestion for rehearing denied 198 F.3d 265, certiorari denied 120 S.Ct. 2657, 530 U.S. 1228, 147 L.Ed.2d 272.—Aliens 40.

Ill. 1996. "Notice to appear" is means by which person may be brought before court without inconvenience of immediate arrest, and may be issued whenever peace officer has probable cause to make warrantless arrest. S.H.A. 725 ILCS 5/107-12.—People v. Warren, 219 Ill.Dec. 533, 671 N.E.2d 700, 173 Ill.2d 348.—Crim Law 216, 217.

### **NOTICE TO APPLICANT**

C.C.A.2 (N.Y.) 1931. "Notice to applicant" under statute relative to abandonment of patent application held satisfied by notice to applicant's attorney. 35 U.S.C.A. § 37.—Rosenberg v. Carr Fastener Co., 51 F.2d 1014, certiorari denied 52 S.Ct. 32, 284 U.S. 652, 76 L.Ed. 553.—Atty & C 104.

### **NOTICE TO BE PRESENT**

Conn.Super. 1954. The term "notice to be present" as used in statutory provision that appeals by those of full age and present or who have legal notice to be present at hearing on probate of will, shall be taken within thirty days, and if they have no "notice to be present" and are not present, then within twelve months, does not mean actual, but legal, notice to be present. Gen.St.Supp.1953, § 2216c.—In re Holland's Estate, 110 A.2d 478, 19 Conn.Sup. 102.—Wills 364.

### **NOTICE TO CITY**

S.D. 1980. Fact that plaintiff, who sought to recover against city for injuries sustained when she fell on ice on sidewalk, had made her claim known to staff physician at municipally owned and operated hospital was not "notice to city" within meaning of statute providing that "No action for the recovery of damages for personal injury \* \* \* caused by its negligence shall be maintained against any municipality unless written notice of the time, place, and cause of the injury is given \* \* \* within sixty days after the injury." SDCL 9-24-2.—Budahl v. Gordon and David Associates, 287 N.W.2d 489.—Mun Corp 812(9).

### **NOTICE TO CREDITORS**

N.D. 2000. Copy of petition commencing probate proceedings and list of legatees, surviving joint

tenants, and heirs at law sent to Department of Human Services was not a "notice to creditors" complying with requirements of statute requiring personal representative to publish such a notice and, thus, statute of limitation requiring filing of claims within three months of first publication of notice to creditors did not apply to Department's claim seeking reimbursement for medical assistance benefits. NDCC 30.1-19-01, 30.1-19-03, subd. 1, par. a, 50-06.3-07, 50-24.1-07.—In re Estate of Kiesow, 615 N.W.2d 538, 2000 ND 155.—Ex & Ad 225(1), 226.

### **NOTICE TO EACH OWNER**

Pa. 1979. Under the section of the Real Estate Tax Sale Law which provides in relevant part that notice of a proposed tax sale must be given at least ten days before the date of the sale to each owner, the requirement of "notice to each owner" means that every owner will be considered and treated as distinct from the others and, therefore, that tenants by the entireties are entitled to separate and individual notice. 72 P.S. § 5860.602.—Teslovich v. Johnson, 406 A.2d 1374, 486 Pa. 622.—Tax 659.

### **NOTICE TO EMPLOYER**

Mich. 1939. Notice of an accidental injury to an insurer does not constitute required "notice to employer." Comp.Laws 1929, § 8431.—Sweet v. Gale Mfg. Co., 289 N.W. 111, 289 Mich. 711.—Work Comp 1219.

### **NOTICE TO PROCEED**

Ct.Cl. 1958. "Notice to proceed" is an order by Government to contractor to get its equipment and men on the job and to begin performing work called for under contract.—Abbott Elec. Corp. v. U.S., 162 F.Supp. 772, 142 Ct.Cl. 609.—U S 73(1).

### **NOTICE TO QUIT**

D.C.App. 1965. A "notice to quit" leased premises is not equivalent of "court process" but is simply notice given privately by one party to another terminating or attempting to terminate landlord-tenant relationship.—Fisher v. Parkwood, Inc., 213 A.2d 757.—Land & Ten 94(1).

D.C.Mun.App. 1946. A "notice to quit" is not process but is simply a notice given privately from one party to another terminating or attempting to terminate the landlord-tenant relationship, and the same exactness is not required in the serving of such a notice as in the serving of a summons. D.C.Code 1940, § 45-906.—Lynch v. Bernstein, 48 A.2d 467.—Land & Ten 94(1), 94(4).

D.C.Mun.App. 1946. A "notice to quit" is not the equivalent of court process but is simply a notice given privately from one party to another terminating or attempting to terminate the landlord-tenant relationship and is without judicial effect unless followed by a court action. D.C.Code 1940, § 45-906.—Craig v. Heil, 47 A.2d 871.—Land & Ten 94(1).

Mich. 1941. Letters from landlords' attorney to tenant demanding that tenant vacate premises were

sufficient compliance with applicable statute to constitute "notice to quit" and termination of lease, where tenant was in default on his covenant to pay rent when letters were written. Comp.Laws 1929, § 13492.—MacGlashan v. Harper, 1 N.W.2d 30, 299 Mich. 662.—Land & Ten 94(3).

Mont. 1948. A letter from land owner to tenants of agricultural lands after expiration of lease notifying tenants that a named third person was made the agent of owner and that dealings for rental or sale of lands would thereafter have to be made through the agent was not as matter of law, a demand for possession or a "notice to quit" within statute entitling tenant of agricultural lands to hold under terms of lease for another year where tenant held over for more than 60 days after expiration of term without any demand or notice to quit by landlord. Rev.Codes 1935, § 9889, subd. 2.—Hamilton v. Rock, 191 P.2d 663, 121 Mont. 245.—Land & Ten 90(1), 94(3).

N.Y.Sup.App.Term 1923. Real Property Law, § 229, providing that, if a tenant gives notice of his intention to quit and does not deliver up possession at the time specified in such notice, he must pay double rent so long as he continues in possession, relates solely to tenancies of indefinite continuance, which may be terminated by the tenant giving a technical "notice to quit," and hence a tenant for a fixed term, who in answer to the landlord's inquiry stated that he would not renew the lease, was not liable for double rent for his subtenant's holding over; the tenant's answer to the landlord's inquiry not being a "notice to quit," within the meaning of the statute.—Lerner v. Wolf, 200 N.Y.S. 368, 121 Misc. 114.—Land & Ten 216.

#### **NOTICE TO TERMINATE**

N.Y.Sup. 1939. An employer's discharge of employee is equivalent of "notice to terminate" employment contract providing that contract should remain in force until cancelled by either party upon written notice to the other.—Stanley v. Chris-Craft Corp., 21 N.Y.S.2d 898, affirmed 21 N.Y.S.2d 502, 259 A.D. 1038, appeal denied 22 N.Y.S.2d 926, 260 A.D. 810.—Mast & S 21.

#### **NOTICE TO THE WORLD**

Colo. 1938. "Notice to the world" of intention to acquire water right does not mean notice to every inhabitant of world, but merely notice reasonably likely to bring knowledge to every one within sphere of possible adverse interest, such as another claimant of priority in water of same natural stream.—San Luis Roller Mills v. San Luis Power & Water Co., 77 P.2d 128, 102 Colo. 119.—Waters 133.

Ga. 1907. The "notice to the world," required in Civ.Code 1895, § 2634, which declares that the dissolution of a partnership by the retiring of an ostensible partner must be made known to creditors and to the world, may be given by publication in a public gazette circulated in the locality in which the business of the partnership has been conducted, if such publication is fair and reasonable as to its terms and the number of times it is made. Such

publication is not, however, necessary, as any means of fairly publishing the fact of dissolution as widely as possible in order to put the public on its guard, as by advertisement, public notice in the manner usual in the community, the withdrawal of the exterior indications of partnership, etc., are proper to be considered on the question of notice.—Bush & Hattaway v. W.A. McCarty Co., 56 S.E. 430, 127 Ga. 308, 9 Am. Ann.Cas. 340.

#### **NOTICE TO VACATE**

La.App.Orleans 1939. The mere publication of an advertisement offering property for rent does not constitute formal "notice to vacate" to tenant already occupying the property. LSA-C.C. art. 2686.—Tuebler v. Latter & Blum, 188 So. 172.—Land & Ten 94(3).

#### **NOTICE TO WITHHOLD**

Cal. 1933. Notice under statute regarding notice to owner of labor performed and materials furnished, served by materialman on second loan association approximately four months after it had purchased assets of first association furnishing building loans *held* not "notice to withhold" so as to create equitable garnishment of building funds remaining in second loan association's possession. Code Civ. Proc. § 1184.—San Mateo Planing Mill Co. v. Davenport Realty Co., 24 P.2d 787, 218 Cal. 702.—Mech Liens 113(2).

#### **NOTIFICATION**

C.A.D.C. 1978. Where, though no contractual safety reporting procedures existed at coal mine, there were procedures established by custom and usage and where coal miner followed those procedures by complaining first to his foreman, then to the mine superintendent and, after his complaints were rejected, to the union safety coordinator who contacted the Bureau of Mines, coal miner's complaint to his foreman and to mine superintendent was a "notification" of the Secretary and an institution of proceedings within the meaning of the Federal Coal Mine Health and Safety Act sections which prohibit discrimination against any miner by reason of the fact that such miner has notified the Secretary of any alleged violation or danger or has filed or instituted any proceeding under the Act. Federal Coal Mine Health and Safety Act of 1969, § 110(b) as amended 30 U.S.C.A. § 820(b).—Munsey v. Federal Mine Safety & Health Review Commission, 595 F.2d 735, 193 U.S.App.D.C. 350.—Labor 13, 26.5.

C.C.A.6 (Ohio) 1937. Clause in license contract to make, use, and sell patented device, providing that licensee should be relieved of paying royalties if licensor, upon being "notified" that unlicensed party was manufacturing similar device, should fail to institute infringement suit within specified time after such "notification," *held* to require actual notification and not mere knowledge by licensor.—General Motors Corporation v. Swan Carburetor Co., 88 F.2d 876, certiorari denied Reeke-Nash Motors Co v. Swan Carburetor Co, 58 S.Ct. 10, 302 U.S. 691, 82 L.Ed. 533, certiorari denied 58 S.Ct.

49, 302 U.S. 691, 82 L.Ed. 534, rehearing denied 58 S.Ct. 137, 302 U.S. 777, 82 L.Ed. 601.—Pat 218(3).

C.C.A.6 (Ohio) 1937. The word “notify” is not synonymous with “notice.” “Notification” is the act of notifying.—General Motors Corporation v. Swan Carburetor Co., 88 F.2d 876, certiorari denied Reeke-Nash Motors Co v. Swan Carburetor Co, 58 S.Ct. 10, 302 U.S. 691, 82 L.Ed. 533, certiorari denied 58 S.Ct. 49, 302 U.S. 691, 82 L.Ed. 534, rehearing denied 58 S.Ct. 137, 302 U.S. 777, 82 L.Ed. 601.

W.D.Mo. 1971. Telephone conversation between branch manager of plaintiff and officer of bank which assigned note, security agreement and financing statements to defendant constituted “notification” under statute to bank, as holder of existing security interest on “after-acquired” inventory, of plaintiff’s intent to take subsequent security interest in inventory property over claim that written notice was required, and plaintiff’s security interest in debtor’s inventory was superior to that of defendant. V.A.M.S. §§ 400.1–201(25), (26) (c), 400.9–110, 400.9–312.—GAC Credit Corp. v. Small Business Administration, 323 F.Supp. 795.—See Tran 145.1.

N.Y.Ct.Cl. 1943. Where claimant, acting on inquiry by the Division of Standards and Purchase, directed its warehouseman to transfer a specified number of tubs of butter to the state department, warehouseman’s receipt to the Commissioner of the department noting description of the butter, and that it was being transferred “to your account” by claimant, was an effective “acknowledgment” that the butter was being held for the state, and mailing the receipt in due course was sufficient “notification” within statute relating to delivery of goods, and title passed to the state, notwithstanding theft of the butter before the state received the receipt. Personal Property Law, § 124, subd. 3.—Wilson & Co. v. State, 45 N.Y.S.2d 610, affirmed 48 N.Y.S.2d 19, 267 A.D. 1028.—Sales 201(5).

Tenn. 1969. “Notification” is the act or instance of notifying.—Calvert Fire Ins. Co. v. American Nat. Bank & Trust Co., 438 S.W.2d 545, 222 Tenn. 515.—Notice 1.

Tex.App.–Eastland 1993. The doctrine of “revival” or “notification” holds that subsequent execution of formal document which expressly recognizes in clear language validity of a lifelease oil and gas lease revives the lease.—Exploracion De La Estrella Soloataria Incorporacion v. Birdwell, 858 S.W.2d 549.—Mines 73.

### NOTIFICATION IS SENT

Okl. 1989. Phrase “notification is sent” to Real Estate Commission, in statute governing conditions of recovery from Real Estate Education and Recovery Fund, requires more than an oral declaration to Commission of intent to file suit against licensed real estate broker for alleged violations of Real Estate License Code. 59 O.S.1981, § 858–601 et seq.—Yoder v. State ex rel. Case, 776 P.2d 1273, 1989 OK 103.—Brok 4.

### NOTIFICATIONS

Mass. 1895. In Pub.St. c. 172, § 29, relating to sale of land on execution, requiring “notifications thereof to be posted up in some public place in the city or town where the land lies, and also in two adjoining cities or towns, if there are so many in the county,” the plural “notifications” would be construed, apart from history, with reference to the several cities or towns in which the notifications are required, notwithstanding the words “and also,” and not as requiring two or more notifications in the city or town where the land lies. In fact, however, the plural is a survival from St.1798, c. 77, § 4, which required the posting up of notifications in two or more public places in the town where the land lies. Rev.St. c. 73, § 39, substituted “some public place” for “two or more public places,” and thereby made one notification sufficient.—Holmes v. Jordan, 39 N.E. 1005, 163 Mass. 147.

### NOTIFICATION STATUTES

Del.Supr. 2001. Generally, sex offender “registration statutes” require released sex offenders to register with law enforcement agencies in their community so that local authorities are aware that a convicted sex offender is present in the area; sex offender “notification statutes,” on the other hand, provide for the dissemination to the community of information about the sex offender to make the public aware of his or her presence.—Helman v. State, 784 A.2d 1058.—Mental H 469(1).

### NOTIFIED

C.A.6 (Mich.) 1979. “Notified” in ordinary usage means the completed act of bringing information to the attention of another, and thus fact that union’s letter to employer invoking arbitration of grievance was dated but not received within time limit specified in collective bargaining agreement did not satisfy provision of the agreement that employer be “notified” within such period, absent any evidence indicating that mere dating of the letter within the time period was within the parties’ understanding of the term.—Detroit Coil Co. v. International Ass’n of Machinists & Aerospace Workers, Lodge No. 82, 594 F.2d 575, certiorari denied 100 S.Ct. 79, 444 U.S. 840, 62 L.Ed.2d 52.—Labor 456.

Ga. 1953. Where Board of Workmen’s Compensation approved agreement for payment of compensation in lump sum of \$1,300 and directed payment of such money in full and final settlement of all compensation, and chairman of board was subsequently told orally by counsel for employer and insurer that counsel had “made a settlement of \$1,300 to” counsel for employee, chairman and board were “notified” that payment was made pursuant to written agreement, so that agreement was binding upon parties.—National Sur. Corp. v. Orvin, 76 S.E.2d 705, 209 Ga. 878, on remand 78 S.E.2d 91, 88 Ga.App. 785.—Work Comp 1006.

Ga. 1953. Within two years from date State Board of Workmen’s Compensation is “notified” of final payment of award of compensation, Board may review award or settlement on ground of a

change in condition, and make award ending, diminishing, or increasing compensation previously awarded, but award could not be reviewed where application therefor was not filed within such time. Ga.Code Ann. § 114–709.—National Sur. Corp. v. Orvin, 76 S.E.2d 705, 209 Ga. 878, on remand 78 S.E.2d 91, 88 Ga.App. 785.—Work Comp 2016.

Ind. 1905. Burns' Ann.St.1901, § 3626a, providing that, in an action to foreclose a lien for a municipal improvement, it must be shown that 10 days before suit the owner, if found or known, was "notified" of the assessment, including the amount thereof, with interest, and where payable, means a notice either verbal or written, and it may be given by any one interested in the claim, or by any municipal officer charged with a duty in connection with the making or collection of the assessment.—Ross v. Van Natta, 74 N.E. 10, 164 Ind. 557.

Ind.App. 1 Div. 1906. Where one desiring to ship goods informed the agent of the carrier that he would want two cars in which to transport the goods, an allegation in a complaint, founded on a failure to furnish the cars, that the agent "notified" the shipper that he "would endeavor" to secure the cars was insufficient to show an acceptance of the proposal according to the terms in which it was made, or an unconditional promise to comply with it. It was no more than a promise that the agent "would endeavor" to comply with the order which it was his duty to do without a contract.—Lake Shore & M. S. R. Co. v. Anderson, 79 N.E. 381, 39 Ind.App. 112.

Mich. 1883. The word "notified," in a charter of a mutual insurance company providing that the members shall be notified of assessments by circular or verbally, means "informed." The mere mailing of a notice to a member is not sufficient, if the notice is not actually received.—Castner v. Farmers' Mut. Fire Ins. Co., 15 N.W. 452, 50 Mich. 273.

N.Y.Sup. 1990. An Article 78 proceeding must be commenced within four months after determination to be reviewed becomes "final and binding" upon petitioner; determination becomes "binding" when the aggrieved party is notified; petitioner is not "notified" and, thus, "aggrieved" when the agency, by its conduct of the matter, has created an ambiguity as to whether the determination is final. McKinney's CPLR 217, 7801 et seq.—Russo v. Nassau Community College, 554 N.Y.S.2d 774, 147 Misc.2d 179, reversed in part 587 N.Y.S.2d 419, 185 A.D.2d 982, leave to appeal granted 597 N.Y.S.2d 937, 81 N.Y.2d 707, 613 N.E.2d 969, reversed 603 N.Y.S.2d 294, 81 N.Y.2d 690, 623 N.E.2d 15.—Lim of Act 61.

N.D. 1898. The statement of a witness, stating that he "notified" the parties to a certain contract, excludes the idea that he showed them the contract or read it to them.—Towne v. St. Anthony & Dakota Elevator Co., 77 N.W. 608, 8 N.D. 200.

Okl.Terr. 1905. The word "notified," in the warrant of a county clerk to the treasurer directing the collection of taxes, reciting, "You are hereby notified to collect the taxes" enumerated in the lists attached, is sufficiently defined to warrant the trea-

surer to proceed to collect the taxes, pursuant to the statute providing that the county clerk shall attach to the lists his warrant in general terms requiring the treasurer to collect the taxes, and no informality shall render any proceedings for the collection of taxes illegal.—Cadman v. Smith, 85 P. 346, 15 Okla. 633, 1905 OK 66.

Or.App. 1980. For purposes of statutory section entitling a claimant whose claim has been denied to a hearing if such request is filed not later than 60th day after claimant was notified of denial, "notified" means deposited in the mails. ORS 656.319(1)(a).—Matter of Madewell, 620 P.2d 953, 49 Or.App. 713.—Work Comp 1687.

#### NOTIFIED IMPORTER

U.S.N.Y. 1890. "Notified importer," when stamped by a customs collector on an entry of goods at the customhouse, liquidated and "notified importer" on a certain date, means that the fact of the liquidation had been stated on a sheet of paper which was hung up in the customhouse for the information of the importer.—Merritt v. Cameron, 11 S.Ct. 174, 137 U.S. 542, 34 L.Ed. 772.

#### NOTIFIES

Kan.App. 1989. Assignee "notifies" account debtor of assignment by taking such steps as may reasonably be required to inform account debtor in ordinary course whether or not account debtor actually comes to know of it, and notification not in ordinary course will be considered sufficient if it ensures that account debtor receives actual notice of assignment. K.S.A. 84-1-201(26).—Bank of Kansas v. Hutchinson Health Services, Inc., 773 P.2d 660, 13 Kan.App.2d 421, review granted, affirmed 785 P.2d 1349, 246 Kan. 83.—Sec Tran 188.

Pa.Cmwlth. 1978. For purposes of statute providing that landowner's appeals from decision of township board of supervisors denying proposed zoning amendment must be filed within 30 days after governing body notifies landowner that it will not adopt the amendment, the word "notifies," means the date on which landowner receives the notice. 53 P.S. §§ 11004, 11004(4); § 11004(3), Act June 1, 1972, P.L. 333.—Whitemarsh Tp. v. Kravitz, 395 A.2d 629, 39 Pa.Cmwlth. 306.—Zoning 584.1.

#### NOTIFY

C.A.9 (Cal.) 1997. "Notify," as used in statutory exception under Right to Financial Privacy Act permitting bank to notify government about suspected illegal activity, referred to what information bank gave authorities, not to who called whom, and therefore bank was not precluded from protection under exception on ground that government agent initiated contact with bank regarding customer, rather than bank contacting government. Right to Financial Privacy Act of 1978, § 1103(c), 12 U.S.C.A. § 3403(c).—Puerta v. U.S., 121 F.3d 1338.—Banks 151.

C.A.5 (Ga.) 1974. When first "suit letter" from EEOC to employee was delivered by certified mail,

return receipt requested, to employee's nine-year-old nephew, but thereafter lost by nephew before being delivered to employee, and employee's action against employer under Civil Rights Act of 1964 was not initiated until over one year later, but within 30 days after employee received second "suit letter" from EEOC, action was timely since mailing of initial letter did not constitute "constructive receipt" by employee and did not effectively "notify" employee of right to bring suit within meaning of Act. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 706(e) as amended 42 U.S.C.A. § 2000e-5(e); Equal Opportunity Act of 1972, § 14, 42 U.S.C.A. § 2000e-5 note.—Franks v. Bowman Transp. Co., 495 F.2d 398, rehearing denied 500 F.2d 1184, certiorari denied Bowman Transp., Inc. v. Franks, 95 S.Ct. 625, 419 U.S. 1050, 42 L.Ed.2d 644, rehearing denied 95 S.Ct. 1417, 420 U.S. 984, 43 L.Ed.2d 667, certiorari granted 95 S.Ct. 1421, 420 U.S. 989, 43 L.Ed.2d 669, reversed 96 S.Ct. 1251, 424 U.S. 747, 47 L.Ed.2d 444.—Civil R 373.

Ala. 1974. The word "notify" is defined under Uniform Commercial Code in such a way as to reasonably include oral communication in light of fact that written requirements throughout the Code are usually imposed by the word "sent" or one of its derivatives. Code of Ala., Tit. 7A, § 1-201(26).—Page v. Camper City and Mobile Home Sales, 297 So.2d 810, 292 Ala. 562.—Notice 1.

Ariz. 1952. The word "notify" in a statute commonly imports that notice shall actually reach party to be notified.—Cameron v. Shuttleworth, 251 P.2d 659, 75 Ariz. 61.—Notice 1.

Conn. 1947. To "notify" a person or official is to make known to him.—Rapid Motor Lines v. Cox, 56 A.2d 519, 134 Conn. 235, 175 A.L.R. 296.—Notice 1.

Ind. 1886. The word "notify," used in such section, never imports or implies, of necessity, a notice in writing, and such notice will not be required unless it is clear that it was so intended.—Vinton v. Builders' & Manufacturers' Ass'n, 9 N.E. 177, 109 Ind. 351.—Mech Liens 99.

Iowa 1927. "Notify" or "notifying" means written notice as applied to official act.—Incorporated Town of Casey v. Hogue, 214 N.W. 729, 204 Iowa 3.—Notice 9.

Iowa 1904. In an action against a bank for damages for delay in the transmission of a draft with bill of lading attached, evidence is admissible to show that the word "notify" in the bill of lading made to plaintiff, consignee, "notify J.," was understood and recognized among carriers having possession of the shipment in question as indicating that the party thus to be notified was entitled to receive the shipment on presentation of the bill of lading, though not indorsed by the consignee and accompanied by the draft to which it was attached.—Stoner v. Zachary, 97 N.W. 1098, 122 Iowa 287.—Banks 175(3).

Iowa 1904. In action against bank for delay in forwarding bill of lading, evidence is admissible to

show that a direction in a bill of lading to "notify" certain parties is recognized among carriers as authorizing a delivery of the shipment to such parties upon presentation of the bill of lading accompanied by the draft.—Stoner v. Zachary, 97 N.W. 1098, 122 Iowa 287.—Banks 175(3).

Iowa 1904. Where a bill of lading read "consignee J. B. S. Nfy. W. H. J. & Co." the legend "Nfy." is equivalent to "notify" and imposes on the railroad company the duty to notify W. H. J. & Co., and evidence to show such meaning is admissible.—Stoner v. Zachary, 97 N.W. 1098, 122 Iowa 287.

Iowa 1890. "Notifying," as used in Code, §§ 2967, 6350, providing that corporate stock may be levied on by notifying the president or other officer of the corporation, means that the communication should be in writing. In common parlance the word "notify" or "notifying" may sometimes mean a mere verbal communication, yet, when applied to an official act, it can have no other meaning than that it should be in writing.—Moore v. Marshalltown Opera-House Co., 46 N.W. 750, 81 Iowa 45.

Ky. 1943. The word "protect" carries the idea of preserving in safety, or making absolutely safe, the sense in which it has been used in thus defining the city's duty to those using its streets is rather that of a synonym of guard, warn or "notify."—City of Bellevue v. Hall, 174 S.W.2d 24, 295 Ky. 57.

Ky. 1932. Word "protect," though carrying idea of making safe, as regards city's duty to protect persons using streets, in synonym of terms "guard" or "notify."—Watkins' Adm'r v. City of Catlettsburg, 47 S.W.2d 1032, 243 Ky. 197.—Mun Corp 794.

Me. 1909. To "notify" one of a fact is to "make it known to him," to "inform him by notice."—Huntington v. City of Calais, 73 A. 829, 105 Me. 144.—Notice 1.

Me. 1896. "Notify," as used in a statute making it a condition precedent for a person, in order to be entitled to recover for injuries caused by a defective highway, to notify the municipal officers of the town by letter or otherwise in writing, setting forth his claim for damages, within 14 days after the injury, means "to make known." The statute requires that the municipal officers should have information or knowledge, and it is not enough for the injured party to write a notice, however formal; it is not enough for him to mail it, even within the 14 days. The writing and mailing of a notice within the time is not notifying the officers of the town as the statute requires.—Chase v. Inhabitants of Surry, 34 A. 270, 88 Me. 468.

Mass. 1937. The word "notify," in statute requiring superior court to notify parties of its decree in workman's compensation proceeding, commonly imports that notice shall actually reach parties. G.L. c. 152, § 11, as amended by St.1932, c. 129, § 1 (M.G.L.A.).—Petition of Liberty Mut. Ins. Co., 9 N.E.2d 718, 298 Mass. 75.—Work Comp 1941.

N.Y.A.D. 2 Dept. 1938. A constitutional amendment authorizing the clerks of each county in

the city of New York to "summon" grand and petit jurors imposes on the county clerk of Queens county the duty to sign and serve notices on the grand and petit jurors in that county, without legislative enactment to make the power effective, since the words "summon" and "notify" are used interchangeably. General Construction Law, § 33-a; Const. art. 10, § 1, effective Jan. 1, 1936.—Livoti v. Fitzgerald, 5 N.Y.S.2d 588, 255 A.D. 711, 255 A.D. 720, amended 255 A.D. 720, affirmed 18 N.E.2d 319, 279 N.Y. 696.—Const Law 31.

N.Y.Mun.Ct. 1946. By common usage the word "notify" simply means to make known and should be construed according to its ordinary usage in the absence of a different meaning expressed or clearly implied except in the case of a notice in a judicial proceeding.—Boland v. Beebe, 62 N.Y.S.2d 8, 186 Misc. 616.—Notice 1.

Oklahoma 1933. Statute providing that grantee must "notify" grantor, sought to be held liable on warranty, at least 20 days before trial of suit against grantee for recovery of realty, held not to require personal service; it being sufficient if proper notice is mailed, where grantor acknowledges in writing receipt of notice in due time. Comp.St.1921, § 5263, 16 Okl.St.Ann. § 23.—Fast v. Scruggs, 23 P.2d 383, 164 Okla. 196, 1933 OK 358.—Covenants 88.

Oklahoma 1933. There is a clear distinction between the terms "notify" and "serve notice." Generally, the word "notify" means to give notice to; to inform by words or writing in person or by message, or by any signs which are understood; to make known; to "notify" one of a fact is to make it known to him; to inform him by notice.—Fast v. Scruggs, 23 P.2d 383, 164 Okla. 196, 1933 OK 358.

Tex.Civ.App.—Fort Worth 1941. The fact that a bill of lading was printed on yellow rather than white paper and contained the expression "notify" a designated company, which was the buyer of the merchandise, did not preclude classification of the bill of lading as a "straight bill of lading" rather than an "order bill of lading". Bills of Lading Act, § 2, 49 U.S.C.A. § 82.—Rountree v. Lydick-Barmann Co., 150 S.W.2d 173, dismissed.—Carr 51.

Tex.Civ.App.—Fort Worth 1941. Where air conditioning unit was shipped under bill of lading naming shipper as consignor and consignee, with direction to "notify" the buyer, the carrier was liable for shipper's loss resulting from delivery of goods to buyer without authorization by shipper, regardless of whether bill of lading was a straight bill or a shipper's order bill, and notwithstanding shipper did not maintain a place of business and could not be found at point named as destination of shipment. Bills of Lading Act, §§ 2, 8, 9, 49 U.S.C.A. §§ 82, 88, 89.—Rountree v. Lydick-Barmann Co., 150 S.W.2d 173, dismissed.—Carr 93.

Tex.Civ.App.—Beaumont 1916. Where the constitution of a mutual benefit association which levied assessments only upon death of a member required the secretary to notify by postal card all members liable, the word "notify" should be construed "to make known," so that, where the insured

failed to receive a postal card mailed by the secretary, notifying him of an assessment, such failure excused insured's failure to pay the assessment, and his beneficiary could recover.—Home Benefit Ass'n of Angelina County v. Jordan, 191 S.W. 725, writ dismissed w.o.j.

Utah 1951. Word "notify" in an order notify bill of lading means that carrier is to notify the notify consignee upon arrival of goods at their destination so that he can arrange payment or credit for shipper.—Garrett Freight Lines v. Cornwall, 232 P.2d 786, 120 Utah 175.—Carr 51.

## NOTIFY V. AT S

Mass. 1916. Words in bill "notify V. at S." do not indicate to carrier that V. is consignee; it appearing in line above that goods were consigned to P.—New York, N.H. & H.R. Co. v. Sampson, 110 N.E. 964, 222 Mass. 311.—Carr 51.

## NO TIME RUNS AGAINST THE SOVEREIGN

D.C. 1989. Under common-law principle of "nullum tempus occurrit regi" ("no time runs against the sovereign"), the District of Columbia enjoys common-law "municipal immunity" from effects of statutes of limitations and repose when suing in its municipal capacity to vindicate public rights.—District of Columbia v. Owens-Corning Fiberglas Corp., 572 A.2d 394, certiorari denied 111 S.Ct. 213, 498 U.S. 880, 112 L.Ed.2d 173.—Lim of Act 11(3).

## NOT IMPAIRED

C.A.7 (Wis.) 1984. As to whether claim is "not impaired" under Chapter 11 plan, so as to satisfy requirement of confirmation, Congress defined impairment in broadest possible terms and then carved out three narrow exceptions which, though narrow in scope, are of vital importance to Chapter 11 reorganization in that a class that is not impaired under plan is deemed to have accepted the plan. Bankr.Code, 11 U.S.C.A. §§ 1101 et seq., 1123(a)(5)(G), 1124, 1124(2), 1126(f), 1129(a)(8); 28 U.S.C.A. §§ 1291, 1293(b).—Matter of Madison Hotel Associates, 749 F.2d 410.—Bankr 3536.1.

## NOT IMPANELED AND SWORN

Ga.App. 1976. Prosecution was "not terminated" and jury was "not impaneled and sworn" within meaning of statute, which provides that "A prosecution is barred if the accused was formerly prosecuted for the same crime, based upon the same material facts, if such former prosecution was terminated improperly after the jury was impaneled and sworn," where prosecution was merely continued until motion to suppress could be heard and trial resumed three days later with same jury panel and where the oath had not been administered to jury. Code, §§ 26-507(a)(2), 59-706, 59-709.—Barner v. State, 227 S.E.2d 874, 139 Ga.App. 50.—Double J 84.

## NOT IN ACCORDANCE

N.D.Ga. 1996. At least insofar as criminal statutes are concerned, law does not have to compel certain course of action in order for agency's action to be "not in accordance" with that law, for purposes of Administrative Procedure Act (APA) section authorizing courts to set aside final agency actions found to be, *inter alia*, not in accordance with law. 5 U.S.C.A. § 706(2)(A).—Sierra Club v. Martin, 933 F.Supp. 1559, reversed 110 F.3d 1551, on remand 992 F.Supp. 1448, reversed 168 F.3d 1, rehearing and suggestion for rehearing denied 181 F.3d 111.—Admin Law 763.

## NOT IN ACCORDANCE WITH LAW

App.D.C. 1935. Cases in which order of commissioner may be set aside as "not in accordance with law" are those in which order of commissioner is arbitrary and unreasonable. Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §§ 901-950; D.C.Code 1929, T. 19, §§ 11, 12.—Speaks v. Hoage, 78 F.2d 208, 64 App.D.C. 324, certiorari denied 56 S.Ct. 121, 296 U.S. 574, 80 L.Ed. 405.—Work Comp 1939.1.

App.D.C. 1935. Cases in which order of commissioner may be set aside as "not in accordance with law" are those in which error of law appears. Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §§ 901-950; D.C.Code 1929, T. 19, §§ 11, 12.—Speaks v. Hoage, 78 F.2d 208, 64 App.D.C. 324, certiorari denied 56 S.Ct. 121, 296 U.S. 574, 80 L.Ed. 405.—Work Comp 1939.1.

App.D.C. 1935. Cases in which order of commissioner may be set aside as "not in accordance with law" are those in which order of commissioner is not supported by substantial evidence, and finding supported by substantial evidence is final. Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §§ 901-950; D.C.Code 1929, T. 19, §§ 11, 12.—Speaks v. Hoage, 78 F.2d 208, 64 App.D.C. 324, certiorari denied 56 S.Ct. 121, 296 U.S. 574, 80 L.Ed. 405.—Work Comp 1939.1.

App.D.C. 1931. Compensation award based on conjecture inconsistent with established facts is "not in accordance with law" (33 USCA 921(b)). Longshoremen's and Harbor Workers' Compensation Act, Sec. 21(b), 44 Stat. 1436 (33 USCA 921(b)), provides that, if not in accordance with law, compensation order may be suspended or set aside through injunction proceedings, mandatory or otherwise, brought by any party in interest against deputy commissioner making order.—New Amsterdam Casualty Co. v. Hoage, 46 F.2d 837, 60 App.D.C. 40.—Work Comp 1939.1.

App.D.C. 1931. Compensation award based on conjecture inconsistent with established facts is "not in accordance with law". 33 U.S.C.A. § 921(b).—New Amsterdam Casualty Co. v. Hoage, 46 F.2d 837, 60 App.D.C. 40.—Work Comp 1939.1.

C.C.A.9 (Or.) 1941. Where deputy commissioner intended to apply provision of the Longshoremen's Compensation Act that claimant's average annual earnings shall be such sum as, having regard

to claimant's previous earnings and earnings of other employees of the same or most similar class, shall reasonably represent claimant's annual earning capacity, but deputy commissioner did not consider previous earnings of other employees of the same or most similar class, deputy commissioner's award was not conclusive, because "not in accordance with law," within the meaning of the act and was properly set aside. Longshoremen's and Harbor Workers' Compensation Act §§ 10(c), 21(b), 33 U.S.C.A. §§ 910(c), 921(b).—Fireman's Fund Ins. Co. v. Peterson, 120 F.2d 547.—Work Comp 818, 1939.1, 1947.

C.C.A.4 (W.Va.) 1930. The statute does not contemplate a hearing *de novo* in the District Court or authorize the court to weigh the evidence taken before the Deputy Commissioner or review the facts as found by him. The compensation order may be set aside only if "not in accordance with law," i.e. if based on error of law, or not supported by any substantial evidence, or manifestly arbitrary and unreasonable.—Wheeling Corrugating Co. v. McManigal, 41 F.2d 593.

S.D.Cal. 1945. Attack upon application of Emergency Price Control Act and regulations imposed thereunder to price of gasoline on grounds of arbitrariness, unreasonableness and unconstitutionality was within exclusive province of Emergency Court of Appeals under provision of act giving such court jurisdiction to determine whether matter complained of is "not in accordance with law, or is arbitrary or capricious" by reason of specific reference to arbitrariness and capriciousness and since the phrase "not in accordance with law" covers both unconstitutionality and unconstitutional application of the act. Emergency Price Control Act of 1942, § 204(b) (d), 50 U.S.C.A.App. § 924(b) (d).—Bowles v. Crew, 59 F.Supp. 809.—Fed Cts 1140.

D.D.C. 1976. Although regulation, fixing return on equity component of noncompensable costs for which medicare providers are entitled to reimbursement, was not made pursuant to determination by Secretary of Health, Education and Welfare as to actual level of return needed in order to prevent nonmedicare patients from carrying burden of paying for costs of servicing medicare patients, and was thus "not in accordance with law" within meaning of Administrative Procedure Act, setting aside of such regulation would be delayed until new regulation could be issued, and Secretary would be directed to proceed with all deliberate speed in making necessary determinations and issuing new regulation. 5 U.S.C.A. § 706(2)(A); Social Security Act, §§ 1814, 1861(v)(1)(A, B), 42 U.S.C.A. §§ 1395f, 1395x(v)(1)(A, B).—Humana of South Carolina, Inc. v. Mathews, 419 F.Supp. 253, affirmed in part, reversed in part 590 F.2d 1070, 191 U.S.App.D.C. 368, appeal after remand Humana, Inc. v. Heckler, 758 F.2d 696, 244 U.S.App.D.C. 376, certiorari denied 106 S.Ct. 791, 474 U.S. 1055, 88 L.Ed.2d 769.—Health 556(1).

E.D.La. 1941. If it appeared from actual finding of deputy commissioner that provisions of Longshoremen's Compensation Act did not in fact apply

to situation which deputy investigated with respect to death of a bargeman, any award of compensation attempted to be made under the act for bargeman's death was "not in accordance with law" and would be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, as provided by the act. Longshoremen's and Harbor Workers' Compensation Act § 1 et seq., and § 21(b), 33 U.S.C.A. § 901 et seq., and § 921(b).—Glens Falls Indem. Co. v. Henderson, 42 F.Supp. 528, reversed 134 F.2d 320, certiorari denied 63 S.Ct. 1175, 319 U.S. 756, 87 L.Ed. 1709.—Work Comp 1947.

E.D.La. 1941. Where deputy commissioner's finding in proceedings for compensation for death of bargeman established on its face that bargeman was a member of a crew engaged in navigating a flotilla of barges upon navigable waters of United States when he fell from a barge and was drowned, an award of compensation under Longshoremen's Compensation Act for death of bargeman was "not in accordance with law" and would be set aside, since bargeman's employment status at time of death was not within the act. Longshoremen's and Harbor Workers' Compensation Act § 1 et seq., and §§ 20, 21(b), 33 U.S.C.A. § 901 et seq., and §§ 920, 921(b).—Glens Falls Indem. Co. v. Henderson, 42 F.Supp. 528, reversed 134 F.2d 320, certiorari denied 63 S.Ct. 1175, 319 U.S. 756, 87 L.Ed. 1709.—Work Comp 1947.

E.D.Pa. 1996. A 19-month delay by Administrator of Environmental Protection Agency (EPA) in preparing and publishing proposed water quality standard for state whose standard EPA had disapproved violated regulation requiring EPA to "promptly" propose and promulgate changes specified in disapproval notice and, thus, failure of Administrator and EPA to act was "not in accordance with law," within meaning of Administrative Procedure Act (APA) section requiring court to hold unlawful and set aside agency action found to be not in accordance with law. 5 U.S.C.A. § 706(2)(A); 33 U.S.C.A. § 1313(c)(3, 4); 40 C.F.R. § 131.22(a).—Raymond Proffitt Foundation v. U.S. E.P.A., 930 F.Supp. 1088.—Admin Law 392.1; Environ Law 188, 672.

E.D.Pa. 1996. When agency fails to act in compliance with its own regulations, such actions are "not in accordance with law," within meaning of Administrative Procedure Act (APA) section requiring court to hold unlawful and set aside agency action not in accordance with law. 5 U.S.C.A. § 706(2)(A).—Raymond Proffitt Foundation v. U.S. E.P.A., 930 F.Supp. 1088.—Admin Law 763.

Md.App. 1996. Agency decision is "not in accordance with law" when it is arbitrary, illegal or capricious; in making a determination whether decision is arbitrary, illegal or capricious, reviewing court must decide whether question before agency was fairly debatable; issue is "fairly debatable" if reasonable persons could have reached a different conclusion on the evidence and, if so, reviewing court may not substitute its judgment for that of agency; fairly debatable test is analogous to clearly erroneous standard under rule and a decision is

fairly debatable if it is supported by substantial evidence on the record taken as a whole. Md.Rule 8-131(c).—Ahalt v. Montgomery County, 686 A.2d 683, 113 Md.App. 14.—Admin Law 763, 789, 791.

### **NOT IN A DEFECTIVE CONDITION**

Ga.App. 2002. For purposes of rule that a duty to warn can arise even if a product is not defective, a product is "not in a defective condition" when it is safe for normal handling and consumption.—Hunter v. Werner Co., 574 S.E.2d 426, 258 Ga.App. 379, certiorari denied.—Prod Liab 14.

### **NOT INCLUDING**

C.A.7 (Ill.) 1972. Within section of the federal antitrust statute reciting that the incitement prohibited therein shall not mean "the mere oral or written (1) advocacy of ideas or (2) expression of belief, not involving advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts," the "not including" phrase was not intended as an exception to the exemption so as to provide punishment for mere advocacy; it was intended to forestall any claim that a truly inciting, action-propelling speech constitutes mere advocacy of ideas or expression of belief excluded under phrases (1) and (2). 18 U.S.C.A. § 2102(b).—U.S. v. Dellinger, 472 F.2d 340, 22 A.L.R. Fed. 159, certiorari denied 93 S.Ct. 1443, 140 U.S. 970, 35 L.Ed.2d 706.—Riot 1.

Ala. 1890. The word "except" means "not including."—Austin v. Willis, 8 So. 94, 90 Ala. 421.

### **NOT INCLUDING SIDEWALKS**

Ala. 1906. Under Avondale City Charter, Acts 1894-95, p. 139, § 12, declaring that not more than one-third of the cost of street improvements should be assessed against abutting property owners, "not including sidewalks" an assessment against property owners for the entire cost of "guttering" was erroneous.—Harton v. Town of Avondale, 41 So. 934, 147 Ala. 458.—Mun Corp 460.

### **NOT IN CONFLICT**

Or. 1993. Words "subject to" contained in constitutional provision permitting the enactment of municipal charter "subject to" Constitution and criminal laws of state, means "not in conflict" with Constitution and criminal laws. Const. Art. 11, § 2.—City of Portland v. Jackson, 850 P.2d 1093, 316 Or. 143.—Mun Corp 79.

### **NOT IN CONFLICT WITH**

Va. 1898. In a clause of a charter conferring general power of taxation on a city, and providing that it shall be exercised "in accordance with" the Constitution and laws of the state, the language "in accordance with" is the equivalent of "not repugnant to," "not in conflict with," or "not inconsistent with" the laws of the state, and does not limit or confine the taxing power of the city to the provisions of the general law.—City of Norfolk v. Norfolk Landmark Pub. Co., 28 S.E. 959, 95 Va. 564.

**NOT INEFFECTIVENESS OF****NOT IN CONFLICT WITH GENERAL LAWS**

Ohio App. 9 Dist. 1982. Words “not in conflict with general laws,” in constitutional home rule article, place a limit on power to adopt and enforce local police, sanitary and other similar regulations but not on the power of local self-government. Const. Art. 18, § 3.—Hills & Dales, Inc. v. City of Wooster, 448 N.E.2d 163, 4 Ohio App.3d 240, 4 O.B.R. 432.—Mun Corp 65.

Ohio Com.Pl. 1969. Words “general laws” as used in phrase “not in conflict with general laws” in Home Rule provision of State Constitution, refers to laws enacted by General Assembly. Const. art. 18, § 3.—Foltz v. City of Dayton, 254 N.E.2d 395, 22 Ohio Misc. 27, 50 O.O.2d 384, 51 O.O.2d 55, affirmed 272 N.E.2d 169, 27 Ohio App.2d 35, 56 O.O.2d 213.—Mun Corp 65.

**NOT INCONSIDERABLE**

C.A.9 (Cal.) 1968. Evidence of events occurring more than six months before filing of charge by union may be used to “shed light” upon events taking place within six-month period, but evidence of violation of National Labor Relations Act drawn from that period must be reasonably substantial in its own right, “substantial” meaning “significant” or “not inconsiderable,” and not necessarily sufficient to sustain unfair labor practice finding in enforcement proceedings. National Labor Relations Act, §§ 8(a) (5), 10(b) as amended 29 U.S.C.A. §§ 158(a) (5), 160(b).—N. L. R. B. v. MacMillan Ring-Free Oil Co., 394 F.2d 26, certiorari denied Oil, Chemical and Atomic Workers Intern Union, Long Beach Local No 1-128 v. N L R B, 89 S.Ct. 237, 393 U.S. 914, 21 L.Ed.2d 199.—Labor 541, 552.

**NOT INCONSISTENT**

Ala.App. 1942. Under local law requiring civil service personnel director in Mobile county to recommend to personnel board a pay plan for employees in classified service, and providing that such plan shall include, for each class of positions, a minimum and a maximum rate “not inconsistent” with such rates as may otherwise in specific instances “be fixed by law”, the quoted words confine director’s suggested plan to rates of pay already fixed by law, but do not restrict the board which may adopt, modify, or reject entirely the proposed plan. Loc.Acts 1939, pp. 299, 300, 304, 305, 307, §§ 1-4, 7, subds. 1-9, 8, 9, 11.—Stone v. State ex rel. Goetz, 8 So.2d 208, 30 Ala.App. 489.—Counties 69.

Wash.App. Div. 1 1992. For purposes of superior or court rule which allows superior court to enact local rules “not inconsistent” with superior court civil rules, court rules are “inconsistent” only when they are so antithetical that it is impossible as matter of law that they can both be effective; ultimate test is whether two rules can be reconciled and both given effect. CR 83(a).—King County v. Williamson, 830 P.2d 392, 66 Wash.App. 10.—Courts 78.

**NOT INCONSISTENT WITH**

D.Alaska 1989. Local admiralty rule could not be considered “not inconsistent with” federal supplemental rules for certain admiralty and maritime claims to extent that it required prearrest proceedings vis-à-vis vessels different from supplemental rules, and suspension of proceedings under local rule was appropriate; although proceedings under local rule were not in overt conflict with supplemental rules, local rule imposed procedural obligations beyond those required by supplemental rules. U.S.Dist.Ct.Rules D.Alaska, Admiralty & Maritime Claims Rules 4, 4(B, D); Supplemental Admiralty and Maritime Claims Rules C(3), E(4)(f), 28 U.S.C.A.; Fed.Rules Civ.Proc.Rule 83, 28 U.S.C.A.—Markham v. F/V Borland Drive, 741 F.Supp. 188.—Adm 48.

Va. 1898. In a clause of a charter conferring general power of taxation on a city, and providing that it shall be exercised “in accordance with” the Constitution and laws of the state, the language “in accordance with” is the equivalent of “not repugnant to,” “not in conflict with,” or “not inconsistent with” the laws of the state, and does not limit or confine the taxing power of the city to the provisions of the general law.—City of Norfolk v. Norfolk Landmark Pub. Co., 28 S.E. 959, 95 Va. 564.

**NOT INCONSISTENT WITH STATUTE**

Cal.App. 1 Dist. 1995. When evaluating whether rule of court is “not inconsistent with statute” within meaning of state constitution, court must determine legislative intent behind statutory scheme that rule was intended to implement, and measure rule’s consistency with that intent; constitutional inconsistency with statutes does not require an impossibility of concurrent operative effect. West’s Ann.Cal. Const. Art. 6, § 6.—California Court Reporters Assn. v. Judicial Council of California, 46 Cal.Rptr.2d 44, 39 Cal.App.4th 15, review denied.—Courts 85(1).

**NOT IN CONSONANCE WITH**

Tenn. 1938. The expression “not in consonance with” means not in accord or agreement with, inconsistent with.—Caldwell v. Huffstutter, 116 S.W.2d 1017, 173 Tenn. 225.

**NOT IN DEFAULT**

N.Y.City Civ.Ct. 1998. Plaintiff, who elected to participate in compulsory arbitration proceeding and try claim on promissory note through his attorney, rather than appearing personally, was “not in default,” for purposes of civil court compulsory arbitration rule permitting demand of a trial de novo only by a party not in default. N.Y.Ct.Rules, § 28.12.—Wugalter v. Constable Merchandising Corp., 684 N.Y.S.2d 851, 179 Misc.2d 312.—Arbit 73.7(4).

**NOT INEFFECTIVENESS OF COUNSEL**

Pa.Super. 1976. Refusal to allow defense counsel to inspect and comment on presentence report was error requiring remand for resentencing in

burglary prosecution, but fact that counsel had failed to obtain inspection was "not ineffectiveness of counsel." 18 Pa.C.S.A. § 3502; Pa.R.Crim.P., Rule 1404.—Com. v. Stanton, 362 A.2d 355, 239 Pa.Super. 47, reversed 388 A.2d 1053, 479 Pa. 521.—Crim Law 641.13(2.1), 1181.5(8).

**NOT INFAMOUS**

W.D.Mo. 1939. The classification of offenses as "felonies" and "misdemeanors," and as offenses as "infamous" and "not infamous," depends upon sentence possible under a statute and not upon nature of the offense.—U.S. v. Carrollo, 30 F.Supp. 3.—Crim Law 27.

**NOTING**

Minn. 1952. A reference in a certificate of title to a recorded plat upon which a restrictive covenant as to usage has been placed on reverse side does not constitute a "noting" of the encumbrance on the certificate within meaning of Torrens Act.—Kane v. State, 55 N.W.2d 333, 237 Minn. 261.

**NOT IN GOOD FAITH**

Cal.App. 4 Dist. 1970. Terms "improper purpose" and "not in good faith" as used in statute authorizing trial court to "expunge lis pendens" on ground that action was commenced for an improper purpose and not in good faith are overlapping and must be defined if construed together in light of purpose for which statute was enacted. West's Ann.Code Civ.Proc. § 409.1(b).—United Professional Planning, Inc. v. Superior Court, 88 Cal.Rptr. 551, 9 Cal.App.3d 377.—Lis Pen 20.

Tenn. 1916. In Acts 1901, c. 141, § 1, as to penalties for refusing to pay a loss, the words "not in good faith" are antithetical to "in good faith," and imply a lack of good or moral intent as the motive for refusal to pay the loss.—Silliman v. International Life Ins. Co., 188 S.W. 273, 135 Tenn. 646.—Insurance 3336.

**NOT IN NATURE OF A TESTAMENTARY DISPOSITION**

Ill.App. 5 Dist. 1975. If an individual fully, and in fact, parts with control of an object, real or personal, the conveyance is "not in nature of a testamentary disposition," but if individual who purports to part with control of an object, real or personal, while actually retaining power to revoke the transfer unilaterally until his death, the conveyance is "in nature of a testamentary disposition" and subject to requirements of Probate Act. S.H.A. ch. 3, § 1 et seq.—Berry v. Berry, 336 N.E.2d 239, 32 Ill.App.3d 711.—Wills 88(1).

**NOT IN ODD-LOT CATEGORY**

Or.App. 1976. Claimant, who, while employed as a concrete finisher, suffered pain and swelling in left arm, involuntary twitching and stiffness of the arm after catching himself from falling from scaffolding by wrapping an arm and leg around beam and who was found by doctors to have a mildly moderate functional overlay, was "not in odd-lot

category," in view of indication that such 62-year-old claimant was not highly motivated to remain in labor force.—Harrison v. State Acc. Ins. Fund, 547 P.2d 164, 24 Or.App. 799.—Work Comp 878.

**NOT INSANE**

C.A.D.C. 1969. Under Sexual Psychopath Act, term "not insane" must be read to mean "not 'mentally ill'" within meaning of new civil commitment statute, and the Sexual Psychopath Act applies only to those who are not mentally ill while compulsory treatment of those who are mentally ill is governed by the 1964 Civil Commitment Act. D.C.C.E. §§ 21-501 to 21-591, 22-3503 to 22-3511.—Cross v. Harris, 418 F.2d 1095, 135 U.S.App.D.C. 259.—Mental H 36, 454.

C.A.D.C. 1968. Words "not insane" as used in District of Columbia Sexual Psychopath Act means "not mentally ill". D.C.C.E. § 22-1112(a).—Millard v. Harris, 406 F.2d 964, 132 U.S.App.D.C. 146.—Mental H 454.

**NOT INSUBSTANTIAL**

C.A.10 (Colo.) 1973. A tying arrangement is a per se Sherman Act violation if the seller has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of commerce is foreclosed to competitors. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 3, 15 U.S.C.A. § 14.—Colorado Pump & Supply Co. v. Febco, Inc., 472 F.2d 637, certiorari denied 93 S.Ct. 2274, 411 U.S. 987, 36 L.Ed.2d 965.—Monop 17.5(7).

N.D.Cal. 1974. A "not insubstantial" amount of interstate commerce is affected by a tying arrangement if a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.—Jack Winter, Inc. v. Koratron Co., Inc., 375 F.Supp. 1, opinion supplemented Koratron Co., Inc. v. Lion Uniform, Inc., 409 F.Supp. 1019.—Monop 17.5(4).

**NOT INSURED**

C.A.6 (Ohio) 1997. Under Ohio law, property insurance policy providing primary coverage on difference in conditions (DIC) basis only when peril was "not insured" under specific primary policy required more than denial of coverage—it required demonstration by insured that it was legally or practically unable to recover from listed primary carrier despite diligent efforts; primary insurer's denial of insurance claim would not indicate future successful judicial outcome.—Sherwin-Williams Co. v. Insurance Co. of Pennsylvania, 105 F.3d 258, 1997 Fed.App. 30P.—Insurance 2191.

Ariz.App. Div. 1 1970. "Uninsured", within uninsured motorist statute, means, literally, "not insured". A.R.S. §§ 20-259.01, 28-1142, subsec. C.—Harsha v. Fidelity General Ins. Co., 465 P.2d 377, 11 Ariz.App. 438.—Insurance 2772.

**NOT INVOLVING ANY**

Minn. 1985. When an employer claims it had workers' compensation insurance on date of injury, and insurer denies coverage, employer is "not insured" until such time as employer proves that coverage exists, for purposes of statute providing for payment of benefits from special compensation fund for employer who is either not insured or self-insured. M.S.A. § 176.183, subd. 1.—Olsen v. Kling, 363 N.W.2d 310.—Work Comp 1057.

**NOT INTERESTED**

Me. 1893. Members of a committee appointed on appeal from county commissioners in proceedings to lay out a highway are "disinterested," though owning lands liable to taxation in the town through which the highway passes. The requirement to be "disinterested" is the equivalent of "not interested." The liability to taxation is not such an interest as disqualifies an action.—Selectmen of Andover v. Oxford County Com'r's, 29 A. 982, 86 Me. 185.

**NOT IN THE PUBLIC INTEREST**

Iowa 1955. Proposed transfer of land by municipal corporation to private charitable foundation for erection of building to house community chest and foundation, under nonmunicipal control, and for proposed consideration of 1/32 the admitted value of such property, was not in the "public interest" within statute authorizing appeal from action of city in sale of real property which is "not in the public interest". I.C.A. §§ 368.39, 368.40.—Gritton v. City of Des Moines, 73 N.W.2d 813, 247 Iowa 326.—Mun Corp 225(1).

**NOT IN THE SAME EMPLOY**

Ind.App. 1 Dist. 1983. In creating the exception for injuries sustained as a result of the acts of someone not in the same employ to the exclusivity provision of the Workmen's Compensation Act, legislature limited the possibility of bringing suit against individuals to those other than the employer or fellow employee; the language "not in the same employ" specifically preserves a coemployee's immunity from common-law liability for accidents found to have arisen out of and in the course of employment. IC 22-3-2-6, 22-3-2-13 (1982 Ed.)—Skinner v. Martin, 455 N.E.2d 1168.—Work Comp 2168.

Okl.App. Div. 2 1981. Where plaintiff was injured by employer's subcontractor, principal employer being engaged in business of drilling oil wells and independent contractor being engaged in business of erecting drilling rigs, and where, until rig was erected, plaintiff's employer simply could not function, task was "integral" and, common task being inherently integral to principal employer's overall function, plaintiff was "in the same employ" as defendant subcontractor and its employees, within statute preserving worker's common-law right to recover in tort against another "not in the same employ." 85 O.S.1971, §§ 1 et seq., 44(a).—Alvis v. Bill Jackson Rig Co., Inc., 636 P.2d 910, 1981 OK CIV APP 65.—Work Comp 2168.

Or. 1947. Under statute providing that if injury to workman is due to negligence of a third person "not in the same employ" the injured workman may elect to seek a remedy against third person, no election may be made to sue the third person if the third person is in the same employ as injured person, and the injured workman must be satisfied with compensation awarded him by Industrial Accident Commission. ORS 656.152, 656.154.—Kowcun v. Bybee, 186 P.2d 790, 182 Or. 271.—Work Comp 2168.

Wash. 1967. Under section of Industrial Insurance Act providing that if injury to workman is due to negligence or wrong of another not in the same employ the injured workman shall elect whether to take under Act or seek remedy against such other, phrase "not in the same employ" contemplates actionable negligence by person not a fellow servant of the same employer and does not immunize from suit persons outside scope of employer-employee relationship. RCWA 51.24.010.—Marsland v. Bullett Co., 428 P.2d 586, 71 Wash.2d 343.—Work Comp 1105, 2158, 2171.

**NOT IN THIS CASE**

Md.App. 1969. Judge's written answer of "not in this case" to jury's written question whether a recommendation could be made upon return of verdict was an instruction as to form of verdict and as to the law, and its communication to the jury constituted a "stage of trial", at which defendant had an absolute right to be present. Maryland Rules, Rule 758 e.—Sweeney v. State, 252 A.2d 9, 6 Md.App. 431.—Crim Law 636(7).

**NOT IN USUAL COURSE OF TRADE, BUSINESS, OR OCCUPATION**

Minn. 1933. Employment as property man in circus performing for week under auspices of fraternal organization held "casual" and "not in usual course of trade, business, or occupation" of such organization. Mason's Minn.St.1927, § 4268 (M.S.A. § 176.05).—Houser v. Osman Temple Ancient Arabic Order Nobles of Mystic Shrine, 248 N.W. 827, 189 Minn. 239.—Work Comp 283.

**NOT IN VIOLATION OF**

C.A.D.C. 1976. Under CAB regulation requiring tariff rules governing carriage of hazardous goods to be in conformity with applicable FAA/DOT safety regulations, CAB may not require air carriers to transport every article which complies with FAA/DOT safety regulations without first affording carriers a hearing for purpose of considering those issues reserved to CAB, not FAA, and phrase "in conformity with," means "not in violation of". Federal Aviation Act of 1958, §§ 1002, 1111, 49 U.S.C.A. §§ 1482, 1511.—Delta Air Lines, Inc. v. C. A. B., 543 F.2d 247, 177 U.S.App.D.C. 100.—Aviation 102.

**NOT INVOLVING ANY PUBLIC OFFERING**

U.S.Mo. 1953. In order for offering of stock by corporation to be "public offering" within contemplation of provision of Securities Act exempting

transactions by an issuer “not involving any public offering” from registration requirements of the act, an offer need not be open to the whole world. Securities Act of 1933, §§ 4(1), 5(a), as amended by Securities Exchange Act of 1934, §§ 203, 204, 15 U.S.C.A. §§ 77d(1), 77e(a).—Securities and Exchange Commission v. Ralston Purina Co., 73 S.Ct. 981, 346 U.S. 119, 97 L.Ed. 1494.—Sec Reg 18.11.

C.A.10 (Okla.) 1959. In determining whether a “public offering of securities” is made within registration requirements of the Securities Act, characterization of the offering does not turn on the number of persons to whom the offer is made and the number and amount and manner of the offering are distinctly relevant, and the accepted criterion is whether the particular class of persons affected need the protection of the Act and an offering to those who are able to fend for themselves is a transaction “not involving any public offering” and is exempt from registration requirements. Securities Act of 1933, §§ 7, 12(1) as amended 15 U.S.C.A. §§ 77g, 77l (1).—Woodward v. Wright, 266 F.2d 108.—Sec Reg 18.13.

D.Colo. 1959. In determining whether sale of unregistered securities is exempt from Securities Act provisions on ground that transaction is one “not involving any public offering”, accepted criterion is whether the particular class of persons affected need protection of the act, and an offering to those who are shown to be able to fend for themselves is a “transaction not involving any public offering.” Securities Act of 1933, § 4, 15 U.S.C.A. § 77d.—Repass v. Rees, 174 F.Supp. 898.—Sec Reg 18.13.

#### **NOT INVOLVING CONTROVERTED ISSUES OF FACT**

Colo. 1978. Phrase “not involving controverted issues of fact” in rule specifying when motion for new trial is not necessary as jurisdictional prerequisite for appellate review pertains to hearings in which underlying facts and circumstances are not in dispute. Rules of Civil Procedure, rules 59, 59(h), 60(b).—Rowe v. Watered Down Farms, 576 P.2d 172, 195 Colo. 152.—App & E 281(1).

#### **NOTION**

Mo. 1907. While the word “opinion,” in a close and strict sense, means a court’s decision upon pleadings and facts duly presented in a cause, yet in a broader sense it means one’s “notion,” “idea,” “view,” or even one’s “sentiments.”—Ex parte Clark, 106 S.W. 990, 208 Mo. 121, 15 L.R.A.N.S. 389.

#### **NOTIONAL AMOUNT**

S.D.Cal. 2000. “Plain vanilla interest rate swap” is transaction whereby one party obligates itself to make payments equal to the interest which would accrue on an agreed hypothetical principal amount, the “notional amount,” during given period at specified fixed rate of interest, while other party must pay amount equal to interest which would accrue on this same notional amount, during the same period, but at a floating interest rate; thus, if fixed

rate that first party agreed to pay exceeds the floating rate that second party agreed to pay, then first party must pay amount equal to the difference between these two rates multiplied by the notional amount, and vice versa.—In re Thrifty Oil Co., 249 B.R. 537.—Contracts 193.

Bkrcty.S.D.Cal. 1997. Under swap agreement, cash flows are calculated by multiplying respective interest rates by notional amount; the “notional amount” is an agreed principal amount against which accruing interest obligations between parties are calculated.—In re Thrifty Oil Co., 212 B.R. 147, affirmed 249 B.R. 537.—Contracts 193.

#### **NOTION OF STRICT ECONOMY**

C.A.1 (Mass.) 1985. Under “notion of strict economy,” concept prevalent under Bankruptcy Act of 1898 [Bankr.Act, § 1 et seq., 11 U.S.C. (1976 Ed.) § 1 et seq.], attorneys are not expected to be compensated as generously for their services as they might be if privately employed.—Boston and Maine Corp. v. Sheehan, Phinney, Bass & Green, P.A., 778 F.2d 890.—Bankr 3193.

#### **NOTIONS**

Minn. 1882. The “baggage” of a passenger, which a common carrier is required to carry safely as a part of his contract with the passenger, is the passenger’s personal baggage, and does not include goods, wares, and merchandise, commonly called “notions,” carried in a valise belonging to the passenger.—Haines v. Chicago, St. P., M. & O.R. Co., 12 N.W. 447, 29 Minn. 160, 43 Am.Rep. 199.

N.Y.Mun.Ct. 1959. Where earrings and cufflinks had wholesale value of less than \$1 a pair and contained no precious stones, precious metals or extraordinary craftsmanship, earrings and cufflinks were “notions” which could be shipped subject to that freight classification of carrier and were not “jewelry” not acceptable for shipment under carrier’s classification rules, and consequently carrier was liable for loss of earrings and cufflinks shipped as notions, and bill of lading did not exonerate carrier from liability on any theory that earrings and cufflinks were jewelry.—Dantzig v. Universal Carloading & Distributing Co., 185 N.Y.S.2d 718, 17 Misc.2d 928.—Carr 156(1).

#### **NOT ISOLATED**

Or. 1990. Continuity is not necessary element of state RICO’s requirements for “pattern of racketeering activity”; phrase “not isolated,” within meaning of statute defining “pattern of racketeering activity,” does not add temporal element but, rather, describes relationship between or among predicate acts, including their nexus to same enterprise. ORS 166.715(4).—Computer Concepts, Inc. v. Brandt, 801 P.2d 800, 310 Or. 706, appeal after remand 905 P.2d 1177, 137 Or.App. 572, review denied 916 P.2d 312, 323 Or. 153.—RICO 28.

#### **NOT JUSTIFIED**

C.A.3 (Pa.) 1964. Within Natural Gas Act provision that where increased rates are made effec-

tive, commission may require company to furnish bond for refund of portion found “not justified” the quoted phrase does not mean “not just and reasonable,” and the section is not limited in its application to rates found unreasonable but includes as well increased rates otherwise found to be unlawful. Natural Gas Act, § 4(d), 15 U.S.C.A. § 717c(d).—Shell Oil Co. v. Federal Power Commission, 334 F.2d 1002.—Gas 14.3(4).

#### **NOT JUSTIFIED BY THE EVIDENCE**

Ariz. 1964. In civil paternity suit trial court’s order granting state a new trial on ground that verdict was “contrary to weight of evidence” came within rule permitting court to grant a new trial where verdict is “not justified by the evidence.” 16 A.R.S. Rules of Civil Procedure, rule 59(a)8.—State v. Ross, 396 P.2d 619, 97 Ariz. 51.—Child 62.

#### **NOT KNOWING**

Ark. 1907. The words “not knowing” or “having no reasonable grounds to suspect,” or “knew” or “know,” or “had reasonable grounds to suspect,” when used in an instruction in an action for injuries to a passenger while attempting to board a train in consequence of the starting of the train, relating to the knowledge or want of knowledge of the conductor in starting the train before the passenger had boarded it, are legal equivalents.—Choctaw, O. & G.R. Co. v. Hickey, 99 S.W. 839, 81 Ark. 579.—Carr 321(1).

#### **NOT KNOWN**

C.A.1 (Puerto Rico) 1995. District court had jurisdiction to reduce defendant’s sentence for changed circumstances consisting of defendant’s cooperation in prosecution of one of her associates, even though information she provided to government literally was known to her at time of sentencing; unless defendant was aware of value of information, such information was “not known” to defendant at time of sentencing within meaning of rule allowing reductions of sentences. Fed.Rules Cr.Proc.Rule 35(b), 18 U.S.C.A.—U.S. v. Morales, 52 F.3d 7.—Sent & Pun 2260.

#### **NOT KNOWN OR USED BY OTHERS**

D.Md. 1930. Phrase, “not known or used by others,” in statute authorizing design patents, means not so known or used as to be accessible to public (35 USCA 73). The phrase, “not known or used by others,” in 35 USCA 73, authorizing issuance of patent on design for article not so known or used, means not known or used in such manner as to be accessible to the public.—Cooper v. Robertson, 38 F.2d 852, reversed 46 F.2d 766.—Pat 51(1).

D.Md. 1930. Phrase “not known or used by others,” in statute authorizing design patents, means not so known or used as to be accessible to public. 35 U.S.C.A. § 73.—Cooper v. Robertson, 38 F.2d 852, reversed 46 F.2d 766.—Pat 51(1).

#### **NOT LATER THAN**

##### **NOT LATER THAN**

C.C.A.6 (Tenn.) 1940. The words “not later than” as used in statute providing that whenever an indictment is found defective before limitation has expired, and limitation will expire before end of next regular term of court to which indictment was returned, a new indictment may be returned “not later than” end of next term, are synonymous with the words “at any time prior to.” 18 U.S.C.A. 588.—Hughes v. U.S., 114 F.2d 285.—Crim Law 160.

Ark. 1949. Phrase “not later than” is synonymous with phrase “at any time prior to”.—Hastings v. Nash, 219 S.W.2d 225, 215 Ark. 38.

Conn. 1979. “Within” as used in statute requiring service of notice of administrative appeal on all parties within 30 days of final decision of the agency means “not later than.” C.G.S.A. § 4-183(b).—Royce v. Freedom of Information Commission, 418 A.2d 939, 177 Conn. 584.—Admin Law 722.1.

Conn.Cir.A.D. 1968. The word “within” in statute providing that appeal from judgment in summary process action must be taken within five days from date of judgment, excluding Sundays and holidays, means “not longer in time than” and “not later than”. C.G.S.A. § 52-542.—Connecticut Betterment Corp. v. Ponton, 250 A.2d 340, 5 Conn.Cir. Ct. 265.—Land & Ten 315(2).

Del.Spr. 1972. Within statute providing that state employees shall be paid semi-monthly, with “the first payment to be made on or before the fifteenth day of each calendar month \* \* \* for the period from the sixteenth day of the preceding calendar month to the last day of the preceding calendar month,” and making parallel provision for the second payment, words “on or before” mean “not later than”; thus statute sets latest but not earliest date for payment of salary for specified pay period and does not preclude payment of salaries during the period in which they are earned. 29 Del.C. § 2713.—Council 81, Am. Federation of State, County and Municipal Emp., AFL-CIO v. State, Dept. of Finance, 293 A.2d 567.—States 64(1).

Ga.App. 1918. Declaration in attachment may be filed either at or before first term of court to which attachment is returnable, the word “at,” as used in Civ.Code 1910, § 5102, being equivalent to the words “not later than.”—Smith v. Jacksonville Oil Mill Co., 94 S.E. 900, 21 Ga.App. 679.—Attach 212.

Ga.App. 1912. A telegram, “If can get peanuts out by Friday, ship; answer,” and response, “Order confirmed; will ship by Friday night of this week,” to which no reply was made until the Friday referred to, when the buyer telegraphed a cancellation of the order, constituted a completed contract; the word “Friday” including 24 hours, until 12 o’clock Friday night, and the word “by” being equivalent to “not later than.”—Dukes v. D.L. Gore & Co., 76 S.E. 365, 11 Ga.App. 743.

Ind. 1959. Supreme court rule, allowing parties three days from the granting of a change of venue in which to agree upon county to which venue shall be changed and providing that, in absence of such agreement, "within" two days thereafter, trial court shall submit to parties written list of all adjoining counties, uses quoted word as synonymous with "not later than." Supreme Court Rules, rule 1-12B.—State ex rel. Bickel v. Lake Superior Court, 158 N.E.2d 161, 239 Ind. 388.—Venue 74.

N.Y.A.D. 4 Dept. 1968. The word "within" fixes the time limit beyond which action cannot be taken, but does not fix first point of time at which action shall be taken; it prescribes the end, not the beginning; it means "not longer in time than" or "not later than".—Reifke v. State, 296 N.Y.S.2d 667, 31 A.D.2d 67, affirmed 309 N.Y.S.2d 601, 26 N.Y.2d 859, 258 N.E.2d 96.—Time 15.

N.C. 1897. "By" has many significations, but when used to designate a terminal point of time it is defined by the Century Dictionary to mean "not later than; as early as"; the Standard defines it "not later than"; and Webster, "not later than; as soon as"; and, as used in an agreement that a subscription was not to be binding unless a certain sum was subscribed "by July 1st," meant that the whole amount should be subscribed not later than July 1st.—Elizabeth City Cotton Mills v. Dunstan, 27 S.E. 1001, 121 N.C. 12, 61 Am.St.Rep. 654.

Or. 1965. Under statute providing that a motion for a new trial shall be filed "within" 10 days after filing of judgment, "within" means "not later than" and motion for new trial which was filed prior to entry of judgment was timely in absence of adversary's objection. ORS 17.615.—State Highway Commission v. Fisch-Or, Inc., 399 P.2d 1011, 241 Or. 412, opinion withdrawn in part on rehearing 406 P.2d 539, 241 Or. 412.—New Tr 117(2).

Utah App. 1999. Motion for new trial in civil case may be timely filed before actual entry of judgment, as rule provides for motions to be served "not later than" 10 days after entry of judgment; phrase "not later than" prohibits motions made after due, usual, or proper time, and thus sets outside deadline but does not prohibit early service. Rules Civ.Proc., Rule 59.—Hudema v. Carpenter, 989 P.2d 491, 1999 UT App 290.—New Tr 116.2.

Utah App. 1999. Defendant's post-verdict motions for judgment notwithstanding the verdict (JNOV), to alter or amend the judgment, or for a new trial, filed before entry of judgment on the verdict, were filed "not later than" ten days after entry of judgment, as required by civil procedure rules, and thus, the motions tolled the appeal period. Rules App.Proc., Rule 4(b); Rules Civ.Proc., Rules 50(b), 52(b), 59.—Kurth v. Wiarda, 981 P.2d 417, 1999 UT App 153.—App & E 344, 345.1, 346.2.

Utah App. 1999. The requirement in civil procedure rules that a motion for judgment notwithstanding the verdict (JNOV), to alter or amend the judgment, or for a new trial be filed "not later than" ten days after entry of judgment does not require that there be a pre-existing judgment; rath-

er, it sets only a maximum period and does not nullify an otherwise valid motion made before a formal judgment has been entered. Rules Civ. Proc., Rules 50(b), 52(b), 59.—Kurth v. Wiarda, 981 P.2d 417, 1999 UT App 153.—Judgm 199(6), 321; New Tr 116.2.

Utah App. 1999. Plaintiff's motion to reconsider and objection to proposed amended order and judgment, filed several days before entry of the amended order and judgment challenged by the motion, was filed "not later than" ten days after entry of the amended judgment, as required under civil procedure rules. Rules Civ.Proc., Rules 52(b), 59(b, e).—Regan v. Blount, 978 P.2d 1051, 1999 UT App 154.—Judgm 321; New Tr 114.

Utah App. 1999. The requirement in civil procedure rules that a motion to alter or amend the judgment or for a new trial be filed "not later than" ten days after entry of judgment does not require that there be a pre-existing judgment; rather, it sets only a maximum period and does not nullify an otherwise valid motion made before a formal judgment has been entered. Rules Civ.Proc., Rules 52(b), 59(b, e).—Regan v. Blount, 978 P.2d 1051, 1999 UT App 154.—Judgm 321; New Tr 116.2.

Va. 1949. Lease, requiring tenant to give landlord written notice of exercise of renewal of option within 60 days "prior to" expiration of five-year term, required tenant to give notice "not later than" 60 days before expiration date of five-year period.—Berkow v. Hammer, 53 S.E.2d 1, 189 Va. 489.—Land & Ten 86(2).

## NOT LATER THAN SEVEN DAYS FOLLOWING

Del.Super. 1975. Statute which requires that notice consisting of copy of process and complaint served upon Secretary of State be mailed to nonresident defendant motorist "not later than seven days following" the filing of return of service of process on the Secretary requires that the notice be mailed within seven days after the return of service and mailing of notice prior to service on the Secretary of State is defective and requires dismissal of the action. 10 Del.C.Ann. § 3112(b).—Viars v. Surbaugh, 335 A.2d 285.—Autos 235(4).

## NOT LATER THAN THE TIME OF THE SENTENCING HEARING

C.A.5 (Tex.) 2001. Safety value statute, under which defendant may avoid mandatory minimum sentence and receive Sentencing Guidelines sentence if he cooperates with officials "not later than the time of the sentencing hearing" requires disclosure of information by the time of the commencement of sentencing hearing. 18 U.S.C.A. § 3553.—U.S. v. Brenes, 250 F.3d 290, rehearing denied.—Sent & Pun 861.

## NOT LATER THAN 30 DAYS AFTER THE SERVICE OF THE LAST PLEADING DIRECTED TO SUCH ISSUE

Ala.Civ.App. 1991. In homeowner's action against repairman for failure to repair and for negligent repair, repairman's counterclaim for fail-

ure to pay costs of repairs made was “compulsory counterclaim,” and thus, where repairman’s request for jury trial was filed with answer and counterclaim, request was served “not later than 30 days after the service of the last pleading directed to such issue,” and repairman had right to trial by jury. Rules Civ.Proc., Rule 38(b).—Seale v. Dekle, 575 So.2d 1128.—Jury 25(6).

#### **NOT LATER THAN 90 DAYS FROM THIS DATE**

Tex.Com.App. 1927. Provision in deed for delivery of possession “not later than 90 days from this date” means “within” or “not beyond” that time, since, when time is spoken of, any act is within time named that does not extend beyond it.—Hansen v. Bacher, 299 S.W. 225.

#### **NOT LAWFULLY AND JUSTLY DUE**

N.J.Super.A.D. 1974. In statute providing that public officer who obtains for any other person from State, etc., any money, etc., not lawfully and justly due to such person is guilty of high misdemeanor, phrase “not lawfully and justly due” was not unconstitutionally vague on its face or as applied. N.J.S.A. 2A:135-3.—State v. Hanly, 317 A.2d 746, 127 N.J.Super. 436, certification denied 325 A.2d 711, 65 N.J. 578.—Crim Law 13.1(11).

#### **NOT LESS**

U.S. 1954. The Davis-Bacon Act, requiring that wages of workmen on government construction projects be “not less” than minimum wages specified in schedule furnished by Secretary of Labor and that schedule be based upon prevailing rates, does not authorize or contemplate any assurance to successful bidder that specified minima will in fact be the prevailing rates, since the quoted phrase presupposes possibility that bidder might have to pay higher rates. Davis-Bacon Act, §§ 1-6 as amended 40 U.S.C.A. §§ 276a to 276a-5.—United States v. Binghamton Const. Co., 74 S.Ct. 438, 347 U.S. 171, 98 L.Ed. 594, rehearing denied 74 S.Ct. 625, 347 U.S. 940, 98 L.Ed. 1089.—U S 70(30).

U.S. 1954. Even if government construction project contract provision, requiring payment of wages not less than those specified by Secretary of Labor in schedule, were a representation that wages specified were the prevailing wages, contractor’s reliance on such representation could not be deemed justified in view of fact that controlling statute required payment of “not less” than wages specified, since quoted phrase presupposes possibility of higher rates. Davis-Bacon Act, §§ 1-6, 2 as amended 40 U.S.C.A. §§ 276a to 276a-5, 276a-1.—United States v. Binghamton Const. Co., 74 S.Ct. 438, 347 U.S. 171, 98 L.Ed. 594, rehearing denied 74 S.Ct. 625, 347 U.S. 940, 98 L.Ed. 1089.—U S 70(30).

#### **NOT LESS FAVORABLE**

N.D.Ill. 1998. Section of the Illinois accident and health insurance statute allowing regulatory approval of changes to statutorily prescribed policy language if the changes are “not less favorable” to the insured or the beneficiary, though inelegant,

essentially prohibits an insurer from using obfuscating boilerplate or substituting language that is less understandable to the average policyholder; it does not necessarily prohibit changes that reduce coverage. S.H.A. 215 ILCS 5/357.14.—Holloway v. J.C. Penney Life Ins. Co., 4 F.Supp.2d 754, reversed 190 F.3d 838, rehearing and rehearing denied.—Insurance 1773, 1774.

#### **NOT LESS THAN**

Colo. 1942. Under statute providing that certificates of nomination shall be filed “not less than” 45 days before election, a certificate of nomination of town trustees and mayor filed on February 21 was in time for a town election to be held on April 7. ’35 C.S.A. c. 59, § 80; Laws 1941, c. 124, § 7.—Luedke v. Todd, 124 P.2d 932, 109 Colo. 326.—Time 9(1).

Conn. 1958. When so many days “at least” are given to do an act in a statute or “not less than” so many days must intervene, both the terminal days are excluded.—Treat v. Town Plan and Zoning Commission of Town of Orange, 139 A.2d 601, 145 Conn. 136.—Time 9(1).

Del.Supr. 1960. The words “at least” express idea of minimum and nothing more and do not evince legislative intent to require longer time, and even when those words or words “not less than” are used in statute fixing time, days required need not be “clear days”; disapproving Robinson v. Collins, 1 Har. 498; Warrington v. Tull, 5 Har. 107; In re Public Roads, 5 Har. 174; Chambers v. Jones, 1 Penn. 209, 39 A. 1098; State ex rel. Content v. Bay State Gas Co., 4 Penn. 214, 221, 57 A. 291, 292; Jones v. Hinderer, 7 Boyce 516, 108 A. 737.—Santow v. Ullman, 166 A.2d 135, 39 Del.Ch. 427.—Time 3.

Del.Supr. 1960. In light of judicial decisions that statute fixing time of notice as “at least” or “not less than” a specified number of days should be interpreted as requiring “clear days”, fact that Levy Court had held eleven hearings under zoning law and that in each case the period of notice was fifteen days, computed by excluding the first day and including day on which hearing was held, did not constitute an administrative interpretation entitled to weight.—Santow v. Ullman, 166 A.2d 135, 39 Del.Ch. 427.—Zoning 605.

Ga.App. 1992. Provision of employment contract stating that employee could not establish another personal care home in any of three counties “for a period of not less than two years following termination of this Contract” imposed two-year restriction period commencing from date of termination; phrase “not less than” could not be construed as imposing no cap on duration of restriction.—Robinwood, Inc. v. Baker, 425 S.E.2d 353, 206 Ga.App. 202.—Contracts 202(2).

Ga.App. 1952. The term “not less than”, as used in code section giving defendant right to peremptorily challenge twenty jurors whenever offense is punishable by “not less than” four years imprisonment, includes amount of exactly four years.

Code, § 59–805.—Arnold v. State, 71 S.E.2d 102, 86 Ga.App. 160.—Jury 136(5).

Ky. 1954. There is no distinction between the phrases “at least” and “not less than”, when used in connection with publication of notice of a thing to be done, each phrase meaning that the prescribed amount of publication is a mandatory minimum.—City of Olive Hill v. Howard, 273 S.W.2d 387.—Time 15.

Minn. 1972. Phrase “not less than” as used in contract for deed stating that sum due was payable in monthly installments of not less than \$223.84 conferred on purchasers an unqualified right to prepay entire balance as part of any monthly installment.—Peters v. Fenner, 199 N.W.2d 795, 294 Minn. 488.—Ven & Pur 77.

N.Y.A.D. 2 Dept. 1967. Statutes applicable to offense of attempted possession of narcotics prescribed minimum term of imprisonment of “not less than” half of three years and did not prescribe outer limit for minimum term of imprisonment so long as it did not exceed one-half of maximum prescribed for consummation of intended crime itself and phrase “not less than” one and one-half years was not to be read as if it were “not more than” one and one-half years. Penal Law, §§ 261, subd. 2, 1751, subds. 3, 5, 2189.—People v. Jackson, 279 N.Y.S.2d 259, 27 A.D.2d 943.—Controlled Subs 100(2).

N.Y.A.D. 2 Dept. 1940. Under statute providing that murder in second degree is punishable by imprisonment for an indeterminate sentence, minimum of which shall be “not less than” 20 years, and maximum of which shall be for offender’s life, it is not required that the offender be sentenced to term of not less than 20 years, or more than life; insertion of phrase “not less than” being intended to give court discretion to impose longer minimum term than 20 years, where circumstances warrant it. Penal Law, § 1048.—People ex rel. Mummiani v. Lawes, 17 N.Y.S.2d 748, 258 A.D. 643, dismissal denied 29 N.E.2d 671, 284 N.Y. 596.—Homicide 1562.

Or. 1980. Words “not less than,” within statute providing that a redemptioner must give not less than two days nor more than 30 days notice of his intention to apply to sheriff for redemption, mean that there must be not less than two full days between the notice and the act of redemption; overruling *Kirk v. Woods*, 218 Or. 593, 346 P.2d 90. ORS 23.570(1).—First Federal Sav. and Loan Ass’n of Salem v. Gruber, 618 P.2d 1265, 290 Or. 53.—Mtg 606.

Pa. 1925. Contract of employment, providing salary be adjusted not less than every two years, held to require adjustment within two years; ‘every’; “not less than.” A contract providing for employment at a salary to ‘be adjusted not less than every two years from date’ held to require an adjustment within two years and within each similar period thereafter, and not to mean that there was to be no adjustment until after two years; the word ‘every’ being the equivalent of ‘each,’ and the words “not less than” meaning ‘at least.’—Miller v. Rodd, 131 A. 482, 285 Pa. 16.—Mast & S 70(1).

Pa. 1925. Contract of employment, providing salary be adjusted not less than every two years, held to require adjustment within two years; “every”; “not less than.”—Miller v. Rodd, 131 A. 482, 285 Pa. 16.—Mast & S 70(1).

Tex.Civ.App.–Hous. [1 Dist.] 1969. Where workmen’s compensation claimant alleged in his pleadings he had an average daily wage of “at least” \$13, “at least” meant “not less than” and his pleadings did not fix an upper limit to his allegations of his average daily wage before he was injured.—Commercial Union Ins. Co. of New York v. Mabry, 442 S.W.2d 413.—Work Comp 1919.

Wash. 1961. Option agreement providing for payment of purchase price for real and personal property in monthly installments of “not less than” stated amount used quoted words as words of limitation fixing minimum amount of monthly payments and such words also granted to purchasers right to make larger monthly payments.—Paulius v. Fowler, 367 P.2d 130, 59 Wash.2d 204.—Ven & Pur 77.

#### NOT LESS THAN FIVE DAYS BEFORE

Cal. 1918. Service of citation upon alleged incompetent on the 23d gave the court the right to hear the matter on the 28th of the same month under Code Civ.Proc. § 1763 (repealed 1931. See West’s Ann.Prob.Code, § 1461), providing that notice must be given “not less than five days before” the appointed time.—In re Espinosa’s Estate and Guardianship, 175 P. 896, 179 Cal. 189.—Time 9(4).

#### NOT LESS THAN FIVE YEARS

Wash.App. Div. 2 1979. Language “not less than five years,” within meaning of enhanced penalty provision in Uniform Firearms Act, was merely an additional minimum condition to underlying ten-year maximum sentence imposed on defendant, who was convicted of second-degree assault involving use of a firearm, rather than a new term of years to be served separately from underlying sentence; thus, defendant’s 20-year sentence was excessive; overruling *State v. Lewis*, 15 Wash.App. 172, 548 P.2d 587. RCWA 9.41.025, 9A.36.020(1)(c).—State v. Stephens, 591 P.2d 827, 22 Wash.App. 548, review granted 92 Wash.2d 1004, reversed 607 P.2d 304, 93 Wash.2d 186.—Sent & Pun 77.

#### NOT LESS THAN FOUR MONTHS

Ariz.App. Div. 1 1976. Statute requiring filing of initiative petitions no later than five months prior to ensuing general election conflicted with constitutional provision requiring such petitions to be filed not less than four months preceding date of election and was thus invalid; although, when considered alone, words “not less than four months” should be interpreted as providing flexible filing standard subject to change at will by legislature whenever changing conditions might appear to legislature to justify departure from initially mandated constitutional standard, that constitutional filing limitation must be considered in context of legisla-

tive rights reserved in people and when considered in that context, constitutional provision must be construed as reserving minimum filing right in people, not subject to future derogation by legislature. A.R.S. § 19-121[D]; A.R.S. Const. art. 4, pt. 1, § 1(4).—Turley v. Bolin, 554 P.2d 1288, 27 Ariz. App. 345.—Statut 302.

#### **NOT LESS THAN FOUR WEEKS**

Pa. 1904. Act April 4, 1870, P.L. 834, 16 P.S. § 2942, provides that county commissioners, before contracting for the erection of any buildings, shall by advertisement invite sealed proposals according to specifications kept open for the inspection of all persons for at least four weeks before the time appointed for opening the proposals. Held, that the phrase “not less than four weeks” means at least four weeks and the four weeks during which the advertisement must be published or the same four weeks during which the specifications must be of record. The commissioners of a certain county fixed the time for opening the bids for a new courthouse at July 19, 1903. The specifications were deposited in the office of the county commissioners for a period longer than four weeks to such date, and the advertisements were published in two weekly newspapers in the county on June 16th, June 23d, June 30th, and July 7th. Held, that the advertisements complied with the requirements of the act that the advertisement shall be published for not less than four weeks before the contract is awarded.—Commonwealth ex rel. Miller & Sons v. Brown, 59 A. 479, 210 Pa. 29.

#### **NOT LESS THAN ONCE A WEEK FOR THIRTY DAYS**

La. 1931. Statute requiring property to be advertised “not less than once a week for thirty days” requires advertisement once in each calendar week (Act No. 104 of 1878, LSA-R.S. 43:203).—Succession of Valenti, 134 So. 95, 172 La. 290.—Time 6.

#### **NOT LESS THAN ONE NOR MORE THAN FIVE YEARS**

Ohio 1994. Statute providing that offense of failure to appear for sentencing, an unclassified felony, is subject to “not less than one nor more than five years” of imprisonment requires sentencing court to impose definite, not indefinite, term of imprisonment. R.C. §§ 2937.29, 2937.99(A).—State v. Quisenberry, 634 N.E.2d 1009, 69 Ohio St.3d 556, 1994-Ohio-382.—Bail 97(4).

#### **NOT LESS THAN SEVEN DAYS**

Tex.App.-Houston [1 Dist.] 1993. Amended answer was timely filed exactly one week before trial of workers’ compensation claim under rule of procedure which required amended pleadings in workers’ compensation cases to be filed “not less than seven days” before trial; under that rule, day of trial was to be excluded when counting the seven days. Vernon’s Ann.Texas Rules Civ.Proc., Rule 93, subd. 13.—Employers Ins. of Wausau v. Contreras, 860 S.W.2d 264, rehearing denied, and writ denied.—Work Comp 1328.

#### **NOT LESS THAN TEN YEARS OR BY DEATH**

C.C.A.9 (Cal.) 1944. Under statute penalizing aggravation of bank robbery by imprisonment for “not less than ten years or by death” if verdict of jury shall so direct, imprisonment is not limited to ten years and sentence of 27 years is proper on verdict of guilty with recommendation that death sentence be not imposed. 12 U.S.C.A. §§ 588b, 588c.—Carter v. Johnston, 145 F.2d 882, certiorari denied 65 S.Ct. 1012, 324 U.S. 874, 89 L.Ed. 1427, rehearing denied 65 S.Ct. 1190, 325 U.S. 894, 89 L.Ed. 2005.—Rob 30.

#### **NOT LESS THAN THREE WEEKS**

Ky. 1954. Statute requiring ordinance providing for annexation of additional territory to fourth class city to be published for “not less than three weeks” meant that the publication must extend for not less than 21 days, and publication of ordinance in weekly newspaper on January 21, January 28, and February 4 was not sufficient. KRS 81.210.—City of Olive Hill v. Howard, 273 S.W.2d 387.—Time 6.

#### **NOT LESS THAN THREE YEARS**

Utah 1943. In the Habitual Criminal Act, providing that one who has been twice sentenced for “not less than three years” shall be deemed an habitual criminal and sentenced to not less than 15 years for certain offenses, the quoted words describe only crimes punishable by a minimum term of three years, and hence do not include an indeterminate sentence of from one to ten years. Utah Code 1943, 103-1-18.—State v. Walsh, 144 P.2d 757, 106 Utah 22.—Sent & Pun 1251.

#### **NOT LESS THAN TWO BOLTS, OR THE EQUIVALENT**

N.D.Ill. 1997. With respect to “two-bolt rule” of OSHA regulation requiring use of “not less than two bolts, or the equivalent,” to secure steel beams during final placing of the beams before release from hoisting line, phrase “not less than two bolts, or the equivalent” is not unconstitutionally vague; regulation is clear that at no time can employer use less than two bolts when fastening in place a finally positioned object, and although regulation fails to specify what the Department of Labor (DOL) had in mind for the phrase “or the equivalent,” regulation will pass constitutional muster even though it is not drafted with the utmost precision. U.S.C.A. Const. Amend. 5; Occupational Safety and Health Act of 1970, § 2 et seq., 29 U.S.C.A. § 651 et seq.; 29 C.F.R. § 1926.751(a)—U.S. v. Pitt-Des Moines, Inc., 970 F.Supp. 1346.—Labor 9.7.

#### **NOT LESS THAN TWO YEARS, OR FOR LIFE**

Colo. 1946. The statute providing that one found guilty of aggravated robbery shall be confined in a penitentiary for a term of “not less than two years, or for life” means a term of two years to life. ’35 C.S.A. c. 48, § 84.—O’Day v. People, 166 P.2d 789, 114 Colo. 373.—Rob 30.

**NOT LESS THAN 10 DAYS IN ADVANCE**

Tex.Civ.App.—Amarillo 1967. Jury demand made 10 days prior to date case was set for nonjury trial was “not less than 10 days in advance” of that date as required by rule governing application for jury trial so that the jury demand was timely and disregard of it required reversal of judgment and remand of cause. Vernon’s Ann.St.Const. art. 1, § 15; Rules of Civil Procedure, rule 216.—First Bankers Ins. Co. v. Lockwood, 417 S.W.2d 738.—Jury 25(6).

**NOT LESS THAN 10 DAYS PRECEDING THE ELECTION**

Iowa 1918. Posting notices of an election 15 days preceding the election was a proper compliance with a statute requiring that notices be posted “not less than 10 days preceding the election”; no maximum period being fixed.—Crawford v. School Tp. of Beaver, Dallas County, 166 N.W. 702, 182 Iowa 1324.

**NOT LESS THAN 15 DAYS BEFORE THE ELECTION**

Ark. 1918. In prosecution under Kirby’s Dig. § 2783, for suppressing a certificate of nomination, indictment held to show that certificate was filed “not less than 15 days before the election” as required by section 2780 in view of section 7822.—State v. Hunter, 204 S.W. 308, 134 Ark. 443.—Elections 328(3).

**NOT LESS THAN 90 DAYS THEREAFTER**

Mass. 1939. The statute giving person holding county office by election when retirement system becomes operative, who then has completed 6 years service or who shall complete 6 years service after date on which system becomes operative, option, to be exercised “not less than 90 days thereafter” to become a member of the system, was intended to give right to exercise option within 90 days from date of eligibility, and not at some undefined time after expiration of 90 days. G.L.(Ter.Ed.) c. 32, § 28(1); § 21(1)(b), (d), as added by St.1936, c. 400, § 1.—Williams v. Contributory Retirement Appeal Bd., 24 N.E.2d 525, 304 Mass. 601.—Counties 65.

**NOT LONGER IN TIME THAN**

Conn.Cir.A.D. 1968. The word “within” in statute providing that appeal from judgment in summary process action must be taken within five days from date of judgment, excluding Sundays and holidays, means “not longer in time than” and “not later than”. C.G.S.A. § 52–542.—Connecticut Betterment Corp. v. Ponton, 250 A.2d 340, 5 Conn.Cir. Ct. 265.—Land & Ten 315(2).

N.Y.A.D. 4 Dept. 1968. The word “within” fixes the time limit beyond which action cannot be taken, but does not fix first point of time at which action shall be taken; it prescribes the end, not the beginning; it means “not longer in time than” or “not later than”.—Reifke v. State, 296 N.Y.S.2d 667, 31

A.D.2d 67, affirmed 309 N.Y.S.2d 601, 26 N.Y.2d 859, 258 N.E.2d 96.—Time 15.

**NOT MAINTAINING**

Mass. 1990. Town which was member of regional vocational school district “maintained” a vocational school and was not required to pay transportation and tuition costs for student who was denied admission into vocational school but was accepted at another school, for purposes of statutes requiring towns “not maintaining” vocational schools to pay for resident students to attend other vocational schools. M.G.L.A. c. 74, §§ 7, 8, 8A.—Ciaramitaro v. Superintendent of Schools of Saugus, 551 N.E.2d 24, 406 Mass. 867.—Schools 159.

**NOT MANIFESTLY APPROPRIATE TO LAWFUL USE IT MAY HAVE**

Pa.Super. 1979. Words “not manifestly appropriate to lawful use it may have,” within statute governing offense of possession of an instrument commonly used for criminal purposes under circumstances not manifestly appropriate for lawful uses it may have and with intent to employ it criminally, must be construed as meaning manifestly inappropriate to lawful uses instrument may have. 18 Pa.C.S.A. § 907(c)(2).—Com. v. Morgan, 401 A.2d 1182, 265 Pa.Super. 225.—Burg 12.

**NOT MARRIED**

N.Y. 1984. Defendant who, while living apart from his wife pursuant to a family court order of protection, forcibly raped and sodomized her was subject to prosecution for both crimes, since he was statutorily “not married” at time of the offenses and, thus, did not come within “marital exemption” to rape and sodomy, in that the family court order of protection came within the marital-exemption exception for a court order “which by its terms or in its effect requires [spouses to live] apart.” McKinney’s Penal Law §§ 130.00, subds. 2, 4, 130.35, 130.50.—People v. Liberta, 485 N.Y.S.2d 207, 64 N.Y.2d 152, 474 N.E.2d 567, certiorari denied Liberta v. New York, 105 S.Ct. 2029, 471 U.S. 1020, 85 L.Ed.2d 310.—Rape 4; Sod 1.

**NOT MARRIED TO EACH OTHER**

Iowa 1967. The statute permitting consent of one parent only to adoption if parents are “not married to each other” is not restricted to parents of illegitimate children, and divorced parents are within it. I.C.A. § 600.3.—In re Adoption of Ellis, 149 N.W.2d 804, 260 Iowa 508.—Adop 7.2(2).

Iowa 1945. The statute permitting consent of one parent only to adoption if parents are “not married to each other” is not restricted to parents of illegitimate children, and divorced parents are within it. Code 1939, § 10501.3.—In re Karns, 20 N.W.2d 474, 236 Iowa 932.—Adop 7.2(2).

**NOT MATERIAL**

Ga.App. 1908. The words “material” and “not material” are absolutely contradictory in that they exclude all middle ground and together include

everything thinkable.—*Bennett v. Ware*, 61 S.E. 546, 130 Ga. 671.

#### **NOT MEDICALLY NECESSARY**

N.Y.A.D. 3 Dept. 1994. Absent documentation to support the medical basis and specific need for services ordered or prescribed by medicaid provider, provider was guilty of causing claims to be submitted for medical care, services or supplies provided at a frequency or in an amount "not medically necessary," within meaning of statute governing eligibility to participate in medicaid program.—*Roggemann v. Bane*, 614 N.Y.S.2d 593, 206 A.D.2d 622, leave to appeal denied 621 N.Y.S.2d 518, 84 N.Y.2d 809, 645 N.E.2d 1218.—Health 489.

#### **NOT 'MENTALLY ILL'**

C.A.D.C. 1969. Under Sexual Psychopath Act, term "not insane" must be read to mean "not 'mentally ill'" within meaning of new civil commitment statute, and the Sexual Psychopath Act applies only to those who are not mentally ill while compulsory treatment of those who are mentally ill is governed by the 1964 Civil Commitment Act. D.C.C.E. §§ 21-501 to 21-591, 22-3503 to 22-3511.—*Cross v. Harris*, 418 F.2d 1095, 135 U.S.App.D.C. 259.—Mental H 36, 454.

C.A.D.C. 1968. Words "not insane" as used in District of Columbia Sexual Psychopath Act means "not mentally ill". D.C.C.E. § 22-1112(a).—*Millard v. Harris*, 406 F.2d 964, 132 U.S.App.D.C. 146.—Mental H 454.

#### **NOT MERCHANTABILITY**

Pa. 1928. Plaintiff need not remove coal "not merchantable" to comply with contract to furnish defendant drainage until coal in mine was worked out. Where plaintiff coal company agreed to furnish defendant coal company drainage through water level heading until all of coal of certain mine was worked out, plaintiff need not remove outcrop coal within lines of such mine which is "not merchantable" and cannot be worked at an expense practicable in business sense, in order to comply with agreement and be able to cease supplying drainage; "not merchantable" meaning such as cannot be secured which is fit for market and sale.—*Commercial Coal Mining Co. v. Big Bend Coal Mining Co.*, 141 A. 732, 293 Pa. 39.—Contracts 215(1).

Pa. 1928. Plaintiff need not remove coal "not merchantable" to comply with contract to furnish defendant drainage until coal in mine was worked out.—*Commercial Coal Mining Co. v. Big Bend Coal Mining Co.*, 141 A. 732, 293 Pa. 39.—Contracts 215(1).

#### **NOT MERCHANTABILITY AND REASONABLY SUITED FOR THE USE INTENDED**

N.D.Ga. 1985. Phrase "not merchantable and reasonably suited for the use intended," used in Georgia statute, O.C.G.A. § 51-1-11, providing that natural person may recover against manufacturer when he suffers injury from product sold by manufacturer which was not merchantable and rea-

#### **NOT MORE THAN**

sonably suited for the use intended, means defective.—*Wells by Maihafer v. Ortho Pharmaceutical Corp.*, 615 F.Supp. 262, affirmed in part, modified in part and remanded 788 F.2d 741, rehearing denied 795 F.2d 89, certiorari denied 107 S.Ct. 437, 479 U.S. 950, 93 L.Ed.2d 386.—Prod Liab 46.1.

#### **NOT MERCHANTABLE AND REASONABLY SUITED TO THE USE INTENDED**

Ga. 1975. Phrase "not merchantable and reasonably suited to the use intended" within statute, which provides that manufacturer is liable if his product "when sold \* \* \* was not merchantable and reasonably suited to the use intended and its condition when sold is the proximate cause of the injury sustained," is used within the context of strict liability; such phrase means that the person seeking recovery must show that the manufacturer's product, when sold by the manufacturer, was defective. Code, § 105-106.—*Center Chemical Co. v. Parzini*, 218 S.E.2d 580, 234 Ga. 868, on remand 221 S.E.2d 475, 136 Ga.App. 396.—Prod Liab 75.1.

Ga.App. 1984. As used in strict liability statute, "not merchantable and reasonably suited to the use intended" means defective. O.C.G.A. § 51-1-11(b)(1).—*Westinghouse Elec. Corp. v. Williams*, 325 S.E.2d 460, 173 Ga.App. 118, appeal after remand 360 S.E.2d 411, 183 Ga.App. 845, certiorari denied.—Prod Liab 8.

Ga.App. 1983. Term "not merchantable and reasonably suited to the use intended" as used in statute governing products liability means "defective." O.C.G.A. § 51-1-11(b)(1).—*Giordano v. Ford Motor Co.*, 299 S.E.2d 897, 165 Ga.App. 644, 39 A.L.R.4th 1.—Prod Liab 8.

#### **NOT MORE**

Me. 1924. Pub.Laws 1921, c. 211, § 74, punishing the offense of operating an automobile on a public highway while drunk by fine or imprisonment for not less than 30 days "nor more than one year," permits imprisonment for a full year under "the possibility of punishment rule," the words "nor more" equivalent to "not more," which means no additional or greater amount.—*State v. Vashon*, 123 A. 511, 123 Me. 412.—Sent & Pun 1127.

#### **NOT MORE HAZARDOUS**

Wis. 1895. A further written clause in such policy by which it covered "the stock of furniture, upholstery goods, and other merchandise, not more hazardous, usual to a retail furniture store" applied to merchandise kept in the trade in the store, and the words "not more hazardous" had no reference to the necessary articles kept for use in the repair shop.—*Faust v. American Fire Ins. Co. of Philadelphia*, 64 N.W. 883, 91 Wis. 158, 51 Am.St.Rep. 876, 30 L.R.A. 783.—Insurance 3050(1).

#### **NOT MORE THAN**

Ark.App. 1996. Statutory affirmative defense to rape of person less than 14 years of age if actor was "not more than" two years older than victim did not apply to juvenile who was two years, four

months, and one day older than victim on date of alleged rape, despite claim that defense included actors between two and three years older than victim. A.C.A. § 5–14–103(a)(3).—W.D. v. State, 931 S.W.2d 790, 55 Ark.App. 88.—Rape 17.

La. 1941. The terms “more or less,” “a little more than,” “not quite,” “not more than” and “approximately” are terms of safety and precaution and ordinarily mean “about” when used in a deed.—Pierce v. Lefort, 200 So. 801, 197 La. 1.—Deeds 113.

La.App. 1 Cir. 1945. “More or less” are words of safety and precaution and when used in deed are intended to cover some slight inaccuracy in frontage, depth or quantity in land conveyed, and ordinarily means “about” the same as terms “a little more than,” “not quite,” “not more than,” or “approximately,” and all are often introduced into a description practically without effect. LSA-C.C. art. 2493.—Harries v. Harang, 23 So.2d 786.—Deeds 113.

Mo. 1942. That provision of St. Louis civil service charter amendment authorizing a leave of absence for city employees of “not more than” four hours to vote, which was required to be read with statute requiring any qualified voter to be allowed four hours from his employment to vote, rendered quoted words of no effect, would not invalidate the entire amendment. Mo.R.S.A. § 11785, V.A.M.S. § 129.060.—State ex inf. McKittrick ex rel. Ham v. Kirby, 163 S.W.2d 990, 349 Mo. 988.—Mun Corp 78.

N.Y.A.D. 2 Dept. 1967. Statutes applicable to offense of attempted possession of narcotics prescribed minimum term of imprisonment of “not less than” half of three years and did not prescribe outer limit for minimum term of imprisonment so long as it did not exceed one-half of maximum prescribed for consummation of intended crime itself and phrase “not less than” one and one-half years was not to be read as if it were “not more than” one and one-half years. Penal Law, §§ 261, subd. 2, 1751, subds. 3, 5, 2189.—People v. Jackson, 279 N.Y.S.2d 259, 27 A.D.2d 943.—Controlled Subs 100(2).

#### **NOT MORE THAN FIVE**

Fla. 1948. The words “not more than five” within constitutional amendment that there should be “not more than five” justice districts in each county meant beyond or in excess of five, and did not within itself connote any requirement of a minimum number or require the existence of any district, and amendment in that respect was repugnant to original constitutional provision that county commissioners should divide county into as many justice districts, not less than two, as they might deem necessary. F.S.A. Const. art. 5, §§ 21, 23.—Wilson v. Crews, 34 So.2d 114, 160 Fla. 169.—J P 2.

#### **NOT MORE THAN ONE BUILDING**

Ky. 1920. An apartment building covering several lots was “not more than one building” on either lot, within the meaning of a building restric-

tion providing that not more than one building should be erected upon either of certain lots.—Struck v. Kohler, 219 S.W. 435, 187 Ky. 517.—Covenants 51(2).

#### **NOT MORE THAN TWO-CAR CAPACITY**

Ill.App. 1 Dist. 2001. Meaning of words “not more than two-car capacity” in protective covenant restricting garage sizes was not ambiguous.—Vandelogt v. Brach, 259 Ill.Dec. 860, 759 N.E.2d 921, 325 Ill.App.3d 847, as modified on denial of rehearing.—Covenants 51(2).

#### **NOT MORE THAN 30 DAYS**

Kan. 1976. As used in provisions of speedy trial statute dealing with continuances because of condition of trial court’s docket, the phrase “not more than 30 days” would be construed to mean “to a day not more than 30 days after the limit otherwise applicable.” K.S.A. 22–3402(2, 3), (3)(d).—State v. Coburn, 556 P.2d 382, 220 Kan. 750.—Crim Law 577.8(1).

#### **NOT NAVIGABLE**

Idaho 1906. The phrase “streams not navigable,” within a statute providing that the right of eminent domain may be exercised for storing and floating logs and lumber on streams “not navigable,” means streams not navigable in fact.—Potlatch Lumber Co. v. Peterson, 88 P. 426, 12 Idaho 769, 118 Am.St.Rep. 233.

#### **NOT NECESSITOUS AND COMPELLING CAUSE**

Pa.Cmwlth. 1976. Claimant’s personality differences with his supervisor, overall dissatisfaction with working conditions and unhappiness with regard to allocation of overtime to claimant was “not necessitous and compelling cause” for voluntarily leaving his employment within statutory provision that employee shall be ineligible for unemployment compensation for any week in which his employment is due to voluntarily leaving work without cause of necessitous and compelling nature. 43 P.S. § 802(b)(1).—Nolte v. Unemployment Compensation Bd. of Review, 358 A.2d 114, 24 Pa. Cmwlth. 541.—Social S 415, 416.

#### **NOT NEEDED FOR PUBLIC USE**

N.J. 1965. Where land to be sold by city as incidental aspect of transaction between city and utility would be needed for water supply system only insofar as hydroelectric plant to be built thereon would yield power to return water and to such extent contract with utility provided required assurance, such sale was permissible under statute authorizing sale of lands “not needed for public use”. N.J.S.A. 40:60–26.—Whelan v. New Jersey Power & Light Co., 212 A.2d 136, 45 N.J. 237.—Mun Corp 225(1).

#### **NOT NEGOTIABLE**

Md. 1904. At common law a bill of lading is not in an unrestricted sense, a negotiable instrument,

**NOT OF THE**

but quasi negotiable only, and this limited negotiability may be destroyed by stamping or printing across the face of the instrument the words "Not negotiable."—National Bank of Bristol v. Baltimore & O.R. Co., 59 A. 134, 99 Md. 661, 105 Am.St.Rep. 321.—Carr 55.

N.Y.A.D. 1 Dept. 1910. Pen.Code, § 633, provides that one mentioned in section 629, who delivers to another any merchandise for which a bill of lading, receipt, or voucher has been issued, unless such receipt or voucher bears on its face the words "not negotiable," or unless such receipt is surrendered to be canceled at the time of delivery is punishable, etc. The "person" mentioned in section 629 is defined to be one carrying on the business of a warehouseman, wharfinger, or other depositary of property who issues any receipt, bill of lading, or voucher, etc. *Held*, that such sections were inapplicable to a manufacturer of automobile bodies to whom a chassis was delivered to be fitted with a body only, and not for storage; such manufacturer not being a "depositary" within section 629.—Manny v. Wilson, 122 N.Y.S. 16, 137 A.D. 140, affirmed 96 N.E. 1121, 203 N.Y. 535.—Bailm 23.

N.Y.A.D. 2 Dept. 1909. The words "not negotiable," stamped on the face of a bill of lading, do not prohibit transfer of the bill and of the contract represented thereby by indorsement and delivery, as, under Code Civ.Proc. § 449, any contract is transferable and enforceable by suit in the name of the assignee, but the transfees of such a bill has only his common-law rights, and cannot avail himself of Factors' Act (Laws 1830, p. 203, c. 179) § 3, providing that an agent intrusted with the possession of a bill of lading shall be deemed the true owner thereof so far as to give validity to any contract for the sale of goods thereunder.—Gass v. Astoria Veneer Mills, 118 N.Y.S. 982, 134 A.D. 184.—Carr 55.

N.Y.A.D. 2 Dept. 1909. Factors' Act (Laws 1830, p. 203, c. 179) § 3, providing that every agent intrusted with the possession of any bill of lading shall be deemed the true owner thereof so far as to give validity to any contract made by the agent for the sale of the goods, and Pen.Code, §§ 628-634a, providing that the agent of any carrier who delivers to another any merchandise for which a bill of lading has been issued is punishable by imprisonment unless the receipt is surrendered at the time of delivery or unless the receipt bears on its face the words "not negotiable," give to a bill of lading a higher quality of negotiability than simply to make it transferable by indorsement and delivery, and the voluntary act of the owner of property in giving to another a bill of lading which unqualifiedly directs the carrier to deliver the goods to the person named therein or to his order is sufficient to estop such owner from making any claim to the goods as against a person dealing in good faith with the person named therein.—Gass v. Astoria Veneer Mills, 118 N.Y.S. 982, 134 A.D. 184.—Carr 59.

N.Y.A.D. 2 Dept. 1909. The words "not negotiable" stamped on the face of a bill of lading do not simply limit the responsibility of the carrier, but give notice to purchasers of the possible rights of

the consignor, and are sufficient to put a purchaser on inquiry as to the facts of the right of stoppage in transitu by the consignor.—Gass v. Astoria Veneer Mills, 118 N.Y.S. 982, 134 A.D. 184.—Carr 59.

N.Y.A.D. 2 Dept. 1909. Where one had in his possession the indorsed bill of lading stamped thereon with the words "not negotiable" and a written order from the consignee to deliver the goods to him, and delivery thereof was refused solely because of his refusal to pay the freight in cash, the failure to obtain possession of the goods and defeat the right of stoppage in transitu was due wholly to his breach of contract of carriage, and he could not invoke the aid of equity to cancel the note given by him for the goods.—Gass v. Astoria Veneer Mills, 118 N.Y.S. 982, 134 A.D. 184.—Carr 59.

**NOT OF A LOCAL NATURE**

S.D.Miss. 1990. Action on promissory note brought by Resolution Trust Corporation (RTC), as receiver, was "not of a local nature," and could thus be brought in any district in which defendant resided. 28 U.S.C.A. §§ 1392, 1392(a), 1404(a); 28 U.S.C.(1970 Ed.) § 2281; 28 U.S.C.(1976 Ed.) § 1393(a); Federal Home Loan Bank Act, § 21A(b)(1), as amended, 12 U.S.C.A. § 1441a(b)(1).—Resolution Trust Corp. v. Cumberland Development Corp. of Mississippi, Inc., 776 F.Supp. 1146.—Fed Cts 74, 93.

**NOT OF OR PERTAINING TO AN OCCUPATION, TRADE OR WORK**

Minn. 1963. As used in policies complementing protection afforded employees by Workmen's Compensation Act, "occupational" is defined as "of or pertaining to an occupation, trade or work," and "non-occupational" means "not of or pertaining to an occupation, trade or work." M.S.A. § 176.01 et seq.—Equitable Life Assur. Soc. of U.S. v. Bachrach, 120 N.W.2d 327, 265 Minn. 83.—Insurance 2543.

**NOT OF PIN TUMBLER OR CYLINDER CONSTRUCTION**

Cust.Ct. 1966. Disc tumbler locks, including padlocks and cabinet or drawer locks, are "not of pin tumbler or cylinder construction" as provided for in tariff schedule contained in Tariff Act of 1930 and disc tumbler locks are dutiable under schedule as provided for locks not of pin tumbler or cylinder construction. Tariff Act of 1930, § 1, par. 384, 19 U.S.C.A. § 1001, par. 384.—Shiro Trading Corp. v. U.S., 259 F.Supp. 619.—Cust Dut 26(2).

**NOT OF THE KIND DESCRIBED IN PARAGRAPH (5)**

Bkrcty.S.D.Ga. 1999. In context of the Bankruptcy Code's discharge exception for nonsupport divorce debt, debt "not of the kind described in paragraph (5)" means a debt payable to a spouse, former spouse, or a child, which is held not to constitute alimony, maintenance or support. Bankr.Code, 11 U.S.C.A. § 523(a)(5, 15).—In re Sanders, 236 B.R. 107.—Bankr 3348.5.

**NOT ONLY THAT BUT THIS**

Mo. 1907. The term "but also," when connecting two parts of a sentence, implies that what follows is in addition to what precedes it, carrying the idea "not only that but this." Hence a newspaper publication that "Julian is remembered here as a member of the Legislature who did well in a legislative way, but also as a chief of police whom a Democratic senate committee said was not a proper man," is so connected in all of its parts that the meaning of the entire publication is properly submitted to the jury for construction in a libel action.—Julian v. Kansas City Star Co., 107 S.W. 496, 209 Mo. 35, error dismissed 30 S.Ct. 406, 215 U.S. 589, 54 L.Ed. 340.

**NOT OPEN FOR BUSINESS**

D.C. 1973. Robbery of insured's store shortly after closing time, while four employees were on duty at store, after all customers had left and while normal closing duties were being performed occurred while premises were "not open for business" within "burglary or robbery of watchman" clause providing maximum coverage of \$15,000 and that clause was applicable rather than clause which applied to a robbery while store was open for business and which provided maximum coverage of \$2,500.—Centennial Ins. Co. v. Dowd's Inc., 306 A.2d 648.—Insurance 2168.

**NOT OPEN TO THE GENERAL PUBLIC**

C.D.Cal. 1998. For purposes of California misdemeanor trespass statute, property "not open to the general public" included public stadium open only to ticket-buyers. West's Ann.Cal.Penal Code § 602(n).—James v. City of Long Beach, 18 F.Supp.2d 1078.—Tresp 77.

**NOT OPERATED FOR PROFIT**

C.A.9 (Or.) 1974. Hospitals which did not distribute assets to any interested persons and which could not do so under the terms of their charters and which expended any surpluses from sales of drugs on the overall cost of continuing operations or invested such surpluses for the improvement of facilities were hospitals "not operated for profit" within meaning of exemption from the coverage of the Robinson-Patman Act. Robinson-Patman Price Discrimination Act, §§ 1 et seq., 1(a), 15 U.S.C.A. §§ 13 et seq., 13(a); 15 U.S.C.A. § 13c.—Portland Retail Druggists Ass'n, Inc. v. Abbott Laboratories, 510 F.2d 486, certiorari granted 95 S.Ct. 2655, 422 U.S. 1040, 45 L.Ed.2d 692, vacated 96 S.Ct. 1305, 425 U.S. 1, 47 L.Ed.2d 537.—Trade Reg 911.

**NOTORIETY**

Bkrcty.E.D.N.Y. 1982. Test applicable, in determining whether debtor has "place of business" in more than one county for purpose of New York statute providing that if debtor has place of business in only one county, a financing statement must be filed in such county in order to perfect a security interest, is a hybrid of "quantity" of work test and the "notoriety" test, but the mere appearance of

doing business at a location, no matter how notorious, is insufficient to constitute such location a "place of business." N.Y. McKinney's Uniform Commercial Code, §§ 9-301, 9-401(1)(c).—In re Alsted Automotive Warehouse, Inc., 16 B.R. 926.—Sec Tran 90.

N.Y.Sup.App.Term 1976. Test used to determine whether a debtor has a "place of business" in more than one county in New York so as to enable a secured creditor to properly file a financing statement and perfect a security interest under the Uniform Commercial Code provision with respect to filing with the Department of State is the "notoriety" test. Uniform Commercial Code, § 9-401(1)(c).—Enark Industries, Inc. v. Bush, 383 N.Y.S.2d 796, 86 Misc.2d 985.—Sec Tran 92.1.

Tenn. 1924. Entry describing land as one south side of south prong of creek beginning at point of bluff about half mile below line of another entry, one line of which fixed beginning point on white oak at named distance from old improvement, first entry held special, as "notoriety," means that object was known by name specified to persons conversant with section generally.—Hilton v. Anderson, 261 S.W. 984, 149 Tenn. 622.—Pub Lands 170(2).

**NOTORIOUS**

W.D.La. 1929. Word 'cohabitation,' in statute providing that widow's 'open' and "notorious" illicit cohabitation terminates her right to war risk insurance, means living together as husband and wife (Act Sept. 2, 1914, Sec. 22, par. 5, added by Act Oct. 6, 1917, Sec. 2, 40 Stat. 401). Word 'cohabitation' in Act Sept. 2, 1914, Sec. 22, par. 5, added by Act Oct. 6, 1917, Sec. 2, 40 Stat. 401, providing that open and notorious illicit cohabitation on part of widow operates to terminate her right to war risk insurance, means living together as husband and wife without formality of marriage, since word 'open' means not concealed or secret, not hidden or disguised, exposed to view and knowledge, open shame or guilt; and "notorious" means generally known and talked of by public, universally believed to be true, manifest to the world, evident, usually in an unfavorable sense.—Robinson v. U.S., 33 F.2d 545, reversed 40 F.2d 14.—Armed S 51.32.

W.D.La. 1929. Word "cohabitation," in statute providing that widow's "open" and "notorious" illicit cohabitation terminates her right to war risk insurance, means living together as husband and wife. Act Sept. 2, 1914, § 22, par. 5, added by Act Oct. 6, 1917, § 2, 40 Stat. 401.—Robinson v. U.S., 33 F.2d 545, reversed 40 F.2d 14.—Armed S 77(16).

Ark. 1969. When possession of property is so conspicuous that it is generally known and talked of by the public or people in the neighborhood, such possession is said to be "notorious" for purpose of determining whether adverse possession has ripened into ownership. Ark. Stats. §§ 37-301, 37-302.—Harrison v. Collins, 444 S.W.2d 861, 247 Ark. 210.—Adv Poss 30.

Conn. 1968. Requirement that adverse possession "notorious" in sense of being or constituting something that is commonly known is to give actual

notice to owner that claim contrary to his ownership is being asserted or to lay a foundation for finding of constructive notice.—*Robinson v. Myers*, 244 A.2d 385, 156 Conn. 510.—Adv Poss 28.

Fla. 1894. The term “notorious,” used in defining adverse possession, means that the character of the holding must possess such elements of notoriety that the owner may be presumed to have notice of it and of its extent.—*Watrous v. Morrison*, 14 So. 805, 33 Fla. 261, 39 Am.St.Rep. 139.—Adv Poss 30.

Ill.App. 2 Dist. 1980. Use by village of property outside described easement by laying portion of actual sewer line outside the easement was neither “open” nor “notorious” because neither party, apparently, was conscious that the sewer line had strayed from the grant of easement.—*Continental Illinois Nat. Bank and Trust Co. of Chicago v. Village of Mundelein*, 41 Ill.Dec. 554, 407 N.E.2d 1052, 85 Ill.App.3d 700.—Mun Corp 270.

Iowa 1914. “General” and “notorious,” as used in Code, § 3385, relative to the recognition of an illegitimate child, defined.—*McNeill v. McNeill*, 148 N.W. 643, 166 Iowa 680.—Child 12.

Iowa 1907. The word “notorious” is used in the statute relating to the recognition of a child, with the design of emphasizing the thought that the understanding of the father’s recognition should be as extensive as the immediate community of his residence and within the common knowledge of the public.—*Morgan v. Strand*, 110 N.W. 596, 133 Iowa 299.

Kan. 1916. As used in Gen.St.1909, § 2956, “general” means “extensive,” though not “universal,” and “notorious” is synonymous with “open.”—*Record v. Ellis*, 156 P. 712, 97 Kan. 754, L.R.A. 1916E,654.—Child 90.

Me. 1999. “Notorious,” for purposes of a common law adverse possession action, means known to some who might reasonably be expected to communicate their knowledge to an owner maintaining a reasonable degree of supervision over his property.—*Striefel v. Charles-Keyt-Leaman Partnership*, 733 A.2d 984, 1999 ME 111.—Adv Poss 30.

Me. 1999. Evidence in common law adverse possession action supported finding that claimants’ possession of land in question was “open,” “visible,” and “notorious”; titleholder did not assert that claimants attempted to conceal their possession and use of parcel, claimant testified that, throughout limitations period, neighbors and passersby on bordering municipal street were able to clearly observe her family’s possession and use of parcel, and families of neighborhood children who played on parcel with claimants’ children might reasonably have been expected to communicate their knowledge of possession and use to true owner maintaining reasonable degree of supervision over its property.—*Striefel v. Charles-Keyt-Leaman Partnership*, 733 A.2d 984, 1999 ME 111.—Adv Poss 33.

Mass. 1890. The primary meaning of the word “notorious,” as given by a leading lexicographer, is “generally known and talked of by the public.” Thus, in accordance with the rule that a city will be

chargeable with notice of a defect in the street on evidence of a fact tending to show the notoriety of the defect, evidence is admissible of what was said of a defect by persons looking at it when it was exposed during the process of certain work.—*Chase v. City of Lowell*, 24 N.E. 212, 151 Mass. 422.

Mass.App.Ct. 2002. To be “notorious,” for purposes of adverse possession, a use must be known to some who might reasonably be expected to communicate their knowledge to the owner if he maintained a reasonable degree of supervision over his premises.—*Lawrence v. Town of Concord*, 775 N.E.2d 448, 56 Mass.App.Ct. 70, review granted 780 N.E.2d 468, 438 Mass. 1103.—Adv Poss 30.

Miss. 1919. The word “conclusive,” in its primary legal meaning, means beyond question or beyond dispute, and is synonymous with manifest, plain, clear, obvious, visible, apparent, indubitable, palpable, and “notorious.”—*Covington County v. Fite*, 82 So. 308, 120 Miss. 421.

Mo. 1913. “Notorious,” as used to establish adverse possession, means generally known and talked of; universally recognized; conspicuous; well, widely, or commonly known.—*Spicer v. Spicer*, 155 S.W. 832, 249 Mo. 582, Am. Ann.Cas. 1914D,238.

Mont. 1994. “Open” and “notorious” for adverse possession purposes is distinct and positive assertion of right hostile to rights of owner and must be brought to attention of owner.—*Greenwalt Family Trust v. Kehler*, 885 P.2d 421, 267 Mont. 508, rehearing denied.—Adv Poss 29, 31.

Neb. 1998. If an occupier’s physical actions on the land constitute visible and conspicuous evidence of possession and use of the land, that will generally be sufficient to establish that possession was “notorious.”—*Wanha v. Long*, 587 N.W.2d 531, 255 Neb. 849.—Adv Poss 30.

N.M. 2002. To be “notorious,” as would support claim for prescription easement, claimant’s use of property must be either actually known to owner or widely known in neighborhood. Restatement (Third) of Property (Servitudes) § 2.17.—*Algermissen v. Sutin*, 61 P.3d 176, 133 N.M. 50, 2003-NMSC-001.—Ease 5.

Ohio App. 1 Dist. 1997. To be “notorious” as required for acquisition of prescriptive easement, use must be known to some who might reasonably be expected to communicate their knowledge to owner if he maintained reasonable degree of supervision over his premises; in other words, use of property must be so patent that true owner of property could not be deceived as to property’s use. R.C. § 2305.04.—*Katz v. Metro. Sewer Dist.*, 690 N.E.2d 1357, 117 Ohio App.3d 584, dismissed, appeal not allowed 678 N.E.2d 1228, 78 Ohio St.3d 1492.—Ease 5.

Ohio App. 3 Dist. 1990. “Notorious” use of disputed property, such as may give rise to prescriptive easement, is one that is so patent that true owner of property could not be deceived as to property’s use; use must be known to someone who might reasonably be expected to communicate their knowledge to owner if owner maintained reasonable degree of

supervision over premises.—*Hindall v. Martinez*, 591 N.E.2d 308, 69 Ohio App.3d 580.—Ease 8(1).

Okla.Crim.App. 1936. To constitute “living in open and notorious adultery” within statute, there must be something more than occasional illicit intercourse, and parties must reside together in face of society as if conjugal relations existed between them, and fact of their so living and that they are not husband and wife must be known in community in which they reside; “notorious” meaning as generally known and talked of, well or widely known, forming a part of common knowledge, or universally recognized. 21 Okl.St.Ann. § 871.—*Mathis v. State*, 61 P.2d 261, 60 Okla.Crim. 58.—Lewd 1.

R.I. 2001. The very act of openly placing a permanent physical structure on another’s property without the true owner’s permission, and maintaining it there for more than ten years, is itself an action that is so inconsistent with the true ownership of that property that it is therefore “notorious,” “adverse,” “hostile,” and under “claim of right,” as elements for adverse possession or easement by prescription. Gen.Laws 1956, § 34-7-1.—*Reitsma v. Pascoag Reservoir & Dam, LLC*, 774 A.2d 826.—Adv Poss 13, 20; Ease 5.

Tex.Crim.App. 1931. The word “notorious” has the meaning of generally known and talked of by the public; universally believed to be true; evident. Synonyms are remarkable; conspicuous; celebrated; noted, etc.—*Finley v. State*, 38 S.W.2d 328, 117 Tex.Crim. 34.

Tex.Civ.App. 1896. Charging a man as having a “notorious reputation” is not defamatory in itself, and an innuendo is necessary in pleading the publication of such a charge in order to make out a case of libel. The word “notorious” would become libelous in itself only when qualifying some other word. It may be properly used in an innocent, and even in a laudatory sense, as being synonymous with “distinguished,” “remarkable,” “conspicuous,” “noted,” “celebrated,” “renowned.” The word being capable of a harmless meaning as well as an injurious one, it would be a question for the jury to decide which meaning was intended.—*George Knapp & Co. v. Campbell*, 36 S.W. 765, 14 Tex.Civ.App. 199.

Wash. 1947. To be “notorious”, a thing or condition must be generally known and talked of, widely or commonly known.—*Sinnott v. Sinnott*, 179 P.2d 305, 27 Wash.2d 520.

#### NOTORIOUS ACT OF PUBLIC INDECENCY

Ga.App. 1941. Where evidence authorized finding that defendant committed a grossly indecent act in a public place and that it was seen by one person named in accusation as having seen it, but other person named did not testify, and no evidence was introduced authorizing finding that act was seen by any other person or that it was committed in a place where some other person was in a position to see it had he looked, the act was not a “notorious act of public indecency” within statute, since it is essential to the offense, not that more than one person shall have actually seen the act, but that more than one person was in a position where it

would have been possible to see it. Code, § 26-6101.—*Wynne v. State*, 15 S.E.2d 623, 65 Ga.App. 213.—Obscen 1.1.

#### NOTORIOUSLY

N.D. 1938. The term “notoriously” as used in the statute providing that every person who lives openly and “notoriously” and cohabits as husband or wife with a person of opposite sex without being married to such person is guilty of a misdemeanor, means generally known, as a matter of common knowledge in the community where the defendants are living. Comp.Laws 1913, § 9581.—*State v. Hoffman*, 282 N.W. 407, 68 N.D. 610.—Lewd 1.

#### NOTORIOUSLY DISGRACEFUL CONDUCT

N.J.Super.A.D. 1966. Absent any extenuating circumstances, driving a motor vehicle while on the revoked list or while intoxicated constitutes “notoriously disgraceful conduct” within statute disqualifying for appointment to civil service position anyone who has been guilty of infamous or “notoriously disgraceful conduct”.—*Toth v. New Jersey Civil Service Commission*, 217 A.2d 882, 90 N.J.Super. 389.—Offic 11.4.

#### NOTORIOUSLY INSOLVENT

Tex.Civ.App.—Beaumont 1937. Maker which had been adjudged a bankrupt and whose assets were exhausted after trustee made three payments totalling \$634.27 on \$1,325 note held “notoriously insolvent” so as to authorize payee of note to sue indorsers without making maker a party defendant (Vernon’s Ann.Civ.St. art. 1987).—*Brooks v. American Nat. Bank of Beaumont*, 103 S.W.2d 246, writ dismissed.—Bills & N 459.

#### NOTORIOUSLY MISCHIEVOUS

Tenn.Ct.App. 1983. Where of seven instances in which cattle escaped during four-year period, some escapes were caused by an automobile running into and knocking holes in the fence, one escape was caused by cattle guard which was filled up with dirt and some escapes were by single calf, the cattle were not “notoriously mischievous,” within meaning of fence law, and, although it was possible that one of the cattle could have gotten its head under gate, which was found lying on pasture side of fence, and lifted gate off its hinges, cattle owners were not liable for damage to adjacent cornfield absent evidence that such in fact occurred or that cattle had been known to knock gates off hinges or push a gate down. T.C.A. §§ 44-8-101, 44-9-106, 44-9-109 to 44-9-111.—*Troutt v. Branham*, 660 S.W.2d 502.—Anim 98.

#### NOTORIOUS POSSESSION

E.D.Ark. 1954. Under Arkansas law, “notorious possession” sufficient to obtain title contemplates possession that is so conspicuous that it is generally known and talked of by the public or people in the neighborhood. ArkStats. §§ 37-101 to 37-103.—*Dierks Lumber & Coal Co. v. Vaughn*, 131 F.Supp. 219, affirmed 221 F.2d 695.—Adv Poss 30.

Ark. 1943. “Notorious possession” contemplates possession that is so conspicuous that it is generally known and talked of by the public or the people in the neighborhood.—*Newman v. Newman*, 169 S.W.2d 667, 205 Ark. 590.

Ark. 1937. “Notorious possession” as respects question of notice of adverse possession contemplates possession that is so conspicuous that it is generally known and talked of by the public or the people in the neighborhood.—*Terral v. Brooks*, 108 S.W.2d 489, 194 Ark. 311.—Adv Poss 30.

Ind.App. 1 Dist. 1991. In context of adverse possession claims, “notorious possession” is possession so conspicuous that it is generally known and talked of by the public—at least by people in the vicinity of the premises.—*Snowball Corp. v. Pope*, 580 N.E.2d 733.—Adv Poss 30.

#### **NOTORIOUS PUBLIC INDECENCY**

Mo.App. 1949. Man who at night stood at running board of truck with back to traveled portion of highway, between legs of female facing him thus revealing her things to view of traffic which might pass at any moment was guilty of “notorious public indecency”. Mo.R.S.A. § 4653.—*State v. Hedrick*, 224 S.W.2d 546.—Obscen 1.1.

#### **NOTORIOUS REENTRY**

Wis.App. 1984. Even if record titleholders to property engaged in such activities on property as raking leaves and allowing their children to play on disputed strip, such activities were insufficient to establish “notorious reentry” needed to dispossess adverse possessor.—*Otto v. Cornell*, 349 N.W.2d 703, 119 Wis.2d 4.—Adv Poss 47.

#### **NOTORIOUS REPUTATION**

Tex.Civ.App. 1896. Charging a man as having a “notorious reputation” is not defamatory in itself, and an innuendo is necessary in pleading the publication of such a charge in order to make out a case of libel. The word “notorious” would become libelous in itself only when qualifying some other word. It may be properly used in an innocent, and even in a laudatory sense, as being synonymous with “distinguished,” “remarkable,” “conspicuous,” “noted,” “celebrated,” “renowned.” The word being capable of a harmless meaning as well as an injurious one, it would be a question for the jury to decide which meaning was intended.—*George Knapp & Co. v. Campbell*, 36 S.W. 765, 14 Tex.Civ.App. 199.

#### **NOTORIOUS RESISTANCE TO LAWFUL AUTHORITY**

Mo. 1888. “Notorious resistance to lawful authority,” as used in a policy of fire insurance covering certain personal property and machinery located in a state penitentiary, and providing that the company shall not be liable for damage by fire which shall happen or arise by any person or persons engaged or concerned in “notorious resistance to lawful authority,” means that there is an unusual, and extraordinary state of affairs, a state of affairs in which, and for the time being, the usually consti-

tuted legal authorities are overpowered and inadequate to successfully contend with the existing emergency. It does not mean that the company should be relieved from payment of the loss when the fire should happen during those occasions of resistance to the authorities which usually well-regulated governments are at all times prepared to overcome, even though well or publicly known. It does not mean that a trivial disobedience to the commands of an officer, if seen or heard by a multitude of people, is a case of notorious resistance. Where four or five convicts by their actions and threats put the guard or timekeeper and foreman in their power, they were in resistance to lawful authority of the prison, but they were not in notorious resistance to such authority, for the notoriety is not that which arises and flows from the results alone of the incendiary act, but there must be an existing and going on of a notorious resistance to the authorities. Webster defines “notorious” as “generally known and talked of by the public; universally believed to be true; manifest to the world,” etc.—*Straus v. Imperial Fire Ins. Co.*, 6 S.W. 698, 94 Mo. 182, 4 Am.St.Rep. 368.

#### **NOTORIOUS SERVICE**

Ga. 1984. “Substituted service” or “notorious service” means leaving copies of complainant’s summons at defendant’s dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. O.C.G.A. § 9-11-4(d)(7).—*Tolbert v. Murrell*, 322 S.E.2d 487, 253 Ga. 566.—Proc 79.

#### **NOT OTHERWISE**

Cal. 1906. The words “not otherwise,” in Pol. Code, § 3366, providing that county boards of supervisors shall, in the exercise of their police powers, and for the purpose of regulation, and “not otherwise,” have power to license all and every kind of business not prohibited by law, transacted, and carried on within the limits of their respective jurisdictions, operate to curtail all power boards of supervisors previously had to issue licenses and charge therefor as a revenue measure.—*Plumas County v. Wheeler*, 87 P. 909, 149 Cal. 758.

Ind. 1901. “Not otherwise,” as used in Rev.St. 1881, § 2508, Horner’s Rev.St.1897, § 2508; Burns’ Rev.St.1894, § 2669, giving the wife an undivided third during the life of her husband whenever, as the result of a sale based on judicial proceedings in which her inchoate interest is not barred, the legal title of the husband in and to such real estate shall become absolute and vested in the purchaser thereof, his heirs or assigns, subject to the provisions of the act, and not otherwise, means that the wife’s inchoate interest cannot become a vested interest during her husband’s lifetime by the operation of the law upon other circumstances than those specified in the context.—*Higgins v. Ormsby*, 59 N.E. 321, 156 Ind. 82.

Me. 1897. “Not otherwise,” as used in Rev.St. 1841, c. 95, § 19, as amended by Laws 1863, c. 199, providing that all tenancies at will may be terminated by either party by three months’ notice in writing

for that purpose given to the other party, and not otherwise, except by mutual consent, refers rather to the acts of the parties to the tenancies, than to the effect of their acts by operation of law.—Seavey v. Cloudman, 38 A. 540, 90 Me. 536.

#### NOT OTHERWISE CLASSIFIED

R.I. 1954. Use of letters "N.O.C.", which meant "not otherwise classified", in corporation's liability policy, related only to rate, and had no relevant bearing on question of insurers liability under policy for damage to customer's home from fire allegedly caused by range purchased from corporation.—Crook v. Kalamazoo Sales & Service, 110 A.2d 266, 82 R.I. 387.—Insurance 2274.

#### NOT OTHERWISE EXCEPTED

Ala. 1906. Under Const.1875, art. 5, § 6, conferring on the circuit courts jurisdiction in all matters, civil and criminal, not otherwise excepted, the words "not otherwise excepted" are not words of prohibition on the Legislature, but simply words of description as to what jurisdiction is conferred absolutely on the circuit courts, and hence, when construed with section 7, declaring that the General Assembly should have power to establish courts of chancery, and directed the state to be divided into chancery divisions and districts, and Const.1901, § 148, declaring that the Legislature may confer upon the circuit court or the chancery court the jurisdiction of both of such courts. Acts 1894-95, p. 881, conferring chancery jurisdiction on the circuit court of Jefferson county, is not unconstitutional.—Ensley Development Co. v. Powell, 40 So. 137, 147 Ala. 300.

#### NOT OTHERWISE EXEMPTED

Mass. 1952. Under old age assistance statute providing that executor of receiver of assistance shall be liable to town for amount of assistance received if receiver's estate possesses funds "not otherwise exempted", quoted words refer to funds whose possession would, if decedent were alive, have disqualified him as recipient of assistance. G.L.(Ter.Ed.) c. 118A, §§ 1 et seq., 4, as amended; § 4A, as amended by St.1948, c. 581, § 3; § 5A, as added by St.1949, c. 622; c. 231, § 111.—Town of Dartmouth v. Paull, 105 N.E.2d 846, 329 Mass. 22.—Social S 182.

#### NOT OTHERWISE INDEXED BY NAME

C.A.7(Ill.) 1955. The term "NOIBN" as used in carrier tariffs means "not otherwise indexed by name."—Chicago, B. & Q. R. Co. v. U.S., 221 F.2d 811.

Ct.Cl. 1930. The abbreviation "N. O. I. B. N." under terms of tariffs, filed with interstate commerce commission, means "not otherwise indexed by name."—Pennsylvania R. Co. v. U.S., 42 F.2d 600, 70 Ct.Cl. 276.

#### NOT OTHERWISE PROVIDED FOR

Ala. 1909. Code 1896, § 4561, provide for a solicitor's fee of \$50 for securing the conviction of

any corporation for violating any law, and another section authorizes a fee of \$7.50 for each conviction of a misdemeanor not otherwise provided for. Held that, since section 5388 makes the willful obstruction of a public road a misdemeanor, but affixes no penalty, the offense is one "not otherwise provided for," for which the solicitor's fee is but \$7.50.—Birmingham Waterworks Co. v. State, 48 So. 658, 159 Ala. 118.—Dist & Pros Atty 5(1).

Mo. 1944. The phrase "not otherwise provided for" in constitutional provision that circuit courts shall have exclusive original jurisdiction in all civil cases not otherwise provided for does not mean not otherwise provided for in this Constitution, and therefore exclusive jurisdiction to grant injunctions does not remain in circuit courts on ground of absence of constitutional provision giving jurisdiction to county courts to grant injunctions. Mo. R.S.A.Const. art. 6, § 22.—Missouri Electric Power Co. v. City of Mountain Grove, 176 S.W.2d 612, 352 Mo. 262.—Courts 472.3.

#### NOT OTHERWISE SECURED

Neb. 1931. Where city, on state bank's insolvency, received proceeds of collateral securing deposits, claim for excess over proceeds of security is one "otherwise secured," and not entitled to share assets on equality with depositors in class "not otherwise secured". Compt.St.1929, § 8-1,102.—State v. First State Bank of Alliance, 239 N.W. 646, 122 Neb. 109.—Banks 80(5).

#### NOT OTHERWISE SPECIFICALLY PROVIDED

Iowa 1996. Language of statute providing for forms of punishment for contempt, where "not otherwise specifically provided," pertains to other statutes bearing on contempt actions, not court orders. I.C.A. § 665.4.—French v. Iowa Dist. Court for Jones County, 546 N.W.2d 911.—Contempt 71.

#### NOT OTHERWISE SPECIFICALLY PROVIDED FOR

Tenn. 1978. Multiple injuries of 15% permanent anatomical impairment of left leg, 15% impairment of right leg, and 35% impairment of left hand were injuries "not otherwise specifically provided for" under worker's compensation statute governing unscheduled injuries; therefore, there was no legal impediment to award under permanent total disability provision for injuries. T.C.A. § 50-1007(d, e).—Tennlite, Inc. v. Lassiter, 561 S.W.2d 157.—Work Comp 873, 874.

#### NOT PAID

Mont. 1915. Words "not paid" held not to make indefinite judgment that in default of payment of fine defendant be imprisoned one day for each \$2 of fine "not paid."—State v. District Court of First Judicial Dist. in and for Lewis and Clark County, 149 P. 958, 51 Mont. 186.—Sent & Pun 1118.

**NOT PAID FOR WANT OF FUNDS**

N.D. 1890. In Laws 1879, c. 14, providing that each order drawn on a school district treasurer shall specify whether the money is to be paid from the teacher's fund, the contingent fund, or schoolhouse fund, and, in case the treasurer has no money in the fund drawn on to pay such school warrant, he shall indorse on it, "Not paid for want of funds," "funds" should be construed as meaning moneys generally, and not any special fund, as distinguished from all others.—Capital Bank of St. Paul v. School-Dist. No. 53 of Barnes County, 48 N.W. 363, 1 N.D. 479.

**NOT PART OF THE RECORD ON APPEAL**

N.D. 1998. While failure of the Workers Compensation Bureau and ALJ to consider documents did not itself preclude a determination that the documents were part of the record on appeal, the claimant's failure to properly present the documents, which were in the Bureau's claim file, to the district court by augmenting the record through a statutorily afforded procedure warranted the conclusion that the documents were "not part of the record on appeal," and thus, the appellate court would not consider them. NDCC 28-32-17, subd. 4, par. j, 28-32-18; Rules App.Proc., Rule 30(a).—Sprunk v. North Dakota Workers Compensation Bureau, 576 N.W.2d 861, 1998 ND 93.—Work Comp 1905.

**NOT PAYING DEBTS**

Bkrcty.E.D.Mo. 1999. For purposes of section of the Bankruptcy Code governing involuntary cases, "not paying debts" includes regularly missing significant number of payments to creditors or regularly missing payments which are significant in amount in relation to size of alleged debtor's operations. Bankr.Code, 11 U.S.C.A. § 303(h)(1).—In re Feinberg, 232 B.R. 164, reversed 238 B.R. 781, vacated.—Bankr 2234.

**NOT PENDING**

C.A.9 1986. Under provision in the 1985 Equal Access to Justice Act, 28 U.S.C.A. § 2412, that amendments made by Act shall apply to cases pending on or commenced on or after date of enactment, case in which only fee application, and not underlying action, remained to be determined as of effective date of the 1985 Act was "not pending" on date of enactment, and thus, provision of the 1985 Act that raised five million dollar ceiling for eligibility for recovery of fees under the Act was not applicable to case. 28 U.S.C.A. § 2412(d)(2)(B).—American Pacific Concrete Pipe Co., Inc. v. N.L.R.B., 788 F.2d 586.—U S 147(2).

**NOT PERMISSIBLE**

Fed.Cl. 1994. There was no mutual mistake which would allow purchasers to rescind contract conveying property from Small Business Administration (SBA) absent anything in record to show that SBA intended to convey unit that was "nonconforming use" pursuant to local zoning laws, rather than "nonconforming" in general sense of "not permissible"; buyers never questioned or clar-

ified use of term "nonconforming."—Badgley v. U.S., 31 Fed.Cl. 508.—U S 53(8).

**NOT PERTINENT**

Del.Ch. 1956. "Impertinence" in equity pleading signifies that which is irrelevant and which does not in consequence belong in the pleading and the word does not include the idea of offending propriety and the full significance of the word is found in the expression "not pertinent".—Suplee v. Eckert, 122 A.2d 918, 35 Del.Ch. 550.—Equity 151.

N.J.Ch. 1916. "Impertinence," in equity pleading, signifies that which is irrelevant, and which consequently does not belong to the pleading; the word does not include the idea of offending propriety, and its full significance is found in the expression "not pertinent." The element of offending the senses is found in the word "scandalous," but, except as to language unnecessarily offensive, the word "scandalous," as used in equity pleading, may also be said to mean irrelevant, since matter in an equity pleading may be *prima facie* scandalous, yet, if not stated in language unnecessarily offensive, it is not to be regarded by the court as scandalous if it can be said to be material to the primary issue of the suit.—Chew v. Eagan, 99 A. 611, 87 N.J.Eq. 80.

**NOT POSSIBLE**

Minn. 2002. Birth mother's concealment of her location from putative father until after running of statutory period for filing with state fathers' adoption registry did not excuse putative father's failure to register as "not possible," or relieve putative father of fault in connection with his failure to register, for purposes of determining putative father's entitlement to notice of child's adoption pursuant to state adoption statutes, where mother's conduct did not amount to fraud or fraudulent nondisclosure as matter of law, and where putative father's ability to register did not depend upon his receipt of information or assistance from mother. M.S.A. § 259.52, subd. 8(i-iii).—Heidbreder v. Carlton, 645 N.W.2d 355, certiorari denied 123 S.Ct. 621, 154 L.Ed.2d 518.—Adop 7.2(3).

**NOT PRACTICING OR LIKELY TO PRACTICE**

Ill. 1988. Attorneys' gifts or loans to judge in court before which they or their associates practiced were not gifts to judge before whom they were "not practicing or likely to practice," within meaning of statutory exception to disciplinary rule. Code of Prof.Resp., DR 7-110(a), S.H.A. ch. 110A, foll. ¶ 774; S.H.A. ch. 110A, ¶ 65, subd. C(4)(a-c).—In re Corboy, 124 Ill.Dec. 6, 528 N.E.2d 694, 124 Ill.2d 29.—Atty & C 38.

**NOT PRESENT**

Pa.Super. 1955. "Absent", within statute defining substitute teacher means "not present". 24 P.S. § 11-1101.—Gorski v. School Dist. of Borough of Dickson City, 113 A.2d 334, 178 Pa.Super. 158.—Schools 133.6(8).

Pa.Super. 1955. "Absent", within statute defining substitute teachers means "not present". 24 P.S.

§ 11-1101.—Gorski v. School Dist. of Borough of Dickson City, 113 A.2d 334, 178 Pa.Super. 158.—Schools 133.6(8).

#### NOT PRESENTLY MARRIED

Cal.App. 4 Dist. 1975. If word “unmarried” within state Department of Benefit Payments’ regulation, which provides that a child is eligible for AFDC benefits on the basis of age until his eighteenth birthday only if he is unmarried, were construed to mean “never married,” regulation would be invalid because it would exclude two classes of married and divorced children otherwise eligible for AFDC benefits; thus, word “unmarried” would be construed to mean “not presently married.” West’s Ann.Welfare & Inst.Code, §§ 11209, 11250; U.S.C.A.Const. art. 6, cl. 2; Social Security Act, §§ 401, 406, 407, 42 U.S.C.A. §§ 601, 606, 607; West’s Ann.Civ.Code, § 206.—Bryant v. Swoap, 121 Cal.Rptr. 867, 48 Cal.App.3d 431.—Social S 194.6.

#### NOT PREVIOUSLY REJECTED

Bkrcty.W.D.Pa. 1997. Phrase “not previously rejected,” as used in bankruptcy statute providing that Chapter 13 plan may provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected, refers to executory contracts or unexpired leases not previously rejected in that specific bankruptcy case; rejection is final, under the statute, only with respect to particular case in which contract was rejected. Bankr.Code, 11 U.S.C.A. § 1322(b)(7).—In re Sims, 213 B.R. 641.—Bankr 3105.1.

#### NOT PREVIOUSLY UNCHASTE

Neb. 1921. In a prosecution for statutory rape, an instruction that it was necessary for the state to prove beyond a reasonable doubt that the prosecuting witness “was previously chaste” held to be the equivalent of “not previously unchaste.”—Christiancy v. State, 184 N.W. 948, 106 Neb. 822.—Rape 59(8).

#### NOT PRIVILEGED

C.A.3 (Pa.) 1959. The term “not privileged” within Federal Rule providing that deponent may be examined regarding any matter not privileged which is relevant to subject matter involved in pending action refers to “privileges” as that term is understood in the law of evidence. Fed.Rules Civ. Proc. rule 26(b), 28 U.S.C.A.—Mitchell v. Roma, 265 F.2d 633.—Fed Civ Proc 1414.1.

Ct.Cl. 1955. Words “not privileged” in rule of Court of Claims providing in substance that Court of Claims may, on motion of any party showing good cause therefor, order any party to produce and permit inspection and copying of any documents or things “not privileged”, relate to privilege as known and understood in the law of evidence and do not permit head of governmental department to withhold compliance with order to produce and permit inspection and copying of documents and things because, in his opinion, compliance will be injurious to the public interest. Rules of Court

of Claims, rules 26, 27, 28 U.S.C.A.; Fed.Rules Civ.Proc. rule 34, 28 U.S.C.A.; 28 U.S.C.A. §§ 1346, 1492, 2071, 2504, 2507, 2509; Interstate Commerce Act, § 220(f), 49 U.S.C.A. § 320(f).—Benson v. U. S., 130 F.Supp. 347, 133 Ct.Cl. 11.—Fed Cts 1112.

S.D.Cal. 1953. Order of United States Attorney General instructing Justice Department employees to decline to produce information contained in Department files merely reserves to Attorney General decision whether some privilege recognized in law of evidence shall be claimed by Government against court order calling for production or disclosure from such files, and, therefore, assertion that to grant motion for such a court order would violate Attorney General’s order falls short of a claim that the documents which would be demanded are “privileged” within discovery rule since term “not privileged”, as used in rule, refers to “privileges” as that term is understood in the law of evidence. Fed.Rules Civ.Proc. rule 34, 28 U.S.C.A.—U.S. v. Certain Parcels of Land, Etc., 15 F.R.D. 224.—Fed Civ Proc 1600(4).

D.Kan. 1973. Term “not privileged” within federal rules of civil procedure permitting discovery of items if they are not privileged refers to a “privilege” as that term is used in the law of evidence. Fed.Rules Civ.Proc. rules 26(b), 34, 28 U.S.C.A.—Lincoln Am. Corp. v. Bryden, 375 F.Supp. 109.—Fed Civ Proc 1272.1.

E.D.La. 1967. “Not privileged”, within rule permitting discovery of documents not privileged, refers to “privilege” as term is used in law of evidence. Fed.Rules Civ.Proc. rules 26, 34, 28 U.S.C.A.—Delta S. S. Lines, Inc. v. National Maritime Union of America, AFL-CIO, 265 F.Supp. 654.—Fed Civ Proc 1600(1).

W.D.Mich. 1964. The term “not privileged” within federal rules limiting discovery to any matter not privileged refers to privileges as that term is understood in the law of evidence. Fed.Rules Civ. Proc. rules 26(b), 34, 43(a), 28 U.S.C.A.—Boyd v. Wrisley, 228 F.Supp. 9.—Fed Civ Proc 1272.1.

D.Neb. 1959. Under rule providing for production of documents before trial which are, among other things, not privileged, term “not privileged”, refers to privilege as that term is understood in the law of evidence. Fed.Rules Civ.Proc. rule 34, 28 U.S.C.A.—Carpenter-Trant Drilling Co. v. Magnolia Petroleum Corp., 23 F.R.D. 257.—Fed Civ Proc 1600(1).

E.D.Pa. 1973. Term “not privileged” as used in rule relating to the scope of discovery refers to privileges as the word is understood in the law of evidence. Fed.Rules Civ.Proc. rules 26, 26(b)(3), 28 U.S.C.A.—Snead v. American Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148.—Fed Civ Proc 1272.1.

W.D.Tex. 1966. Term “not privileged”, as used in rule providing for discovery of matter “not privileged”, refers to privileges as that term is understood in the law of evidence. Fed.Rules Civ.Proc. rule 34, 28 U.S.C.A.—Franks v. National Dairy

**NOT READILY OBTAINABLE**

Products Corp., 41 F.R.D. 234.—Fed Civ Proc 1600(1).

Cal.App. 2 Dist. 1967. Term “not privileged”, as used in statute providing for the production and inspection of documents which are not privileged and in other sections relating to discovery, refers to privilege as that term is understood in the law of evidence. West’s Ann.Code Civ.Proc. § 2031.—Sierra Vista Hospital v. Superior Court for San Luis Obispo County, 56 Cal.Rptr. 387, 248 Cal.App.2d 359.—Pretrial Proc 356.1.

**NOT PROPERTY OF THE ESTATE**

Bkrcty.E.D.N.C. 1983. Unlike postpetition earnings in Chapter 13 case, individual Chapter 11 debtor’s earnings from services rendered after commencement of case are “not property of the estate” and thus are subject to alimony claims. Bankr. Code, 11 U.S.C.A. §§ 510(c), 541(a)(3-7), 543, 550, 551, 553, 723, 1306(a)(2).—In re Summerlin, 26 B.R. 875.—Bankr 2558.

**NOT PROVEN**

Conn. 1895. Where a defendant, having appealed, requested the judge to incorporate in the findings certain alleged facts which he claimed to be proven by the evidence, embraced in certain numbered paragraphs, upon the margin of which the court wrote “Found” and “Not found,” the judge used “found” as meaning “proven,” and “not found” as signifying “not proven.”—Ketchum v. Packer, 33 A. 499, 65 Conn. 544.

**NOT PROVIDED FOR OR MENTIONED**

N.J.Co.Prob.Div. 1961. In statute voiding will made when testator had no issue, if testator dies leaving issue “not provided for or mentioned”, the word “mentioned” does not mean “provided for”. N.J.S. 3A:3-10, N.J.S.A.—In re Campbell’s Estate, 176 A.2d 840, 71 N.J.Super. 307.—Des & Dist 47(1).

**NOT PUBLICLY A RESIDENT**

Wis.App. 1991. Defendant was “not publicly a resident” of state within meaning of statute of limitations during two and one-half years he was on active duty in the United States Army stationed outside state and, thus, statute of limitations was tolled during that period, though defendant remained state resident for purposes of voting, was registered to vote and did vote once by absentee ballot, and filed state income tax returns during that period and defendant returned to state after his service commitment was completed. W.S.A. 939.74(3).—State v. Whitman, 466 N.W.2d 193, 160 Wis.2d 260, review denied 468 N.W.2d 28.—Crim Law 152.

**NOT PUNISHABLE BY DEATH OR LIFE IMPRISONMENT**

C.A.1 (Puerto Rico) 1992. Statute permitting suspension of sentence only in cases of offenses “not punishable by death or life imprisonment” precludes suspension if crime is capable of such

punishments, even if those are not the only punishments possible. 18 U.S.C.(1982 Ed.) § 3651.—U.S. v. Nieves-Rivera, 961 F.2d 15.—Sent & Pun 1837.

**NOT QUITE**

La. 1941. The terms “more or less,” “a little more than,” “not quite,” “not more than” and “approximately” are terms of safety and precaution and ordinarily mean “about” when used in a deed.—Pierce v. Lefort, 200 So. 801, 197 La. 1.—Deeds 113.

La.App. 1 Cir. 1945. “More or less” are words of safety and precaution and when used in deed are intended to cover some slight inaccuracy in frontage, depth or quantity in land conveyed, and ordinarily means “about” the same as terms “a little more than,” “not quite,” “not more than,” or “approximately,” and all are often introduced into a description practically without effect. LSA-C.C. art. 2493.—Harries v. Harang, 23 So.2d 786.—Deeds 113.

**NO TRACT OF LAND**

Neb. 1895. As used in Act March 27, 1889, art. 3, § 3, providing that no tract of land shall be crossed by more than one ditch for irrigation purposes, the term “no tract of land,” being employed without qualifications, must be held to include the property of corporations as well as natural persons, since such would have been the construction, had the statute read, “The land of no person shall be crossed.”—Paxton & Hershey Irrigating Canal & Land Co. v. Farmers’ & Merchants’ Irrigation & Land Co., 64 N.W. 343, 45 Neb. 884, 50 Am.St.Rep. 585, 29 L.R.A. 853.

**NOT READILY ACCESSIBLE FOR IMMEDIATE USE**

Fla. 1993. Unloaded firearm in floorboard area of right front passenger’s seat was “not readily accessible for immediate use” when no ammunition for weapon was found in vehicle for purposes of statute stating that it is lawful to possess concealed firearm within interior of private conveyance if firearm is not readily accessible for immediate use. West’s F.S.A. § 790.25(5).—Ashley v. State, 619 So.2d 294.—Weap 4.

**NOT READILY ASCERTAINABLE**

W.Va. 1940. In action to abate a private nuisance and for damages, issue out of chancery, ordered because depositions showed that plaintiff’s damages were “not readily ascertainable,” was proper since quoted phrase, used by court, meant that evidence as to damages was conflicting, as required by statute authorizing such an issue out of chancery. Code 1931, 56-6-4.—Lyons v. Viglianco, 8 S.E.2d 801, 122 W.Va. 257.—Equity 377.

**NOT READILY OBTAINABLE IN IOWA**

Iowa 1955. In action for cancellation of certain use tax assessments, evidence sustained trial court’s finding that certain equipment for generation of electricity was “not readily obtainable in Iowa”, as

term is used in exemption provision. I.C.A. §§ 423.1 et seq., 423.1, subd. 10.—City of Ames v. State Tax Commission, 71 N.W.2d 15, 246 Iowa 1016.—Tax 1317.

Iowa 1955. Custom-manufactured switch-gear delivered in 1949 was not exempt from use tax as industrial equipment “not readily obtainable in Iowa” merely because it was custom-made, where it could have been readily ordered through agent or dealer in Iowa. I.C.A. §§ 423.1 et seq., 423.1, subd. 10.—City of Ames v. State Tax Commission, 71 N.W.2d 15, 246 Iowa 1016.—Tax 1241.1.

Iowa 1946. Whether interpretation of words, “not readily obtainable in Iowa,” in section of Use Tax Law excluding processing of tangible personalty, including industrial materials and equipment not so obtainable, from definition of word “use”, as not limited to materials and equipment not being sold by vendors in state subject to state sales tax, would bring ruin to such vendors and consequent loss of revenue to state, are questions for Legislature to consider, but should not control Supreme Court or State Tax Commission in construing statutory language. Code 1939, § 6943.102, subd. 1(c).—Dain Mfg. Co. of Iowa v. Iowa State Tax Commission, 22 N.W.2d 786, 237 Iowa 531.—Const Law 70.3(14).

Iowa 1946. An article is “not readily obtainable in Iowa” within provision of Use Tax Law that property used in processing, which is excepted from statutory definition of word “use”, shall include industrial materials and equipment not so obtainable, unless it can be procured in state in kind and quality fairly equivalent to articles purchased outside state, and purchaser’s whim, opinion or pretense is insufficient to establish superiority of article purchased outside state, but where such fact is conceded or proof fairly establishes actual material difference between domestic and foreign article, purchaser of foreign article is not liable for use tax. Code 1939, §§ 6943.102, subd. 1(c), 6943.103.—Dain Mfg. Co. of Iowa v. Iowa State Tax Commission, 22 N.W.2d 786, 237 Iowa 531.—Tax 1241.1.

**NOT REASONABLY**

Iowa 1950. Under statute making provisions prohibiting stopping vehicle on paved part of highway when it is practical to stop off paved part of highway, inapplicable when automobile is so disabled as to make it “impossible” to avoid stopping and leaving vehicle temporarily on paved part of highway, quoted word should be given a practical construction and may be construed to mean “not reasonably” practical. I.C.A. §§ 321.354, 321.355.—Heidenbrink v. Messinger, 44 N.W.2d 713, 241 Iowa 1188.—Autos 173(2).

**NOT REASONABLY FORESEEABLE**

C.A.7 (III.) 1993. Decision by foundation that managed hospital’s financial affairs to cease making subventions to hospital because prior subventions had invaded principal of endowment fund was “not reasonably foreseeable” for purposes of Worker Adjustment and Retraining Notification (WARN) Act provision stating that employer may order mass layoff before conclusion of 60-day period if mass

layoff is caused by unforeseeable business circumstances; no one on hospital’s board knew or had reason to know that foundation had invaded principal in making subventions to hospital, that invasions of principal might jeopardize foundation’s tax exempt status or that foundation would cease making subventions. Worker Adjustment and Retraining Notification Act, § 3(b)(2)(A), 29 U.S.C.A. § 2102(b)(2)(A).—Jurcev v. Central Community Hosp., 7 F.3d 618, certiorari denied 114 S.Ct. 1830, 511 U.S. 1081, 128 L.Ed.2d 459.—Labor 7.1.

**NOT REASONABLY OBTAINABLE**

Ohio App. 4 Dist. 1993. Fact that child abuse victim was not competent to testify did not mean that child’s testimony was “not reasonably obtainable,” such that out-of-court statements made by child were admissible. Rules of Evid., Rule 807(A)(2), (B).—State v. Black, 622 N.E.2d 1166, 87 Ohio App.3d 724.—Infants 20.

**NOT REASONABLY PRACTICABLE**

Iowa App. 1981. “Impossible” in statute governing excuse for failure to completely remove vehicle from traveled portion of road when vehicle “is disabled \* \* \* to such an extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle in such a position” should not be given narrow, literal construction; it means “not reasonably practicable.” I.C.A. § 321.355.—Hamilton v. Luckey, 315 N.W.2d 823.—Autos 173(2).

**NOT RECEIVING SIMILAR SERVICE FROM ANOTHER UTILITY**

N.D. 1956. The statute respecting a certificate of public convenience and necessity if a public utility extends its service into territory contiguous to that already occupied by it and “not receiving similar service from another utility” or electric cooperative corporation has reference to service in fact as distinguished from ability to give service and it denotes actual physical delivery of electrical energy. NDRC 1953 Supp. 49-0301 and subd. 3.—Williams Elec. Co-op., Inc. v. Montana-Dakota Utilities Co., 79 N.W.2d 508.—Electricity 8.1(3).

**NOT RECOGNIZED AS VALID IN STATE**

Utah App. 1992. Utah statute regarding divorce decrees “not recognized as valid in state,” which purported to prevent party who obtains or consents to such a decree from claiming status of other party’s spouse following his or her death, applied only to invalid divorce decrees obtained while other spouse was alive, not to divorce decrees which were void ab initio because of other party’s intervening death; statute could not be applied to prevent wife whose husband died during pendency of default divorce proceeding from inheriting from husband’s estate. U.C.A.1953, 75-2-803(2)(a).—Farrell v. Porter, 830 P.2d 299.—Des & Dist 52(1); Divorce 169.

**NOT RECORDED ON A RETURN**

S.D.N.Y. 1971. Where corporate taxpayer filed petition for arrangement in 1968 (and was ultimate-

**NOT RESTRAINED BY**

ly adjudicated a bankrupt), and where, pursuant to consent to extension, the government made assessment in 1969 based on disallowance of certain deductions claimed by taxpayer on his 1964 income tax return, the taxes which were the subject of the assessment became "legally due and owing" at the time of the assessment, following completion of the audit procedures, rather than upon filing of the 1964 return, within statute providing that discharge in bankruptcy shall release bankrupt from taxes which became legally due and owing to the United States more than three years preceding bankruptcy, and such taxes were "not recorded on a return" within provision excepting taxes not so recorded from the aforesaid release. *Bankr.Act.*, §§ 17, sub. a, 64, sub. a(4), 11 U.S.C.A. §§ 35(a), 104(a) (4).—In re Laytan Jewelers, Inc., 332 F.Supp. 1153.—*Bankr* 3352.

**NOT REGISTERED AS HEREIN PROVIDED FOR**

*La.App. 1 Cir. 1934.* Words, "not registered as herein provided for," in act authorizing any citizen or officer to kill dangerous dog not so registered, mean not tagged as required by previous section. Act No. 239 of 1918, §§ 1-3, LSA-R.S. 3:2771-3:2773.—*Jeane v. Johnson*, 154 So. 757.—*Anim* 52.

**NOT REGULARLY FURNISHED**

*N.Y. 1960.* In policy insuring with respect to nonowned automobile, any relative of named insured, but only with respect to vehicle "not regularly furnished" for use of such relative, quoted phrase may not be read as meaning merely "furnished occasionally", but by its plain language it includes an automobile not furnished at all, and, although it is not synonymous with "stolen", it includes stolen automobiles which are in the same class as automobiles taken without permission or on a joy ride. *Penal Law* §§ 1290, 1293-a.—*Sperling v. Great Am. Indem. Co.*, 199 N.Y.S.2d 465, 7 N.Y.2d 442, 166 N.E.2d 482, reargument denied 201 N.Y.S.2d 1027, 8 N.Y.2d 785, 168 N.E.2d 136.—*Insurance* 2657.

**NOT REGULARLY FURNISHED FOR USE**

*Md. 1967.* Period and frequency of permitted use of nonowned automobile are elements to be considered in determination of whether there was coverage under automobile liability policy providing coverage to insured while operating a nonowned vehicle "not regularly furnished for use".—*Allstate Ins. Co. v. Humphrey*, 229 A.2d 70, 246 Md. 492.—*Insurance* 2657.

**NOT REGULATED**

*Ill.App. 1 Dist. 1999.* Words "exclude from active regulatory oversight," within the meaning of the Public Utilities Act section authorizing the Commerce Commission to exclude cellular radio service from active regulatory oversight, did not mean the same thing as "not regulated," within the meaning of the Messages Tax Act section precluding imposition of the invested capital tax on persons who were not regulated by the Commission, and

thus, cellular telephone service providers were properly subject to the invested capital tax. *S.H.A. 35 ILCS 610/2a.1; 220 ILCS 5/13-203.—Chicago SMSA Ltd. Partnership v. Illinois Dept. of Revenue*, 240 Ill.Dec. 32, 715 N.E.2d 719, 306 Ill.App.3d 977, rehearing denied, appeal denied 244 Ill.Dec. 182, 724 N.E.2d 1266, 187 Ill.2d 566.—*Tel* 461.5.

**NOT RELIGIOUS IN CHARACTER NOR DEVOTED TO RELIGIOUS ENDS OR USES**

*Conn. 1967.* Under statute prohibiting any secular business or labor except works of necessity or mercy on Sunday, "secular" means "nonecclesiastical" or "not religious in character nor devoted to religious ends or uses". *C.G.S.A. §§ 1-1, 53-300.—Knights of Columbus Council No. 3884 (Reverend Edward Shaughnessy Council) v. Mulcahy*, 227 A.2d 413, 154 Conn. 583.—*Sunday* 3.

**NOT REMEDIABLE**

*Ill.App. 2 Dist. 1963.* Cause "not remediable" for purpose of determining whether to dismiss a teacher is the doing of irreparable damage. *Ill.Rev. Stat.1959, c. 122, § 24-3.—Werner v. Community Unit School Dist. No. 4, Marshall County*, 190 N.E.2d 184, 40 Ill.App.2d 491.—*Schools* 147.26.

**NOT REPUGNANT TO**

*Va. 1898.* In a clause of a charter conferring general power of taxation on a city, and providing that it shall be exercised "in accordance with" the Constitution and laws of the state, the language "in accordance with" is the equivalent of "not repugnant to," "not in conflict with," or "not inconsistent with" the laws of the state, and does not limit or confine the taxing power of the city to the provisions of the general law.—*City of Norfolk v. Norfolk Landmark Pub. Co.*, 28 S.E. 959, 95 Va. 564.

**NO TRESPASSING**

*Md.App. 1982.* Conspicuously posted signs indicating that presence of unauthorized persons was proscribed adequately "posted" property and defendant who entered property despite those signs could be convicted of trespass on posted property; use of precise wording, "No trespassing" or "Trespassers forbidden" was not mandated. *Code 1957, Art. 27, § 576.—Monroe v. State*, 445 A.2d 1047, 51 Md.App. 661.—*Tresp* 81.

**NOT RESTRAINED BY LAW**

*N.Y.A.D. 1 Dept. 1907.* The term "agreement," in *Code Civ.Proc. § 66*, providing that the compensation of an attorney for his services is governed by agreement, express or implied, which is "not restrained by law," means an agreement which is recognized by the law as a valid agreement. An agreement obtained for a consideration which is valid, or upon inducement which is expressly prohibited, would not be an agreement which was not restrained by law.—*O'Neill v. Campbell*, 103 N.Y.S. 150, 39 Civ.Proc.Rep. 121, 118 A.D. 64, reversed 86 N.E. 1128, 193 N.Y. 634.

**NOT REVIEWABLE AS A LAND USE DECISION**

Or.App. 1992. Appeal that is “not reviewable as a land use decision,” as to invoke statutory provision that such appeals be transferred from Land Use Board of Appeals to circuit court, means that subject matter of controversy is outside statutory definition of land use decision. ORS 19.230(4), 197.015(10).—Owen Development Group, Inc. v. City of Gearhart, 826 P.2d 1016, 111 Or.App. 476.—Zoning 569.

**NOT SAFE**

Tex.Civ.App. 1905. The phrase “not safe” is a negation of every degree of safety, and hence an instruction, in an action against a railroad company for injury resulting from a defective track, merely relating to the condition of the track, and not to an imposed duty, which was otherwise covered, stating “If you believe from the evidence that the track of the defendant at the place of the accident was not in a safe condition,” etc., if erroneous in omitting to qualify the phrase “not in safe condition,” was to the advantage of defendant, and it had no right to complain.—Galveston, H. & S.A. Ry. Co. v. Roberts, 91 S.W. 375, writ refused.

**NOT SANE**

Cal.App. 4 Dist. 1959. The term “insane” is the equivalent of “non compos mentis”, both meaning “not sane” or “of unsound mind”.—Gottesman v. Simon, 337 P.2d 906, 169 Cal.App.2d 494.—Mental H 3.1.

**NOT SATISFIED**

Mo. 1922. In an action for injuries received by the derailment of a hand car, the jury were instructed that they must be satisfied that the hand car was defective and, if they were in doubt about plaintiff having received his injuries from the cause and in the manner stated, they should find for defendant. *Held*, that such instruction is not error because of the use of the words “in doubt”; such words having the meaning “not satisfied.”—Shepard v. Schaff, 241 S.W. 431.—Trial 228(3).

**NOT SECRET, WITHOUT CONCEALMENT OR DISGUISE**

La. 1905. The word “open,” in Civ.Code, art. 1481, providing that those living in open concubinage are respectively incapable of making to each other any donation of immovables, means “not secret, without concealment or disguise”; so that, where the living is under the cloak of an innocent relation and sought to be kept secret, it does not give rise to the incapacity pronounced by that article.—Succession of Jahraus, 38 So. 417, 114 La. 456.—Gifts 6.

**NOT SELECTED OR DRAWN ACCORDING TO LAW**

Ariz. 1967. The words “not selected or drawn according to law” within rule providing that a challenge to the panel may be made only on the ground that the grand jurors were not selected or drawn

according to law encompasses failure of impaneling court to examine the grand jurors touching their qualifications. A.R.S. § 21-201; 17 A.R.S. Rules of Civil Procedure, rules 82, 84.—State v. Superior Court In and For Pima County, 430 P.2d 408, 102 Ariz. 388.—Gr Jury 17.

Ariz.App. 1966. “Not selected or drawn according to law” within rule providing that challenge to panel may be made only on ground that grand jurors were not selected or drawn according to law did not include examination of jurors touching their qualifications in pursuance of rule providing that when grand jury is drawn and appears the court and prosecuting officer shall examine grand jurors touching their qualifications. 17 A.R.S. Rules of Criminal Procedure, rules 82, 84.—State v. Superior Court In and For Pima County, 420 P.2d 945, 4 Ariz.App. 373, rehearing denied 422 P.2d 393, 4 Ariz.App. 562, vacated 430 P.2d 408, 102 Ariz. 388.—Gr Jury 17.

**NOT SERIOUSLY MISLEADING**

C.A.9 (Cal.) 1984. Erroneous checking of “TERMINATION” box rather than “RELEASE” box on financing statement could not be considered “not seriously misleading” merely because no one was actually misled by the termination; whether filing statement is “not seriously misleading” does not turn on whether a creditor is actually misled but whether a potential creditor could have been misled. West’s Ann.Cal.Com.Code § 9402(8).—In re Pacific Trencher & Equipment, Inc., 735 F.2d 362.—Sec Tran 100.

C.A.2 (Conn.) 1965. Use of name “Excel Department Stores” instead of true name “Excel Stores, Inc.” in signing conditional sale contract was a “minor error” and “not seriously misleading,” and contract was enforceable where properly signed by appropriate officer and creditor or other interested person would in fact be put on notice of lien. C.G.S.A. §§ 42a-1-201(39), 42a-9-402.—In re Excel Stores, Inc., 341 F.2d 961.—Sales 461; Sec Tran 42.

E.D.Va. 1993. Federal Deposit Insurance Corporation’s (FDIC) signing continuation statement in its corporate capacity rather than in its capacity as receiver was “minor” error and “not seriously misleading,” and thus Uniform Commercial Code’s (UCC) exculpatory provision governing minor errors in financing statements precluded invalidation of the statement based on the misnomer; reasonably diligent researcher was told that secured party was FDIC and was given sufficient information about the original creditor to be on notice that further inquiry was required. U.C.C. §§ 9-402(8), 9-403; Va.Code 1950, §§ 8.9-402(8), 8.9-403.—F.D.I.C. v. Victory Lanes, 158 B.R. 617.—Sec Tran 98.

**NOT SETTLED BY AGREEMENT OF THE PARTIES**

Ohio App. 10 Dist. 1995. For purposes of provision of prejudgment interest statute pursuant to which such interest is available only when judgment was rendered in civil action that was “not settled by

**NOT SPECIFIED HEREIN**

agreement of the parties,” case in which insureds and their uninsured motorist carrier submitted issues of liability and damages to arbitration and insureds thereafter sought confirmation of arbitration award and entry of judgment thereon was not settled by agreement of the parties. R.C. § 1343.03(C).—Woods v. Farmers Ins. of Columbus, Inc., 666 N.E.2d 283, 106 Ohio App.3d 389.—Interest 39(2.20).

**NOT SEVERE**

C.A.11 (Ala.) 1986. Regulation setting forth severity requirement for disability benefits is threshold inquiry allowing only claims based on most trivial impairments to be rejected; impairment is “not severe” only if abnormality is so slight and its effect so minimal that it would clearly not be expected to interfere with individual’s ability to work, irrespective of age, education, or work experience. Social Security Administration Regulations, §§ 404.1520, 404.1520(c), 42 U.S.C.A.App.—McDaniel v. Bowen, 800 F.2d 1026.—Social S 140.21.

C.A.6 (Tenn.) 1985. In order to ensure consistency with statutory disabilities standards set forth in the Social Security Act, § 1614(a)(3)(A-C), as amended, 42 U.S.C.A. § 1382c(a)(3)(A-C), impairment can be considered as “not severe,” and application for disability benefits rejected at second stage of sequential evaluation process, only if impairment is a slight abnormality which has such minimal effect on individual that it would not be expected to interfere with individual’s ability to work, irrespective of age, education and work experience.—Farris v. Secretary of Health and Human Services, 773 F.2d 85.—Social S 140.21.

D.Me. 1983. Impairment is “not severe,” for purposes of social security disability benefits eligibility, if impairment has such minimal effect on individual’s ability to do basic work activities that the impairment would not be expected to interfere with ability to do most work, irrespective of age, education and work experience. Social Security Administration Regulations, §§ 404.1520(c), 404.1521, 404.1521(b), 42 U.S.C.A.App.—Trafton v. Heckler, 575 F.Supp. 742.—Social S 140.21.

**NOT SHOWING THE NAMES OF THE PARTNERS**

Cal. 1914. A firm name, “Lamberson & Lamberson,” is not “a fictitious name,” nor designation “not showing the names of the partners,” within Civ.Code, §§ 2466, 2468.—Lamberson v. Bashore, 139 P. 817, 167 Cal. 387.—Partners 64.

**NOT SIGNIFICANTLY PROBATIVE**

N.D.Ga. 1994. An issue is not “genuine,” for purposes of establishing genuine issue of material fact necessary to defeat motion for summary judgment, if it is unsupported by evidence or is created by evidence that is “merely colorable” or “not significantly probative.” Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.—Dickson v. Amoco Performance Products, Inc., 845 F.Supp. 1565.—Fed Civ Proc 2470.1.

**NOT SO DYING**

Ill. 1910. By the third, fourth, and fifth paragraphs of his will, testator devised in fee simple lands in severalty to his three sons. The seventh paragraph of the will provided that, if any or either of such children should die leaving no issue living at the time of his or her decease, the estate devised to the child so dying was to go to the other and remaining “children or child not so dying in equal proportions in fee simple in remainder forever.” *Held*, that the words “not so dying” meant that the executors devisees should be children of the testator not dying in like manner or under the same circumstances as the deceased child—that is, leaving no child or children, or descendant or descendants living at the time of their decease—and such words could not be changed so as to read “not having so died,” and since by this construction there will be no person who can take under the seventh paragraph, as no living person can fulfill the description, the seventh paragraph must be regarded as ineffective and insufficient to restrain or limit the previous paragraphs of the will, and hence the devisees in such paragraphs take a fee-simple estate.—Mills v. Teel, 92 N.E. 310, 245 Ill. 483.—Wills 601(1).

**NOT SOLELY WITHIN THE CONTROL OF THE ARCHITECT**

Ill.App. 1 Dist. 1993. Architect did not breach flat fee agreement with developer by refusing to redo, without additional compensation, working drawings covering over 100,000 square feet of shopping center space to enable anchor tenants to switch locations; requested change was cause “not solely within the control of the Architect,” within meaning of additional services section of contract which architect understood governed parties’ relationship.—Edward M. Cohen & Associates, Ltd. v. First Nat. Bank of Highland Park, 188 Ill.Dec. 106, 618 N.E.2d 676, 249 Ill.App.3d 929, appeal denied 191 Ill.Dec. 617, 624 N.E.2d 805, 153 Ill.2d 558.—Contracts 232(2).

**NOT SPECIFIED**

N.Y.A.D. 4 Dept. 1944. Since death claims are not specifically mentioned in section 6, relating to presentation of claims against county for injuries to person or property caused by defective highways and bridges, it would be assumed that Legislature intended that section 6-a, relating to presentation of claims “not specified” in section 6, should cover death claims whether arising from highway accidents or defects or from some other cause. County Law, §§ 6, 6-a.—Hawkins v. Oneida County, 47 N.Y.S.2d 574, 267 A.D. 547, appeal granted 49 N.Y.S.2d 424, 267 A.D. 1041, motion denied 78 N.E.2d 350, 297 N.Y. 807, reversed 79 N.E.2d 458, 297 N.Y. 393.—Bridges 44(4); High 203.

**NOT SPECIFIED HEREIN**

N.C. 1917. Under Revisal 1905, § 3142, will devising real estate to wife for life, and after her death to a brother, who died before the testator, and devising to the wife all other property “not

specified herein," held not to give the wife the remainder interest covered by the lapsed devise to the brother.—*Howell v. Mehegan*, 93 S.E. 438, 174 N.C. 64.—Wills 858(4).

**NOT STRICTLY PRIVATE**

U.S.N.Y. 1927. The phrase 'affected with a public interest,' used as a basis for legislative regulation of prices, means something more than 'quasi public,' or "not strictly private," and like phrases employed as a basis for upholding police regulation in respect to the conduct of particular businesses.—*Tyson & Bro.-United Theatre Ticket Offices v. Banton*, 47 S.Ct. 426, 273 U.S. 418, 71 L.Ed. 718, 58 A.L.R. 1236.—Const Law 81.

U.S.N.Y. 1927. "Affected with a public interest," as relates to legislative price regulation, means something more than "quasi public," "not strictly private," or like phrases.—*Tyson & Bro.-United Theatre Ticket Offices v. Banton*, 47 S.Ct. 426, 273 U.S. 418, 71 L.Ed. 718, 58 A.L.R. 1236.—Const Law 81.

**NOT SUBJECT TO REQUIREMENTS OF THIS SECTION**

C.A.D.C. 1992. Section of Freedom of Information Act pertaining to informant records maintained by criminal law enforcement agency, permitting record holder to treat records as "not subject to requirements of this section" unless informant's status as informant has been officially confirmed, provides express legislative authorization for "Glo-mar response," in which agency neither confirms nor denies existence of records, unless informant's status has been officially confirmed; in latter instance, requirements of FOIA govern, and agency must acknowledge existence of any records it holds. 5 U.S.C.A. § 552(c)(2).—*Benavides v. Drug Enforcement Admin.*, 968 F.2d 1243, 296 U.S.App.D.C. 372, opinion modified on rehearing 976 F.2d 751, 298 U.S.App.D.C. 102.—Records 62.

**NOT SUBSTANTIALLY DIFFERENT**

Ala.Crim.App. 1984. State, which presented testimony that marijuana was found by first officer in trunk of car which defendant was driving, that first officer handed bag of contraband to second officer and followed second officer's automobile directly to station, that marijuana was weighed, placed in sealed bag, and locked in second officer's locker, and that bag was then taken from locker to drug analyst, who observed that seal had not been broken, showed to a "reasonable probability" that evidence was "not substantially different" from the way it was at time it was seized, sufficiently establishing necessary chain of custody, despite discrepancy between weight of marijuana at time it was weighed by two officers and later when it was weighed in lab.—*Lott v. State*, 456 So.2d 857.—Crim Law 404.60.

**NOT SUBSTANTIALLY JUSTIFIED**

Cal.App. 1 Dist. 1991. Provision of Taxpayers' Bill of Rights granting trial courts the power to award attorney fees to taxpayers that have prevailed

in tax-related litigation where state's position was "not substantially justified" vests trial court with discretion to make an award subject to reversal only for abuse. West's Ann.Cal.Rev. & T.Code § 7156.—*Tetra Pak, Inc. v. State Bd. of Equalization*, 286 Cal.Rptr. 529, 234 Cal.App.3d 1751.—Tax 1319, 1340.

**NOT SUFFICIENT**

Iowa 1886. The court instructed the jury, in substance, that if the bridge in question was properly built, though from a plan in the builder's head, such plan would be sufficient. Some or all of the jurors seem to have regarded the instruction as an interrogatory, and some one wrote directly under it "Not sufficient." Held that these words could not be regarded as a special verdict, and that the irregularity was not sufficient ground for setting aside the general verdict.—*Cooper v. Mills County*, 28 N.W. 633, 69 Iowa 350.—App & E 1070(2).

**NOT SUFFICIENT GOOD CAUSE SHOWN**

Fla. 1976. Though trial court may have had discretion to postpone discovery by plaintiff taxpayer for a short period pending determination of defendants' motions to dismiss complaint in action for ad valorem tax relief, pendency of such motions was "not sufficient good cause shown" to justify postponement of discovery for 12-month period. 30 West's F.S.A. Rules of Civil Procedure, rule 1.280(c).—*Deltona Corp. v. Bailey*, 336 So.2d 1163.—Pretrial Proc 25.

**NOT SUMMONED**

Oklahoma 1933. Statement in sheriff's return that defendant was "not found in my county" held equivalent to "not summoned," authorizing court clerk to issue alias summons. 12 Okl.St.Ann. § 157.—*Schuman v. Joseph H. Cohen & Sons*, 26 P.2d 733, 166 Okla. 159, 1933 OK 567.—Proc 45.

**NOT SUPPORTED BY THE GREAT WEIGHT OF THE EVIDENCE**

Tex.App.—Austin 1995. Under Solid Waste Disposal Act (SWDA) section permitting Natural Resource Conservation Commission to overturn underlying finding of fact made by hearing examiner only if finding is "not supported by the great weight of the evidence," Commission is not permitted to overturn examiner's underlying finding on ground that Commission would have reached contrary decision, but can only exercise its discretion to reverse those findings that do not find support in "great weight" of evidence in record, though "not supported by the great weight of the evidence" standard is not functional equivalent of "against the great weight of the evidence" standard of appellate evidentiary review. V.T.C.A., Health & Safety Code § 361.0832(c).—*Hunter Indus. Facilities, Inc. v. Texas Natural Resource Conservation Com'n*, 910 S.W.2d 96, rehearing overruled, and writ denied, and motion dismissed.—Environ Law 382.

### NOT SUSTAINED BY SUFFICIENT EVIDENCE

Iowa 1903. A case where the verdict is under the evidence, inadequate, is a case “not sustained by sufficient evidence,” within Code, § 3755, authorizing the trial court to grant a new trial where the verdict is not sustained by sufficient evidence, etc.—Tathwell v. City of Cedar Rapids, 97 N.W. 96, 122 Iowa 50.

Ohio 1970. Phrase “not sustained by sufficient evidence,” in statute authorizing new trial is synonymous and interchangeable with phrase “against the weight of the evidence,” or like phrase. R.C. §§ 2321.17(F), 2321.18.—Rohde v. Farmer, 262 N.E.2d 685, 23 Ohio St.2d 82, 52 O.O.2d 376.—New Tr 70, 72(1).

### NOT TAKEN

N.Y.A.D. 1 Dept. 1927. A central bureau for clearing earned premiums under “not taken” and canceled casualty policies and binders, created within a rating organization of underwriters, though organized ostensibly as an independent unincorporated, held a “rating organization,” within Insurance Law, § 141, subd. 6, being either an integral part of the rate-making organization or its mere agent to carry on some of its claimed purposes.—Rosensweig v. Whitney, 222 N.Y.S. 87, 221 A.D. 8.—Insurance 1547(1).

N.Y.A.D. 1 Dept. 1927. So-called “rule” of insurance rating organization, requiring broker to be “responsible” for the payment of earned premiums from effective date of insurance under “not taken” and canceled policies and binders, unless the order for insurance is signed by applicant or accompanied by his written authority with certain other exceptions, held not a “rule” authorized to be adopted by such organizations, under Insurance Law, § 141, and is unreasonable, and if its purpose be to punish or penalize insolvent brokers making a practice of effecting insurance without due authorization, remedy is by application to insurance superintendent for disciplinary action under section 143.—Rosensweig v. Whitney, 222 N.Y.S. 87, 221 A.D. 8.—Insurance 1644.

### NOT TAKING INTO ACCOUNT

Alaska 1993. Phrase “exclusive of,” in statutes pertaining to minimum automobile policy limits, means “not taking into account.” AS 01.10.040, 28.20.440(b), 28.22.101(d).—Hughes v. Harrelson, 844 P.2d 1106.—Insurance 2756(1).

### NOT TERMINATED

Ga.App. 1976. Prosecution was “not terminated” and jury was “not impaneled and sworn” within meaning of statute, which provides that “A prosecution is barred if the accused was formerly prosecuted for the same crime, based upon the same material facts, if such former prosecution was terminated improperly after the jury was impaneled and sworn,” where prosecution was merely continued until motion to suppress could be heard and trial resumed three days later with same jury panel and where the oath had not been administered to

jury. Code, §§ 26–507(a)(2), 59–706, 59–709.—Barner v. State, 227 S.E.2d 874, 139 Ga.App. 50.—Double J 84.

N.M. 1919. “Pending” means “depending” “remaining undecided” “not terminated.”—Stockard v. Hamilton, 180 P. 294, 25 N.M. 240.

### NOT THE LAWFUL BODILY ISSUE

Minn. 1976. Child, who was conceived after his parents were divorced and whose father died without having remarried mother, was “illegitimate” and, thus, was “not the lawful bodily issue” of father within meaning of group life policy’s substitute beneficiary clause which stated that benefits would be paid to “Your surviving children” and that term “children” meant only first generation lawful bodily issue and legally adopted persons.—Unborn Child v. Evans, 245 N.W.2d 600, 310 Minn. 197.—Insurance 3480.

### NOT THERETOFORE ENJOYED

Iowa 1961. In statute providing for municipal annexation of territory to which municipality can furnish substantial services and benefits “not theretofore enjoyed”, the quoted phrase means services not theretofore available and presents a factual question and does not inject judicial discretion. I.C.A. § 362.26, subd. 6.—City of Cedar Rapids v. Cox, 108 N.W.2d 253, 252 Iowa 948, appeal dismissed Abelman v. City of Cedar Rapids, 82 S.Ct. 16, 368 U.S. 3, 7 L.Ed.2d 17.—Mun Corp 29(1).

### NOT THE SUBJECT OF BONA FIDE DISPUTE

Bkrcty.S.D.N.Y. 1997. To qualify as petitioning creditor with claim which is “not the subject of bona fide dispute,” claimant need only establish that there are good grounds for its claim, and that no defenses have been asserted in substantiable form. Bankr.Code, 11 U.S.C.A. § 303(b)(1).—In re Audio Visual Workshop, Inc., 211 B.R. 154.—Bankr 2286.

### NOT TO BE AVOIDED

N.Y.Sur. 1924. The “necessary implication” of testator’s intent not to exercise a power of appointment by his will, within Real Property Law, § 176, results only where the will permits no other interpretation; “necessary implication” meaning “such as must be,” “impossible to be otherwise,” “not to be avoided,” and “inevitable,” and the use of the words “of which I may die seized” did not provide the necessary implication.—In re Flewwellin’s Will, 202 N.Y.S. 496, 122 Misc. 256.—Wills 692(5).

### NOT TO BE DISPENSED WITH

Ky. 1925. Instruction to acquit defendant if possessed of a reasonable doubt as to any “material” fact necessary to establish his guilt, though not in the language of Cr.Code Prac. § 238, held not prejudicial, since the word “material” means “of consequence” or “not to be dispensed with.”—Ray v. Commonwealth, 268 S.W. 804, 207 Ky. 96.

**NOT TO BE FOUND IN MY COUNTY**

Tenn. 1886. The return "not to be found in my county" indorsed by the Sheriff on an original summons implies that the defendant is a resident of the county; and failure of the Sheriff to find him implies that he is evading process; and under section 3466 of Code, T. & S., such return authorizes the issuance of an alias summons for the defendant, as a resident of the county.—Carlisle v. Corran (State Report Title: Carlisle v. Cowan), 2 S.W. 26, 85 Tenn. 165.—Proc 45, 140.

Tenn. 1886. Under Code, § 3466, providing that "in any civil action where the summons has been returned, 'Not to be found in my county,'" as to all or any of the defendants resident of the county, the plaintiff may have an alias and pluries summons for the defendant, or, at his election, sue out an attachment against the estate of such defendant," a return by a sheriff, "Not to be found in my county," implies that the defendant is a resident of the county, and, if the defendant is not a resident of the county, is a false return.—Carlisle v. Corran (State Report Title: Carlisle v. Cowan), 2 S.W. 26, 85 Tenn. 165.—Proc 140.

**NOT TO BE PERFORMED**

Okl. 1932. In determining whether oral contract comes within one-year statute of frauds, courts have been governed by words "not to be performed". 15 Okl.St.Ann. § 136.—Municipal Gas Co. v. Gilkeson, 16 P.2d 247, 160 Okla. 284, 1932 OK 722.—Frds St of 45(1).

**NOT TO BE PERFORMED WITHIN A YEAR**

Ky. 1904. The provision in a contract of sale of a machine that the seller would keep at a certain place a stock of all parts of the machine, so that, if any part of it broke, the buyer could get the part needed for repairs within 24 hours of giving an order, is not within the statute of frauds, as an undertaking "not to be performed within a year."—Janney Mfg. Co. v. Banta, 83 S.W. 130, 26 Ky.L.Rptr. 1089.

**NOT TO BE PERFORMED WITHIN ONE YEAR**

Cal.App. 2 Dist. 1948. Under statute of frauds which requires agreements "Not to be performed within one year" from the making thereof to be in writing, an oral agreement is valid if it can be performed within one year. West's Ann.Civ.Code, § 1624, subd. 1; West's Ann.Code Civ.Proc. § 1973, subd. 1.—Columbia Pictures Corp. v. De Toth, 197 P.2d 580, 87 Cal.App.2d 620.—Frds St of 49.

Ga. 1939. An oral contract of employment for the remainder of the year 1934, which provided that the contract should continue from year to year thereafter unless notice to terminate for any succeeding year be given by either party 90 days prior to December 31 of the preceding year, was "not to be performed within one year," and so was within the statute of frauds, and was unenforceable by employee who was discharged in February, 1938, without the required notice. Code 1933, § 20-401,

subd. 5.—White v. Simplex Radio Co., 3 S.E.2d 890, 188 Ga. 412, answer to certified question conformed to 5 S.E.2d 922, 61 Ga.App. 157.—Frds St of 45(1).

Ga. 1939. The express provision of an oral contract of employment for the remainder of the year 1934, that the contract should continue from year to year thereafter unless notice to terminate for any succeeding year be given by either party 90 days prior to December 31 of the preceding year, was a condition subsequent; hence the contract was within the statute of frauds as a contract "not to be performed within one year," whether considered as dating from its inception in 1934 or from the time of the failure to give notice each year. Code 1933, § 20-110; § 20-401, subd. 5; § 61-102.—White v. Simplex Radio Co., 3 S.E.2d 890, 188 Ga. 412, answer to certified question conformed to 5 S.E.2d 922, 61 Ga.App. 157.—Frds St of 45(1).

Ga.App. 1939. An oral contract of employment for the remainder of 1934, providing that the contract should continue from year to year thereafter unless notice to terminate be given 90 days before December 31 of preceding year, was "not to be performed within one year," and hence was within the statute of frauds and not enforceable by employee discharged without the required notice in February, 1938. Code 1933, § 20-401.—White v. Simplex Radio Co., 5 S.E.2d 922, 61 Ga.App. 157.—Frds St of 45(1).

Miss. 1916. In an action on a contract for the delivery of 90,000 logs at the rate of 200 per day, an instruction that a suit cannot be maintained on an oral contract which was not to be performed within one year and if the jury believed that the logs could not be handled within one year at the rate of 200 a day they shall find for the defendant, was improperly refused, as the contract was within the statute of frauds, since the clause "not to be performed within one year" includes any agreement which by a reasonable interpretation in view of all the circumstances does not admit of its performance, according to its language and intention, within one year from the time of its making.—Mrs. K. Edwards & Sons v. Farve, 71 So. 12, 110 Miss. 864.

R.I. 1888. The words "not to be performed within one year," in the statute of frauds, relating to contracts, mean not to be performed by one party within the year.—Durfee v. O'Brien, 14 A. 857, 16 R.I. 213.

**NOT TO BE PREVENTED**

N.J.Ch. 1906. Testatrix devised to persons named all her property, to be divided in unequal shares, not to be paid until the respective donees should become of age, but to be deposited on interest. Her executor was "not to be prevented" from applying any share during the minority of the donee to his support, if he deemed it proper. The executor was empowered to sell her estate "as the law may require" him to do. Held, that the executor was empowered to sell the real estate and divide its proceeds, and the undisposed part of the personal estate into the shares designated, and to pay the

share of any owner, of age, to him, and retain the share of any donee not yet of age.—Weber v. Waldeck, 63 A. 495, 71 N.J.Eq. 56.—Ex & Ad 138(1).

#### **NOT TO BE SOLD**

S.D.N.Y. 1962. Drugs, which were labeled "complimentary," "physician's sample," "not to be sold," and "professional sample," were not "misbranded" within Federal Food, Drug and Cosmetic Act, because they were in possession of repacker of drugs who intended to repackage them and sell them to pharmacists who would eventually resell to ultimate consumer. Federal Food, Drug, and Cosmetic Act, § 502(a), 21 U.S.C.A. § 352(a).—U.S. v. Various Articles of Drugs Consisting of Unknown Quantities of Prescription Drugs, 207 F.Supp. 480.—Health 314.

#### **NOT TO EMPLOY**

Ohio Com.Pl. 1950. The words "to employ" a superintendent or teacher in statute providing that, on a motion to adopt a resolution to employ a superintendent or teacher, clerk of board shall publicly call roll of members composing board and enter on records names of those voting aye and names of those voting no, embody and encompass words "not to employ," "to accept or not to accept a resignation" and "to retain or not to retain" a superintendent of schools. Gen.Code, § 4834-1.—Schafer v. Board of Ed. of Alliance City School Dist., Stark County, 94 N.E.2d 112, 42 O.O. 319, 58 Ohio Law Abs. 554.—Schools 58, 63(1), 133.1(1).

#### **NOT TO EXCEED**

U.S.Dist.Col. 1975. Words "not to exceed" in provisions of 1972 Amendments of Federal Water Pollution Control Act authorizing appropriation "not to exceed" specified amount for each of several fiscal years, for federal assistance for municipal sewers and sewage treatment works, reflects realistic possibility that approved applications for grants from funds already allotted might not total maximum amount authorized to be appropriated. Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), §§ 205, 207, 33 U.S.C.A. §§ 1285, 1287.—Train v. City of New York, 95 S.Ct. 839, 420 U.S. 35, 43 L.Ed.2d 1.—U.S. 85.

Or.App. 1978. Language of statute governing amount of wage assignment that may be ordered in paternity-child support cases, that the order may be issued for amount "not to exceed" one-fourth of the obligor's disposable earnings, means that it is not within the trial judge's discretion to set any amount other than the prescribed statutory maximum. ORS 23.777.—State ex rel. Roth v. Bookhart, 586 P.2d 382, 37 Or.App. 173.—Exempt 48(1).

#### **NOT TO EXCEED SIXTY DAYS**

Cal.App. 2 Dist. 1941. Where lessee agreed to open and equip on leased premises a liquor and drug sundries store and to conduct it for a period "not to exceed sixty days", and lessor agreed to purchase store fixtures and incidental equipment and all stock in trade, and lessee thereafter

equipped store and operated it until lessor refused to receive an inventory of stock or to discuss matter of purchase further, after which lessee removed stock from store, lessee's right to recover for fixtures and equipment could not be defeated on ground that it failed to operate store for full sixty days, since contract did not require lessee to do so.—Union Liquors v. Finkel & Lasarow, 113 P.2d 19, 44 Cal.App.2d 706.—Sales 347(1).

#### **NOT TO EXCEED THE MAXIMUM WEEKLY BENEFIT**

Fla.App. 1 Dist. 2000. The phrase "not to exceed the maximum weekly benefit" in the workers' compensation statute addressing the computation of impairment income benefits refers to the immediately preceding phrase—the employee's average weekly temporary total disability benefit. West's F.S.A. §§ 440.12, 440.15(3)(a)3.—City of St. Petersburg v. Nasworthy, 751 So.2d 772.—Work Comp 816.

#### **NOT TO EXCEED \$300 IN VALUE**

Alaska 1979. Phrase "not to exceed \$300 in value", within statutory provision granting an exemption from execution for "pictures \* \* \* belonging to the judgment debtor not to exceed \$300 in value," was to be read as allowing judgment debtor with paintings exceeding \$300 in value to receive the \$300 amount of the exemption from the proceeds of the sale of the paintings by the judgment creditor at an execution sale. AS 09.35.080(a)(2).—Guterman v. First Nat. Bank of Anchorage, 597 P.2d 969.—Exempt 37.

#### **NOT TO LEASE**

Cal. 1942. That lessor's agreement "not to lease" any other part of building for drug store purposes and lessee's agreement "to pay rent" appeared in a rider attached to and made part of lease was a circumstance to be considered in determining parties' comprehension of reciprocal nature of specified promises.—Medico-Dental Bldg. Co. of Los Angeles v. Horton & Converse, 132 P.2d 457, 21 Cal.2d 411.—Land & Ten 44(1).

Cal. 1942. Where lessor's agreement "not to lease" any other part of building for drug store purposes and lessee's agreement "to pay rent" appeared in rider attached to and made part of lease, and lessee was limited by terms of lease to maintaining a drug store, and lease provided that time was of essence, parties recognized the essential interdependence of their obligations.—Medico-Dental Bldg. Co. of Los Angeles v. Horton & Converse, 132 P.2d 457, 21 Cal.2d 411.—Land & Ten 44(1).

Cal. 1942. Where lessor agreed "not to lease" any other part of building for drug store purposes and lessee which conducted a pharmacy catering principally to doctors and dentists for reference of prescription work and not relying upon transient trade agreed "to pay rent", and lease provided that time was of the essence and that all covenants thereof were conditions, the restrictive covenant was not "incidental" with or "subordinate" to the

main object of lease, but went to the whole of consideration and hence was a “dependent covenanted”—Medico-Dental Bldg. Co. of Los Angeles v. Horton & Converse, 132 P.2d 457, 21 Cal.2d 411.—Land & Ten 44(1).

**NOT UNREASONABLE MEANS TO EFFECT PROPER GOVERNMENTAL PURPOSE**

N.C. 1988. Statute requiring businesses which purchase or sell military property to obtain license, present personal information about owner, post bond, maintain certain records regarding acquisitions, and keep records open for inspection by law enforcement officials, had a “rational basis”, “bore a rational relation to a legitimate state objective”, and was “not unreasonable means to effect proper governmental purpose” of determining how military goods reached civilian hands and preventing unauthorized transfers of military goods; thus, statute did not violate due process provisions of North Carolina and United States Constitutions. Const. Art. 1, §§ 1, 19; G.S. § 127B-1 et seq.—Poor Richard’s, Inc. v. Stone, 366 S.E.2d 697, 322 N.C. 61.—Const Law 287.2(1); Licens 7(1).

**NOT USED WITH A VIEW TO PROFIT**

Tex. 1944. The phrase “not used with a view to profit”, as used in constitutional provision exempting from taxation the endowment funds of institutions of learning and religion not used with a view to profit, would be construed to mean only that the fund be not used with a view to private gain or profit. Vernon’s Ann.Civ.St. art. 7150, subd. 1; Vernon’s Ann.St.Const. art. 8, § 2.—Harris v. City of Fort Worth, 180 S.W.2d 131, 142 Tex. 600.—Tax 242(6), 244.

**NOT USED WITH A VIEW TOWARD PROFIT**

Ohio App. 10 Dist. 1990. When applying phrase “not used with a view toward profit” found in statute exempting from property taxes lands connected with public institutions of learning and not used with a view toward profit, court should focus on use to which property is put by party entitled to exemption under statute. R.C. § 5709.07.—Bexley Village, Ltd. v. Limbach, 588 N.E.2d 246, 68 Ohio App.3d 306.—Tax 242(2.1).

**NOT USUALLY AND PUBLICLY RESIDENT WITHIN THIS STATE**

Wash.App. Div. 3 1984. Defendant’s mere absence from state was sufficient to toll statute of limitations for filing charges against him on basis that defendant was “not usually and publicly resident within this state,” though defendant’s address within other state was known to authorities and defendant was living openly and was available for prosecution at all times. West’s RCWA 9A.04.080.—State v. Ansell, 675 P.2d 614, 36 Wash. App. 492, review denied 101 Wash.2d 1006.—Crim Law 152.

**NOT USUALLY AND PUBLICLY RESIDING WITHIN THIS STATE**

Ill.App. 5 Dist. 1991. Defendant was “not usually and publicly residing within this State,” within meaning of tolling provision applicable to rape limitations statute, even though his absence from State, in connection with criminal prosecutions, was involuntary and State at all times knew his out-of-state location. S.H.A. ch. 38, ¶ 3-7(a).—People v. Harvey, 157 Ill.Dec. 166, 571 N.E.2d 1185, 213 Ill.App.3d 83, appeal denied 162 Ill.Dec. 498, 580 N.E.2d 124, 141 Ill.2d 550.—Crim Law 152.

**NOT VIOLATE**

N.D. 1998. Condition of probation requiring that defendant “not violate” any law meant that he should “not commit” further offenses during the period of probation, and thus, because his disorderly conduct occurred nearly six months before the imposition of his sentence, he did not violate any law or ordinance during the period of probation, even though no judgment of guilty was entered regarding the disorderly conduct until during the probationary period. NDCC 12.1-32-07, subd. 2.—State v. Ballensky, 586 N.W.2d 163, 1998 ND 197.—Sent & Pun 1966(3).

**NOT WHOLLY**

N.Y.A.D. 2 Dept. 1910. Ordinarily the words “not wholly within” refer to a situation where a part is within. “Not wholly” is synonymous with “partly.”—People ex rel. Donegan v. Dooling, 125 N.Y.S. 783, 141 A.D. 31.

**NOT WHOLLY WITHIN**

N.Y.A.D. 2 Dept. 1910. Election Law (Consol.Laws, c. 17) § 127, provides that certificates of nomination for office to be filed by the voters of any district greater than a county shall be filed with the Secretary of State, except that certificates of nomination of candidates for offices to be filled only by the voters or a portion of the voters of the city of New York shall be filed with the board of elections of such city, and that certificates of nomination of candidates for offices to be filled only by the votes of voters, part of whom are of New York City and part of whom are of a county “not wholly within” the city of New York, shall be filed with the clerk of such county and in the office of the board of elections of said city. The statute is a re-enactment of Laws 1896, c. 909. General Construction Law (Consol.Laws, c. 22) § 95, provides that a re-enactment of a previous statute shall be deemed a continuation of the former law. As the election law was originally enacted, it did not contain the provisions as to a county not wholly within the city; it being introduced by an amendment made by Laws 1897, c. 379, designed to meet a situation created by Laws 1897, c. 378, whereby a part of Queens county was partly included in the city of New York. Held that, where a certificate of the nomination of a senator in a district embracing the counties of Richmond and Rockland was filed in the office of the board of elections of New York City and county clerk of Rockland county, it was insufficient; Rock-

**NOTWITHSTANDING**

land county being entirely without New York City.—*People ex rel. Donegan v. Dooling*, 125 N.Y.S. 783, 141 A.D. 31.—Elections 139.

N.Y.A.D. 2 Dept. 1910. Ordinarily the words “not wholly within” refer to a situation where a part is within. “Not wholly” is synonymous with “partly.”—*People ex rel. Donegan v. Dooling*, 125 N.Y.S. 783, 141 A.D. 31.

**NOT WITHIN THE POWER**

Mo. 1914. The words “not within the power,” used in Rev.St.1909, § 2819, V.A.M.S. § 490.420, authorizing the use of the record of an instrument duly recorded, and lost, or not within the power of the party wishing to use the same, means not in the possession of the party, his agent, servant, or bailee, or other person under his control.—*Idalia Realty & Development Co. v. Norman*, 168 S.W. 749, 259 Mo. 619.—Evid 333(2).

Mo. 1914. A showing under oath of a party offering the record of deeds that the originals have never been in his hands is sufficient to make the record admissible, as provided by Rev.St.1909, § 2819, V.A.M.S. § 490.420, when the instrument is “not within the power” of the party; the quoted words of the statute meaning not within the control or possession of the party.—*Akins v. Adams*, 164 S.W. 603, 256 Mo. 2.

**NOT WITHOUT FAULT**

C.A.2 (N.Y.) 1990. Substantial evidence supported finding that old-age benefits claimant was “not without fault” in receiving overpayments due to his failure to report income earned beyond retirement date he gave when he applied for benefits, notwithstanding claimant’s contention that he believed payments would be automatically adjusted. Social Security Administration Regulations, §§ 404.510, 404.511, 42 U.S.C.A.App.—*Brown v. Bowen*, 905 F.2d 632, certiorari denied 111 S.Ct. 979, 498 U.S. 1093, 112 L.Ed.2d 1064.—Social S 140.3.

**NOTWITHSTANDING**

C.A.3 (Del.) 1992. Bowaters corporation does not have unfettered authority to bareboat charter vessels for transportation of nonproprietary cargo as common carrier in coastwise trade; “notwithstanding” language of Bowaters Amendment does not mean that Amendment supersedes Shipping Act section requiring corporations operating vessels in coastwise trade to be 75% owned by United States citizens, and “shall be deemed a citizen” language does not render Bowaters corporation a citizen for all purposes. Shipping Act, 1916, § 2, as amended, 46 App.U.S.C.A. § 802; Merchant Marine Act, 1920, § 27A, as amended, 46 App.U.S.C.A. § 883-1.—*Conoco, Inc. v. Skinner*, 970 F.2d 1206, rehearing denied.—Ship 35.

6th Cir.BAP (Ohio) 1998. Use of introductory “notwithstanding” phrase in statute signals drafter’s intention that provisions of “notwithstanding” section override conflicting provisions of any other section.—*In re Eubanks*, 219 B.R. 468.—Statut 199.

Colo. 1965. The word “notwithstanding” is one in opposition to and not one of compatibility with another statute and actually means in spite of.—*Theodore Roosevelt Agency, Inc. v. General Motors Acceptance Corp.*, 398 P.2d 965, 156 Colo. 237.—Statut 199.

Ga. 1976. Natural and ordinary meaning of word “Notwithstanding,” within provision of Constitution that “Notwithstanding provisions contained in Article VIII, Section V, Paragraph I [§ 2-6801] of this Constitution, or in any local constitutional amendment applicable to any county school district,” is found in phrases “without obstruction from” or “in spite of” and, as such, indicates that provision was not intended as the exclusive method for effecting changes in school board terms. Const. art. 8, § 5, par. 2.—*Williamson v. Schmid*, 229 S.E.2d 400, 237 Ga. 630.—Schools 53(4).

Mo.App. S.D. 1999. The term “notwithstanding” does not necessarily mean that it is to the complete exclusion of all other statutory provisions.—*State ex rel. Casey’s General Stores, Inc. v. City of West Plains*, 9 S.W.3d 712, rehearing, transfer denied, and transfer denied.—Statut 199.

N.H. 1999. Term “notwithstanding” meant “without prevention or obstruction from or by” or “in spite of” as that term was used in workers’ compensation statute providing that, notwithstanding other provisions, compensation of self-employed persons shall be computed on basis of 80% of their average weekly wages, but no more than \$300 per calendar week, and thus, where any of the enumerated provisions modified by “notwithstanding” conflicted with the statute, the latter controlled. RSA 281:2, subd. 3-a (Repealed).—*In re Cote*, 737 A.2d 1114, 144 N.H. 126.—Work Comp 816.

N.H. 1985. Plain meaning of word “notwithstanding” is without prevention or obstruction from or by, or in spite of.—*King v. Sununu*, 490 A.2d 796, 126 N.H. 302.—Statut 199.

N.Y.A.D. 2 Dept. 1996. Statute did not limit renter’s liability for damage to rented vehicle to \$100 where renter was charged with driving while intoxicated; while statute indicated that “notwithstanding” another provision, rental company could hold driver liable for damage up to \$100, provision referred to allowed company to hold renter liable for actual damage in case involving drunk driving by renter, and term “notwithstanding” means “without prevention or obstruction from or by; in spite of.” McKinney’s General Business Law § 396-z, subds. 3, 4 (1994 Ed.)—*Premier Car Rental, Inc. v. Government Employees Ins. Co.*, 637 N.Y.S.2d 177, 223 A.D.2d 629.—Autos 390.

Ohio Com.Pl. 1973. Term “notwithstanding,” as used in statute providing that, notwithstanding other statutory provision, board of education may not enter into contract unless it has sufficient revenue raising power to pay the contract without impairing its existing programs and level of education, means that the statute requiring the certificate operates without prevention or obstruction from or by the other statutory provision and operates in spite of

the other statutory provision. R.C. §§ 5705.41, 5705.412.—Board of Ed. Maple Heights City School Dist. v. Maple Heights Teachers Ass'n, 322 N.E.2d 154, 41 Ohio Misc. 27, 70 O.O.2d 73.—Schools 135(3).

Tex.Civ.App.—Waco 1951. As used in the final paragraph of deed to railroad reading in part, “However, this deed is made as a right-of-way deed for an interurban railway \* \* \*,” the word “however” is synonymous with such words and expressions as “notwithstanding”, “in all events”, and “in any case”, “nevertheless.”—Texas Elec. Ry. Co. v. Neale, 244 S.W.2d 329, reversed 252 S.W.2d 451, 151 Tex. 526.—R R 69.

Va.App. 1998. Statute stating that courts “shall” sentence one convicted of the use of a firearm in the commission of a felony to a mandatory sentence “[n]otwithstanding any other provision of law” is not limited by other incongruous laws, and thus controlled over statute which provides that a juvenile convicted of a violent felony will be sentenced as an adult “but the sentence may be suspended,” which does not contain mandatory language; “notwithstanding” is defined as without prevention or obstruction from or by. Code 1950, §§ 16.1–272, subd. A, par. 1, 18.2–53.1.—Green v. Com., 507 S.E.2d 627, 28 Va.App. 567.—Sent & Pun 1827.

Wash.App. Div. 1 1993. Penalty imposed by local firearms ordinance for discharge of firearms could lawfully exceed that imposed by state firearms statute in light of exception to statute preempting field of firearms regulation; term “notwithstanding,” within meaning of statute conditionally authorizing municipalities to restrict discharge of firearms “notwithstanding” preemption statute, meant that preemption statute and its restrictions, including penalty restrictions, were to be disregarded. West’s RCWA 9.41.230, 9.41.290, 9.41.300(2)(a).—City of Seattle v. Ballsmider, 856 P.2d 1113, 71 Wash.App. 159.—Mun Corp 592(3).

Wis. 1952. The word “notwithstanding” means “without prevention or obstruction from or by” and “in spite of”.—State ex rel. Morse v. Christianson, 55 N.W.2d 20, 262 Wis. 262.

#### **NOTWITHSTANDING ANY OTHER LAW**

C.A.9 (Or.) 1996. Rescissions Act’s provision to expedite the preparation, offer and award of timber sales “notwithstanding any other law” in area covered by Standards and Guidelines for Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl (Option 9), requires the disregard only of environmental laws, not all laws otherwise applicable to Option 9 sales. Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act, 1995, § 2001(d), 16 U.S.C.A. § 1611 note.—Oregon Natural Resources Council v. Thomas, 92 F.3d 792.—Environ Law 536; Woods 8.

C.A.9 (Or.) 1996. Statutory phrase “notwithstanding any other law” is not always construed literally.—Oregon Natural Resources Council v. Thomas, 92 F.3d 792.—Statut 199.

C.A.9 (Or.) 1996. Congress did not intend phrase “notwithstanding any other law” in Rescissions Act to require the agency to disregard all otherwise applicable laws, only to disregard environmental laws.—Oregon Natural Resources Council v. Thomas, 92 F.3d 792.—Woods 8.

C.A.9 (Or.) 1996. Under Rescissions Act provisions concerning salvage timber sales, phrase “notwithstanding any other law” supercedes only the federal environmental and natural resource laws. Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act, 1995, § 2001(b), 16 U.S.C.A. § 1611 note.—Oregon Natural Resources Council v. Thomas, 92 F.3d 792.—Woods 8.

Cal.App. 5 Dist. 1997. “Notwithstanding any other law” is term of art expressing legislative intent to have specific statute control despite existence of other law which might otherwise govern.—People v. Franklin, 66 Cal.Rptr.2d 742, 57 Cal. App.4th 68, as modified on denial of rehearing, and review denied.—Statut 223.4.

#### **NOTWITHSTANDING ANY OTHER PROVISION OF LAW**

C.A.9 1993. Congressional rejection of provision making coverage under Longshore and Harbor Workers’ Compensation Act (LHWCA) exclusive demonstrated that phrase “notwithstanding any other provision of law” in provision of LHWCA that employer has right to receive offset credit for any amounts paid to employee pursuant to any other workers’ compensation law, notwithstanding any other provision of law, was not intended to preempt state workers’ compensation law or to upset scheme allowing concurrent federal and state coverage. Longshore and Harbor Workers’ Compensation Act, § 3(e), as amended, 33 U.S.C.A. § 903(e).—E.P. Paup Co. v. Director, Office of Workers Compensation Programs, U.S. Dept. of Labor, 999 F.2d 1341.—States 18.47; Work Comp 93.

C.A.5 (La.) 1980. In Federal Water Pollution Control Act of 1972, phrase “notwithstanding any other provision of law” supports at least two conflicting interpretations and cannot alone resolve controversy about whether statutory remedy is exclusive. Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), §§ 101 et seq., 311(f)(1) as amended 33 U.S.C.A. §§ 1251 et seq., 1321(f)(1).—U.S. v. Dixie Carriers, Inc., 627 F.2d 736.—Environ Law 167.

C.A.9 (Or.) 1996. Supplemental Appropriations for Disaster Assistance and Rescissions Act section requiring release and harvesting of timber sales previously authorized by Congress in Northwest Timber Compromise does not preempt regulations granting Secretaries of Agriculture and Interior dis-

creation in deciding whether to award timber sale contracts to entities other than high bidders, despite “notwithstanding any other provision of law” language of Act; nothing in language of Act implies preemption of existing regulations governing award of contracts, or duty of Secretaries to protect government property by requiring successful bidders to meet standard qualifications. Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City and Rescissions Act, 1995, § 2001(k)(1), 16 U.S.C.A. § 1611 note.—Northwest Forest Resource Council v. Pilchuck Audubon Soc., 97 F.3d 1161, rehearing denied.—Pub Lands 10.

C.A.4 (Va.) 1999. “Any,” as used in subsection of Immigration and Nationality Act (INA) providing that, “[e]xcept as provided in this section and notwithstanding any other provision of law” no court would have jurisdiction to hear claim arising from certain decisions of Attorney General, means “all,” and, thus, “notwithstanding any other provision of law” means that all other jurisdiction-granting statutes, including general habeas statute, shall have no effect. Immigration and Nationality Act, § 242(g), 8 U.S.C.A. § 1252(g); 28 U.S.C.A. § 2241.—Mapoy v. Carroll, 185 F.3d 224, certiorari denied 120 S.Ct. 1417, 529 U.S. 1018, 146 L.Ed.2d 310.—Aliens 54.3(1); Hab Corp 521.

Cal.App. 2 Dist. 1967. The quoted phrase of statute providing that “notwithstanding any other provision of law” where the state is named as “a” defendant venue of action is county where injury occurred expresses legislative intent that the statute control venue in all tort cases in which state is a defendant even though by reason of joinder of other defendants venue would also be proper in another county, especially in view of use of indefinite article “a” suggesting intent that statute is to control even in cases where state is one of several defendants. West’s Ann.Gov.Code, § 955.2.—State v. Superior Court of Los Angeles County, 60 Cal. Rptr. 653, 252 Cal.App.2d 637.—States 200.

Cal.App. 5 Dist. 2000. Statutory phrase “notwithstanding any other provision of law” is a very comprehensive phrase, signaling a broad application overriding all other code sections unless it is specifically modified by use of a term applying it only to a particular code section, or phrase.—In re Marriage of Cutler, 94 Cal.Rptr.2d 156, 79 Cal. App.4th 460, as modified, and rehearing denied, and review denied.—Statut 199.

Cal.App. 5 Dist. 1971. Words “notwithstanding any other provision of law” within statute authorizing Judicial Counsel to provide by rule for practice and procedure in proceedings under Family Law Act make family law rules adopted by the Counsel “sui generis” and controlling over both statutory and decisional law. West’s Ann.Civ.Code, §§ 4000–5138, 4001; Cal.Rules of Court, rule 1201 et seq.—In re Marriage of Dover, 93 Cal.Rptr. 384, 15 Cal.App.3d 675.—Courts 85(1).

## NOTWITHSTANDING ISSUANCE OF

### NOTWITHSTANDING ANY OTHER PROVISION OF THIS TITLE

Ariz.App. Div. 1 1994. Phrase “notwithstanding any other provision of this title” found in statute governing classification of class six felony, does not preclude bargaining regarding designation of class six felony; phrase applies to trial court’s exercise of sentencing authority and not to negotiation of plea agreement. A.R.S. § 13–702, subd. H.—State v. Corno, 876 P.2d 1186, 179 Ariz. 151.—Crim Law 273.1(2); Sent & Pun 66.

### NOTWITHSTANDING ANY OTHER PROVISION OR RULE OF LAW

C.A.7 (Ill.) 1995. CERCLA clause providing that the statute applies “notwithstanding any other provision or rule of law” does not authorize litigation against defunct corporation, since it refers only to substantive liability and does not displace ancillary rules influencing how litigation proceeds. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(2), 42 U.S.C.A. § 9607(a)(2).—Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co., 68 F.3d 1016.—Corp 630(1).

### NOTWITHSTANDING ANY OTHER PROVISIONS OF LAW

C.A.2 (N.Y.) 1981. “Notwithstanding any other provisions of law,” as used in Federal Water Pollution Control Act, means that remedies established by Act are not to be modified by any preexisting law. Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), § 311(f)(1) as amended 33 U.S.C.A. § 1321(f)(1).—Matter of Oswego Barge Corp., 664 F.2d 327, rehearing denied Complaint of Oswego Barge Corp., 673 F.2d 47.—Environ Law 170.

### NOTWITHSTANDING ANY RESISTANCE ON HER PART

N.C. 1979. Although instruction on lesser included offense of assault with intent to commit rape was erroneous for failure to include language “notwithstanding any resistance on her part,” instruction was not prejudicial to defendant where evidence did not support such an instruction.—State v. Pearce, 250 S.E.2d 640, 296 N.C. 281.—Crim Law 1172.6.

### NOTWITHSTANDING ISSUANCE OF ANY PATENT

U.S.Wash. 1962. Words “notwithstanding issuance of any patent”, within definition of Indian country as including all land within limits of any Indian reservation under jurisdiction of the federal government, notwithstanding issuance of any patent, means that patented lands should not be excluded from an Indian reservation regardless of whether the patents are issued to Indians or non-Indians. 18 U.S.C.A. §§ 1151, 1153.—Seymour v. Superintendent of Washington State Penitentiary, 82 S.Ct. 424, 368 U.S. 351, 7 L.Ed.2d 346, on remand 369 P.2d 309, 59 Wash.2d 913.—Indians 32(1).

**NOTWITHSTANDING LEGAL TITLE BEING VESTED IN AN INDUSTRIAL DEVELOPMENT AGENCY**

E.D.N.Y. 1995. Subcontractor which performed improvements to city's disposal/energy recovery facility failed to show likelihood of success, in support of motion for preliminary injunctive relief, as to claim that fund established to pay for construction of improvements related to "improvement of real property," so as to entitle subcontractor to assert mechanics' lien under New York Lien Law, despite claim that Lien Law section providing that, if beneficial interest of improvement was in entity other than state or public corporation "notwithstanding legal title being vested in an industrial development agency" then improvement would be considered "improvement of real property," rather than "public improvement," had to be construed as meaning legal title of improvement, rather than legal title to property, was vested with industrial development agency, as were improvements at issue; read in context and in its entirety, statute concerned title to real property, not to improvement. N.Y.McKinney's Lien Law §§ 2, subd. 7, 70, subd. 1.—Interel Environmental Technologies, Inc. v. United Jersey Bank, 894 F.Supp. 623.—Mech Liens 115(1).

**NOTWITHSTANDING THE FOREGOING LIMITATIONS**

Nev. 1968. Term "notwithstanding the foregoing limitations" as used in provision exempting bonds for protection and preservation of state's natural resources from state debt limitation applied to all limitations contained in debt limitation provision. Const. art. 9, § 3; St.1967, c. 520.—State ex rel. State General Obligation Bond Commission v. Koontz, 437 P.2d 72, 84 Nev. 130.—States 115.

**[IN]OTWITHSTANDING THE PROVISIONS OF ANY OTHER LAW**

D.Alaska 1991. The \$100 million strict liability "[in]otwithstanding the provisions of any other law" imposed by TAPAA does not create \$100 million window of opportunity for states to legislate as they wish regarding TAPAA oil spills, unrestricted by other maritime law but, rather, states can impose strict liability unrestricted by *Robins Dry Dock* rule, barring economic recovery without physical harm, only to extent that state law does not conflict with TAPAA. Trans-Alaska Pipeline Authorization Act, §§ 202–206, 43 U.S.C.A. §§ 1651–1655.—In re Glacier Bay, 865 F.Supp. 629.—Adm 1.20(5); Environ Law 411; States 18.57.

**NOTWITHSTANDING THE PROVISIONS OF THE MEDICAL PRACTICE ACT**

Cal.App. 4 Dist. 1996. Phrase "notwithstanding the provisions of the Medical Practice Act," contained in statute authorizing hospital district to enter into contracts with physicians to provide medical services not resulting in profit or gain for district, does not create exception to the corporate practice doctrine barring practice of medicine by entities other than physicians, but rather was intended to clarify that particular practice of treating

physicians as independent contractors in situations covered by statute remained permissible and was not in conflict with Medical Practice Act. West's Ann.Cal.Bus. & Prof.Code § 2400; West's Ann.Cal.Health & Safety Code § 32129.—Conrad v. Medical Bd. of California, 55 Cal.Rptr.2d 901, 48 Cal.App.4th 1038, review denied.—Health 103.

**NOT WORKING AT THE TRADE**

C.A.10 (Colo.) 1970. Classification of union member having full-time employment outside printing trade has "not working at the trade" was reasonable and was fairly applied to plaintiff who readily admitted that he had full-time job with United States Bureau of Reclamation as technical writer, and this application to plaintiff did not constitute "discipline" within Labor-Management Reporting and Disclosure Act provision that no union member may be disciplined unless he had had notice of the charges, time to prepare a defense, and a full and fair hearing. Labor-Management Reporting and Disclosure Act of 1959, § 101(a) (5), 29 U.S.C.A. § 411(a) (5).—Williams v. International Typographical Union, AFL-CIO, 423 F.2d 1295, certiorari denied 91 S.Ct. 47, 400 U.S. 824, 27 L.Ed.2d 53.—Labor 101, 111.

**NOUN**

C.C.A.10 (Kan.) 1941. Where record of judgment stated that accused was present and "sentenced" to seven years' imprisonment on each of three counts, "sentence" not to run concurrently, the word "sentenced" was an "active verb" denoting the pronouncement of the court's judgment and was used in its common ordinary accepted usage, and the word "sentence", evidencing the court's judgment, was a "noun" denoting the judgment which the court had pronounced.—Subas v. Hudspeth, 122 F.2d 85.—Sent & Pun 1129.

**NO UNDUE INFLUENCE WAS HAD OR EXERCISED**

Vt. 1907. Where the validity of assignments from testatrix to defendant is questioned on the ground that the relations between the parties were confidential, and the master weighed the presumption of undue influence, in favor of the contestant, a finding that "no undue influence was had or exercised" is equivalent to a finding that the transaction was not the result of undue influence, and does not negative merely the direct employment of undue influence, without taking into consideration the effect of the influence naturally arising from testatrix's reliance on defendant's protection and her appreciation of his kindness.—Taylor v. Vail, 66 A. 820, 80 Vt. 152.—Princ & A 69(3).

**NOVATIO**

Ill. 1886. Where the parties to a contract come to a fresh agreement of such a kind that the two cannot stand together, the effect of the second agreement is to rescind the first, and is one form of "novatio" in the Roman law.—Harrison v. Polar Star Lodge, No. 652, A.F. & A.M., 5 N.E. 543, 116 Ill. 279.—Contracts 245(1).

## NOVATION

C.A.10 1960. The requirements of a “novation” are a previous valid obligation, and agreement of all of the parties that the old contract shall be extinguished and a valid one substituted for the old; a novation may be effected by the substitution of a new debtor in place of old one with intent to release the latter or by substitution of a new creditor in place of old one with intent to transfer rights of latter to the former, but all three parties must agree to the substitution.—Warren Petroleum Corp. v. Federal Power Com’n, 282 F.2d 312.—Nova 1, 5, 6, 7.

C.A.9 (Alaska) 1955. Where third party contracts with debtor to assume, as an immediate substitution for debtor’s duty, a duty to creditor to render either performance for which debtor was previously bound, or some other performance, and creditor agrees either with debtor or with third person to such substitution, there is a “novation” that discharges original debtor and subjects third person to a duty to creditor.—Bank of Fairbanks v. Kaye, 16 Alaska 23, 227 F.2d 566.—Nova 5.

C.A.9 (Ariz.) 1972. Extension agreement, which was entered into by mortgagee and then owner of property who had assumed payment of mortgage, and which showed there was no release of original debt and substitution of new, did not constitute either “novation” or a “material alteration” so that it discharged comakers, who claimed to have become sureties, from their liability.—United Am. Life Ins. Co. v. Perillo, 462 F.2d 254, certiorari denied 93 S.Ct. 442, 409 U.S. 1008, 34 L.Ed.2d 301.—Bills & N 140; Nova 4.

C.A.3 (Del.) 1999. Under common law rule, a “novation” occurs when obligee consents to a substitution of a new obligor for the old one, thus relieving original obligor from its duty to perform the novated obligations.—American Flint Glass Workers Union v. Anchor Resolution Corp., 197 F.3d 76.—Nova 1.

C.A.5 (Fla.) 1975. “Novation” is a mutual agreement between parties concerned for discharge of valid existing obligation by substitution of a new valid obligation on part of the debtor; novation does not result from mere substitution of one paper writing for another or one evidence of debt for another, but only by substitution of the new obligation for another with intent to extinguish the old one.—U.S. v. Nill, 518 F.2d 793.—Nova 1.

C.A.5 (Fla.) 1971. Where contract between financier and manufacturer provided for assignment by manufacturer to financier of customer’s notes and each assignment contained guaranty of payment, notes executed by customer directly to financier, without cancellation of notes executed to manufacturer and at interest rate two per cent higher than notes executed to manufacturer, were “renewal notes” and did not constitute a “novation” in absence of express agreement or intent that the new notes were to discharge the underlying debt, and manufacturer was not discharged was guarantor.—Northwest Acceptance Corp. v. Heinicke Instruments Co., 441 F.2d 887.—Guar 53(1); Nova 6.

C.A.5 (Fla.) 1963. “Novation” is the substitution of a new contract between the same parties with intention of extinguishing the old contract.—Fontainbleau Hotel Corp. v. Crossman, 323 F.2d 937.—Nova 1.

C.A.5 (Ga.) 1970. Under law of Florida, “novation” is a mutual agreement between parties concerned for discharge of a valid obligation on part of same or another debtor.—Capital Nat. Bank of Tampa v. Hutchinson, 435 F.2d 46.—Nova 1.

C.A.8 (Iowa) 1996. Under Iowa law, “novation” is substituted contract that includes as party one who was neither obligor nor obligee of original duty.—Trostel v. American Life & Cas. Ins. Co., 92 F.3d 736, certiorari granted, vacated 117 S.Ct. 939, 519 U.S. 1104, 136 L.Ed.2d 829, on remand 133 F.3d 679, certiorari denied 118 S.Ct. 2359, 524 U.S. 945, 141 L.Ed.2d 728, opinion after remand 168 F.3d 1105, certiorari denied Conseco Annuity Assurance Co. v. Trostel, 120 S.Ct. 284, 528 U.S. 922, 145 L.Ed.2d 238.—Nova 1.

C.A.6 (Mich.) 2001. Assumption of liability is not “novation” under Michigan law, unless there concur the consent of the one party to accept the substitute in lieu of the other party to the original contract, and a discharge of the latter.—Imperial Hotels Corp. v. Dore, 257 F.3d 615.—Nova 5, 7.

C.A.4 (N.C.) 2002. While “novation” is sometimes interpreted to mean the replacement of a third party to an existing contract, in the context of the fraud discharge exception the term is used to express the substitution of a contract claim for a tort claim through a settlement agreement. Bankr. Code, 11 U.S.C.A. § 523(a)(2)(A).—In re Warner, 283 F.3d 230, certiorari granted Archer v. Warner, 122 S.Ct. 2618, 153 L.Ed.2d 802.—Bankr 3353(1).

C.A.10 (Okla.) 1982. “Novation” is replacement of unexpired contract by another contract reached through renegotiation, or the substitution of a new party with the concurrent release of an original party from liability.—Williams Petroleum Co. v. Midland Cooperatives, Inc., 679 F.2d 815.—Nova 1.

C.A.7 (Wis.) 1999. Under Wisconsin law, “novation” is an agreement between the obligor, obligee and a third party by which the third party agrees to be substituted for the obligor and the obligee assents thereto, the obligor is released from liability and the third person takes the place of the obligor.—Shank v. William R. Hague, Inc., 192 F.3d 675.—Nova 1.

C.C.A.9 (Cal.) 1938. Where holder of permit to prospect for oil and gas on California tidelands assigned permit to oil company under agreement providing that oil company should pay permit holder 29% per cent. of value of oil and gas produced and similar amount of net profits from manufacture of casinghead gasoline whereafter permit holder made assignment of part of payments due under agreement, an agreement whereby the oil company accepted the assignment of payments and agreed to make payments in accordance therewith constituted a “novation” pro tanto after which the obligation of the oil company under the agreement was to the

assignee instead of the permit holder, to the extent indicated by the assignment. Gen.Laws, Act 6341, § 4 (repealed 1938).—U.S. v. Spalding, 97 F.2d 701, certiorari denied 59 S.Ct. 147, 305 U.S. 644, 83 L.Ed. 415, rehearing denied 59 S.Ct. 242, 305 U.S. 674, 83 L.Ed. 436.—Nova 1; Pub Lands 144(1).

C.C.A.5 (Fla.) 1941. Where guarantors bound themselves to pay any sum becoming and remaining due from corporate agent to insurer and, when agent owed more than \$5,000, agency contract was canceled, but thereafter insurer agreed to make new agency contract with successor corporation which was to acquire good will and other assets and to pay debt owed by original agent and new contract, which was guaranteed by successor guarantors was dated back to date of original agreement, in insurer's suit against original agent and guarantors of original agency agreement to recover insurance premiums collected and not remitted, evidence did not establish that the transaction was a "novation" which released original guarantors from their obligation.—Travis v. Central Sur. & Ins. Corp., 117 F.2d 595.—Nova 12.

C.C.A.5 (Ga.) 1934. Agreement between son of deceased security deed grantor and grantees, for extension of security deed loan expressly recognizing original debt, did not constitute "novation."—Tanner v. John Hancock Mut. Life Ins. Co., 73 F.2d 382, certiorari denied 55 S.Ct. 644, 295 U.S. 733, 79 L.Ed. 1682.—Nova 1.

C.C.A.5 (Ga.) 1931. "Novation" does not take place by substitution of new debt or new debtor, unless old debt is extinguished or old debtor discharged.—John Wanamaker New York v. Comfort, 53 F.2d 751, 81 A.L.R. 133, certiorari denied 52 S.Ct. 457, 285 U.S. 560, 76 L.Ed. 948.—Nova 1.

C.C.A.8 (Iowa) 1928. Original creditor must release original debtor to constitute "novation." One of the indispensable requisites of a "novation" is that the original creditor shall release the original debtor.—Kirkman v. Farmers' Sav. Bank of Boyden, Iowa, 28 F.2d 857.—Nova 3.

C.C.A.8 (Iowa) 1928. Original creditor must release original debtor to constitute "novation."—Kirkman v. Farmers' Sav. Bank of Boyden, Iowa, 28 F.2d 857.—Nova 3.

C.C.A.1 (Mass.) 1937. Where creditor surrendered debtor's note and collateral therefor, receiving in return note indorsed by debtor, which corporate contractor that had been doing work for debtor executed in consideration of debtor's delivering bonds and stocks to contractor, transaction was a mere "novation" rather than a giving of accommodation note without consideration, and hence creditor could recover on note in contractor's reorganization proceeding in absence of showing that corporation reserved any title or interest in stocks and bonds delivered to contractor. Bankr.Act, § 77B, as amended, 11 U.S.C.A. § 207.—Waldorf System v. M. McDonough Co., 93 F.2d 363, certiorari denied 58 S.Ct. 829, 303 U.S. 663, 82 L.Ed. 1121.—Bankr 2825.

C.C.A.1 (Mass.) 1937. Where creditor surrendered debtor's note and collateral therefor, receiving in return note indorsed by debtor, which corporate contractor that had been doing work for debtor executed in consideration of debtor's delivering bonds and stocks to contractor, transaction was a mere "novation" rather than a giving of accommodation note without consideration. Bankr. Act, § 77B, as amended, 11 U.S.C.A. § 207.—Waldorf System v. M. McDonough Co., 93 F.2d 363, certiorari denied 58 S.Ct. 829, 303 U.S. 663, 82 L.Ed. 1121.—Nova 1.

C.C.A.8 (Mo.) 1942. Where joint-stock land bank acquired assets and assumed liabilities of liquidating joint-stock land banks, as between acquiring bank and liquidating banks' bondholders who exchanged their bonds for acquiring bank's bonds, transaction resulted in a "novation", since it left the creditor the same but substituted a new debtor. Federal Farm Loan Act §§ 20, 21, 12 U.S.C.A. §§ 864, 871.—Andrews v. St. Louis Joint Stock Land Bank of St. Louis, Mo., 127 F.2d 799.—Nova 5.

C.C.A.8 (Mo.) 1929. "Novation" is substitution of new obligation in place of old one. The term "novation" means a substitution of a new obligation in the place of an old one, between the same parties.—Hodiamont Bank v. Livingstone, 35 F.2d 18.—Nova 4.

C.C.A.8 (Mo.) 1929. "Novation" is substitution of new obligation in place of old one.—Hodiamont Bank v. Livingstone, 35 F.2d 18.—Nova 4.

C.C.A.2 (N.Y.) 1938. Evidence that oil company agreed that charter hire payable on vessel by its affiliate should be applied on indebtedness to oil company of vessel owner, and, after payment thereof, on indebtedness of affiliate of vessel owner, for fuel oils, and that accounts of vessel owner and its affiliate were consolidated to show only indebtedness of vessel owner after bookkeeper of vessel owner and its affiliate erroneously stated to credit manager of oil company that vessel owner had absorbed assets and liabilities of its affiliate, did not establish a "novation" precluding bankruptcy claim by oil company against affiliate of vessel owner.—In re Marine Transit Corporation, 94 F.2d 7.—Nova 12.

C.C.A.10 (Okla.) 1940. To constitute a "novation", the creditor must unconditionally release the original debtor and accept a third person in his stead.—Standard Acc. Ins. Co. of Detroit, Mich. v. Federal Nat. Bank of Shawnee, 112 F.2d 692, adhered to 115 F.2d 34.—Nova 5.

C.C.A.10 (Okla.) 1940. Where bank advanced money to contractor and as security therefor took an assignment from contractor of certain sums due under the contract, the assignment did not effect a "novation".—Standard Acc. Ins. Co. of Detroit, Mich. v. Federal Nat. Bank of Shawnee, 112 F.2d 692, adhered to 115 F.2d 34.—Nova 1.

C.C.A.3 (Pa.) 1943. A "novation" involves an agreement of all parties to a new contract with intention that it shall entirely extinguish the old

contract.—U. S., to Use of Par-Lock Appliers of New Jersey v. J. A. J. Const. Co., 137 F.2d 584.—Nova 7.

C.C.A.3 (Pa.) 1943. That materialman, without demanding payment of larger amount due under contract with subcontractor for labor and material, borrowed from subcontractor to meet pay rolls money borrowed by subcontractor from general contractor did not establish a "novation" relieving subcontractor of liability upon original contract with materialman.—U. S., to Use of Par-Lock Appliers of New Jersey v. J. A. J. Const. Co., 137 F.2d 584.—Nova 12.

C.C.A.3 (Pa.) 1940. The written assumption by daughter, who was sole beneficiary of her deceased father's estate, of the estate's indebtedness, for considerations moving to the daughter alone, consisting of protecting collateral which secured the indebtedness and relieving the estate from liability, constituted a "novation", and new note executed by the daughter was supported by consideration.—Hart v. Stevens, 112 F.2d 934.—Nova 1.

C.C.A.3 (Pa.) 1940. Under patent license contract authorizing licensee to assign contract to a company, and authorizing the company to reassign the contract providing that, if the reassignment was made to parties accepted in writing by the licensor, the party accepted should become responsible for the contract and the company should be relieved from obligations thereunder, if licensor should accept as licensees, assignees to whom company assigned license contract, a "novation" would be effected, by which the assignees would become responsible for performance of terms of the contract and original licensee would be relieved from obligations thereunder.—Paul E. Hawkinson Co. v. Carnell, 112 F.2d 396.—Nova 1.

C.C.A.8 (S.D.) 1931. Necessary elements of "novation" stated (Rev. Code S.D. 1919, Secs. 788-790, 833). Necessary elements of "novation" are a previous valid obligation, agreement of all parties to new contract, extinguishment of creditor's claim against original debtor, and validity of new obligation.—City Nat. Bank of Huron, S.D., v. Fuller, 52 F.2d 870, 79 A.L.R. 71.—Nova 1.

C.C.A.8 (S.D.) 1931. Mere assumption of debt by third party is insufficient to constitute "novation." Rev.Code S.D.1919, §§ 788-790, 833.—City Nat. Bank of Huron, S.D., v. Fuller, 52 F.2d 870, 79 A.L.R. 71.—Nova 1.

C.C.A.8 (S.D.) 1931. There is no "novation," unless there is intent to relinquish original claim and original debtor. Rev.Code S.D.1919, §§ 788-790, 833.—City Nat. Bank of Huron, S.D., v. Fuller, 52 F.2d 870, 79 A.L.R. 71.—Nova 1.

C.C.A.8 (S.D.) 1931. To constitute "novation," all parties must agree to substitution of new debt and debtor, and creditor is under no obligation to accept new debtor. Rev.Code S.D.1919, §§ 788-790, 833.—City Nat. Bank of Huron, S.D., v. Fuller, 52 F.2d 870, 79 A.L.R. 71.—Nova 7.

C.C.A.8 (S.D.) 1931. If new debtor has no intention to pay obligations of old debtor, regardless

of defenses available to old debtor, there would be no "novation." Rev.Code S.D.1919, §§ 788-790, 833.—City Nat. Bank of Huron, S.D., v. Fuller, 52 F.2d 870, 79 A.L.R. 71.—Nova 5.

C.C.A.8 (S.D.) 1931. Necessary elements of "novation" stated. Rev.Code S.D.1919, §§ 788-790, 833.—City Nat. Bank of Huron, S.D., v. Fuller, 52 F.2d 870, 79 A.L.R. 71.—Nova 1.

C.C.A.5 (Tex.) 1938. A "novation" is the creation of a new contract in place of an old one; the new contract being formed by a meeting of the minds and a consideration as in case of any other contract.—Crook v. Zorn, 95 F.2d 782.—Nova 1.

C.C.A.5 (Tex.) 1938. To effect a "novation," all parties must intend to terminate old agreement and to substitute or create one that is entirely new.—Crook v. Zorn, 95 F.2d 782.—Nova 1.

C.C.A.5 (Tex.) 1938. An intention to substitute new agreement for old agreement is never presumed, and a "novation" arises as legal consequence of an express agreement therefor, or from acts, conduct, and circumstances proving such agreement, although not expressed.—Crook v. Zorn, 95 F.2d 782.—Nova 1, 12.

C.C.A.5 (Tex.) 1938. Where lessor and lessee, subsequent to lessee's default in payment of rent, entered into new agreement which provided that lessor would accept increased rental for remainder of term and notes for past-due rent, which modified original provision concerning manner of termination, but under which there was no eviction and occupancy was to continue for remainder of term created by old lease, there was no complete "novation" of old lease agreement, but current contract year was the same as under old agreement, as respects period for which lessor's statutory lien for rent to become due could be enforced against bankrupt lessee. Vernon's Ann.Civ.St.Tex., art. 5238.—Crook v. Zorn, 95 F.2d 782.—Bankr 2581; Nova 1.

C.C.A.4 (W.Va.) 1926. A "novation" is mutual agreement for discharge of existing obligations by substitution of new obligation or like agreement for discharge of debtor to his creditor by substitution of new creditor.—Martin v. Breckenridge, 14 F.2d 260.—Nova 1.

E.D.Ark. 1938. On question whether an Arkansas drainage district was insolvent at time of filing petition for debt composition under Municipal Corporation Bankruptcy Act, the purchase of a majority of district's bonds and judgments against district by a trustee with funds advanced by the Reconstruction Finance Corporation was not a "novation," where refunding bonds issued were never delivered but were deposited in escrow and original bonds were never canceled but were held as collateral to trustee's note. Bankr.Act §§ 81-84, 11 U.S.C.A. §§ 401-404.—In re Drainage Dist. No. 7, 25 F.Supp. 372, affirmed Luehrmann v. Drainage Dist. No. 7 of Poinsett County, 104 F.2d 696, certiorari denied Haverstick v. Drainage Dist No 7 of Poinsett County, Ark, 60 S.Ct. 141, 308 U.S. 604,

84 L.Ed. 505, rehearing denied 60 S.Ct. 260, 308 U.S. 638, 84 L.Ed. 530.—Bankr 2251.

W.D.Ark. 1964. Essential requisites of “novation” embrace consent by all interested parties that proposed agreement be substituted as complete relief or in lieu of prior obligation.—*Douglas-Guardian Warehouse Corp. v. Nickell*, 236 F.Supp. 842.—Nova 4.

N.D.Cal. 1995. “Novation” is substitution of new obligation for existing one and amounts to new contract which supplants original agreement and completely extinguishes original obligation.—*Airs Intern., Inc. v. Perfect Scents Distributions, Ltd.*, 902 F.Supp. 1141.—Nova 1.

N.D.Cal. 1995. If new contract is invalid, there is no “novation” and parties’ previous obligations are not extinguished.—*Airs Intern., Inc. v. Perfect Scents Distributions, Ltd.*, 902 F.Supp. 1141.—Nova 8.

S.D.Ga. 1970. Under Georgia law, any change in terms of contract is considered a “novation” and discharges surety in absence of consent of surety.—*Brunswick Nursing & Convalescent Center, Inc. v. Great Am. Ins. Co.*, 308 F.Supp. 297.—Princ & S 99.

D.Kan. 1997. Under Kansas law, “novation” is the substitution of new obligation for existing one, which is thereby extinguished.—*Baxter State Bank v. Bernhardt*, 985 F.Supp. 1259.—Nova 4.

D.Kan. 1992. Under law of Illinois and Kansas, “novation” is substituted contract that includes as party one who is neither obligor nor obligee of original duty.—*Security Ben. Life Ins. Co. v. F.D.I.C.*, 804 F.Supp. 217.—Nova 1.

W.D.Ky. 1961. There was in effect “novation” of contract to purchase  $\frac{1}{2}$  interest in oil lease, where purchasers were unable to make final cash payment in accordance with terms of original agreement and requested additional time, and they were granted additional time on payment of \$5,000, and new writing was executed.—*Krumholz v. Goff*, 198 F.Supp. 129, affirmed in part, remanded in part 315 F.2d 575, rehearing denied 318 F.2d 911.—Nova 4.

E.D.La. 1992. Under Louisiana law, “novation” involves the substitution of new obligation for existing one, which is thereby extinguished. LSA-C.C. art. 2185 (Repealed).—*Wainer v. A.J. Equities, Ltd.*, 150 B.R. 916, affirmed 984 F.2d 679.—Nova 4.

D.Md. 1959. Contract between debtor and third person, by which third person unconditionally assumes debtor’s duty, is not in itself a “novation,” even though creditor accepts payment from the third person, unless the creditor consents to the substitution.—*General Elec. Co. v. Lombardi*, 173 F.Supp. 841.—Nova 7.

E.D.Mo. 1972. A “novation” is a mutual agreement, between all parties concerned, for discharge of a valid existing obligation by substitution of a new valid obligation on part of the debtor or another, or a like agreement for the discharge of a debtor to his creditor by substitution of a new creditor.—

*Charles Kahn & Co. v. Sobery*, 355 F.Supp. 156.—Nova 1.

D.N.J. 1949. A “novation” implies the extinguishment of an existing debt or obligation by the parties thereto, and its transition into a new existence between the same or different parties.—*Newtown Title & Trust Co v. Admiral Farragut Academy*, 84 F.Supp. 527, affirmed 178 F.2d 406.—Nova 1.

D.N.J. 1949. Debtor’s consent to assignment of balance of fee due or to become due under contract for personal services to be rendered by assignor, did not alter, extinguish or substitute performance by assignor and hence there was no “novation” but only a consent that assignee might receive any moneys due under the contract to the assignor.—*Newtown Title & Trust Co v. Admiral Farragut Academy*, 84 F.Supp. 527, affirmed 178 F.2d 406.—Nova 3.

E.D.N.Y. 1994. “Novation” of retainer agreement was not accomplished when client informed attorney upon discharge that client would not seek refund of retainer allegedly resulting in attorney forbearing to clarify attorney’s entitlement to general retainer before court.—*Wong v. Michael Kennedy, P.C.*, 853 F.Supp. 73.—Atty & C 137; Nova 3.

S.D.N.Y. 2000. Under New York law, a “novation” requires (1) a previously valid obligation, (2) agreement of all parties to a new contract, (3) extinguishment of the old contract, and (4) a legally valid new contract.—*Schuster v. Dragone Classic Motor Cars, Inc.*, 98 F.Supp.2d 441.—Nova 1.

S.D.N.Y. 1996. Elements of “novation,” under New York law, are: (1) previously valid obligation; (2) agreement of all parties to extinguish old contract; (3) agreement of parties to new contract; and (4) valid new contract.—*Sudul v. Computer Outsourcing Services, Inc.*, 917 F.Supp. 1033.—Nova 1.

S.D.N.Y. 1996. Under New York law, “novation” is agreement for existing obligation to be extinguished immediately by acceptance of new promise, but if parties intended that under new agreement, existing claim would be discharged in future by rendition of substituted performance, new agreement constitutes “accord.”—*Sudul v. Computer Outsourcing Services, Inc.*, 917 F.Supp. 1033.—Accord 1; Nova 3.

S.D.N.Y. 1941. Where plaintiff orally agreed to work for individual defendant and at individual’s request agreed to receive his compensation through corporate defendant, payment of compensation by corporation did not amount to a “novation” and did not release individual except pro tanto so far as plaintiff’s right to compensation was in fact satisfied.—*Vassardakis v. Parish*, 36 F.Supp. 1002.—Nova 1.

S.D.Ohio 2002. Under Colorado law, “novation” extinguishes previously existing contract by substituting new contract or obligation.—*Russell v. GTE Government Systems Corp.*, 232 F.Supp.2d 840.—Nova 10.

E.D.Pa. 1995. Under Pennsylvania law, oral agreement consisting of stock purchase agreement and restructuring agreement entered into between creditor and debtor after debtor defaulted on line of credit was not “novation” of prior credit agreement, where oral agreement specifically stated that restructured note would not release or extinguish any unpaid indebtedness under line of credit documents.—GE Capital Mortg. Services, Inc. v. Pinnacle Mortg. Inv. Corp., 897 F.Supp. 854.—Nova 1.

E.D.Pa. 1995. Under Pennsylvania law, party arguing that new agreement constitutes “novation” must establish following elements: displacement and extinction of valid contract; substitution for it of new contract; sufficient legal consideration for new contract; and consent of parties.—GE Capital Mortg. Services, Inc. v. Pinnacle Mortg. Inv. Corp., 897 F.Supp. 854.—Nova 1.

E.D.Pa. 1995. Under Pennsylvania law, unlike “novation,” which immediately discharges prior obligation, “executory accord” discharges prior obligation only after performance of new agreement. Restatement (Second) of Contracts § 281 comment.—GE Capital Mortg. Services, Inc. v. Pinnacle Mortg. Inv. Corp., 897 F.Supp. 854.—Accord 15.1.

E.D.Pa. 1995. Under Pennsylvania law, party asserting that new agreement constitutes “novation” must establish the following elements: displacement and extinction of valid contract; substitution for it of new contract; sufficient legal consideration for new contract; and consent of parties.—GE Capital Mortg. Services, Inc. v. Pinnacle Mortg. Inv. Corp., 897 F.Supp. 842, on reconsideration 897 F.Supp. 854.—Nova 1.

E.D.Pa. 1937. The mere assumption of a debt by third party is insufficient to constitute a “novation” but it is essential that intention to release first obligor and extinguish his liability should definitely appear, otherwise assumption of debt by third party will be presumed to be merely additional security.—Fidelity-Philadelphia Trust Co. v. Hale & Kilburn Corp., 24 F.Supp. 3.—Nova 1.

E.D.Pa. 1937. The conveyance of mortgaged property in Pennsylvania by corporate mortgagor to a company which assumed mortgage debt, and execution by company and bondholders’ trustee of supplemental indenture, did not constitute a “novation” so as to release corporate mortgagor from liability on bonds and mortgage, notwithstanding mortgage contained provision that mortgagor’s successor should be substituted for corporation, where “substitution” clause in mortgage was intended to apply to matter of issuing of additional bonds by mortgagor’s grantee. 21 P.S.Pa. §§ 655, 656.—Fidelity-Philadelphia Trust Co. v. Hale & Kilburn Corp., 24 F.Supp. 3.—Nova 1.

W.D.Pa. 1974. Under Pennsylvania law, in order to constitute “novation,” there must be a substitute of a new contract supported by sufficient consideration and the consent of both the parties; a novation may be between the same parties or through introduction of a new creditor or debtor to the arrangement. 12A P.S.Pa. § 3-601(2).—Ampex

Corp. v. Appel Media, Inc., 374 F.Supp. 1114.—Nova 1, 5, 6.

W.D.Pa. 1974. Under Pennsylvania law, in order for there to be a “novation,” there must be an entire new agreement which is binding upon those parties. 12A P.S.Pa. § 3-601(2).—Ampex Corp. v. Appel Media, Inc., 374 F.Supp. 1114.—Nova 4.

D.Puerto Rico 1999. Agreement between vendor and prospective purchaser of property which extended initial option period in parties’ contract did not constitute “novation.”—Adria Intern. Group, Inc. v. Ferre Development, Inc., 85 F.Supp.2d 82, vacated and remanded 241 F.3d 103.—Nova 1.

D.Puerto Rico 1988. “Novation” is broader than its Roman law genesis, which was conceived simply as a way of extinguishing obligations between individuals, and encompasses the simple modification as well as the extinction of debts.—Federal Deposit Ins. Corp. v. Prann, 694 F.Supp. 1027, affirmed 895 F.2d 824.—Nova 1.

D.S.C. 1996. Under South Carolina law, a “novation” is a mutual agreement between all concerned parties for discharge of valid existing obligation by substitution of new valid obligation on behalf of parties.—Laidlaw Environmental Services, (TOC), Inc. v. Honeywell, Inc., 966 F.Supp. 1401, affirmed 113 F.3d 1232.—Nova 1.

D.S.C. 1996. Under South Carolina law, to establish “novation,” party must prove existence of a previous valid obligation, agreement of all parties to new contract, extinguishment of old contract, and making of valid new agreement.—Laidlaw Environmental Services, (TOC), Inc. v. Honeywell, Inc., 966 F.Supp. 1401, affirmed 113 F.3d 1232.—Nova 1.

D.S.C. 1996. Under South Carolina law, party’s reaffirming its obligations under extant contract and requesting that other party comply with terms of extant contract do not constitute a “novation.”—Laidlaw Environmental Services, (TOC), Inc. v. Honeywell, Inc., 966 F.Supp. 1401, affirmed 113 F.3d 1232.—Nova 4.

D.S.C. 1968. “Novation” is substitution of new contract or obligation for old one which is thereby extinguished or is substitution of one debtor or of one creditor for another.—Jay Cee Fish Co. v. Cannarella, 279 F.Supp. 67.—Nova 1.

D.S.D. 1930. To constitute “novation,” it must clearly appear that new debtor was accepted by creditor who discharged first debtor. Rev.Code S.D. 1919, §§ 788, 789.—Fuller v. City Nat. Bank of Huron, S.D., 52 F.2d 865, affirmed 52 F.2d 870, 79 A.L.R. 71.—Nova 1.

D.S.D. 1930. That holder of transferring bank’s certificate of deposit proved claim before and accepted dividends from transferee bank’s receiver held not to constitute “novation.” Rev.Code S.D. 1919, §§ 788, 789.—Fuller v. City Nat. Bank of Huron, S.D., 52 F.2d 865, affirmed 52 F.2d 870, 79 A.L.R. 71.—Nova 1.

W.D.Wash. 1986. A “novation” is a new obligation unto itself as of the date the substitution of parties is complete.—*Fay Corp. v. BAT Holdings I, Inc.*, 646 F.Supp. 946, reconsideration denied 651 F.Supp. 307, affirmed 896 F.2d 1227.—Nova 1.

S.D.W.Va. 1965. “Novation” is a mutual agreement among all parties for discharge of valid existing obligation by substitution of new valid obligation by debtor or another.—*Edward Petry & Co. v. Greater Huntington Radio Corp.*, 245 F.Supp. 963.—Nova 1.

E.D.Wis. 1998. Under Wisconsin law, “novation” occurs where there is agreement between obligor, obligee, and third party by which third party agrees to be substituted for obligor and obligee assents thereto, obligor is released from liability, and third person takes place of obligor.—*Shank v. William R. Hague, Inc.*, 16 F.Supp.2d 1038, affirmed 192 F.3d 675.—Nova 5.

E.D.Wis. 1942. Where third person contracts with debtor to assume, as an immediate substitution of the debtor's duty to the creditor, to render either the performance for which the debtor was previously bound or some other performance, and the creditor agreed either with the debtor or with the third person to such substitution, there is a “novation” that discharges original debtor and subjects the third person to a duty to the creditors.—*Durkey v. Arndt*, 46 F.Supp. 256, affirmed 138 F.2d 317.—Nova 1.

E.D.Wis. 1942. In order to establish a “novation” by substitution of debtors, it is not necessary that assent of the creditor to take a new debtor in place of the old one be given by any writing or by express words, if the fact of such assent appears clearly from the circumstances.—*Durkey v. Arndt*, 46 F.Supp. 256, affirmed 138 F.2d 317.—Nova 7.

Bkrcty.M.D.Ala. 1997. “Novation” is defined as substitution of new contract, debt or obligation from existing one, between same or different parties, or substitution by mutual agreement of one debtor for another or of one creditor for another, whereby old debt is extinguished; requisites of novation are previous valid obligation, agreement of all parties to new contract, extinguishment of old obligation, and validity of new one.—*In re Jones*, 206 B.R. 569.—Nova 1.

Bkrcty.D.Colo. 1986. Guarantee executed by purchaser of tire warehouse, pursuant to which purchaser agreed to pay any indebtedness that warehouse incurred in consideration of such credit as supplier thereafter extended, would be construed against supplier to cover only prospective obligations; accordingly, guarantee did not constitute “novation” of vendors under prior guarantees and did not render purchaser liable to supplier for debts incurred prior to sale.—*In re Anzman*, 73 B.R. 156.—Nova 3.

Bkrcty.M.D.Fla. 1999. “Novation” is a mutual agreement between the parties concerned for the discharge of a valid existing obligation by the substitution of a valid new contract.—*In re Marineland Ocean Resorts, Inc.*, 242 B.R. 748.—Nova 1.

Bkrcty.S.D.Fla. 1993. Assumption agreement did not constitute “novation” that extinguished and reincorporated terms of prior loan documents, but rather merely evidenced parties' intent to supplement and amend prior documents, and thus statute which was enacted after execution of prior loan documents but before assumption, and which provided for transfer of income stream to mortgagee upon mortgagor's default and mortgagee's written demand, did not preclude Chapter 11 debtor mortgagor's use of cash collateral. West's F.S.A. § 697.07.—*In re River Oaks Inv. Corp.*, 152 B.R. 684.—Bankr 3082.1; Nova 4.

Bkrcty.D.Idaho 1993. Under Idaho law, refinancing agreement executed by purchase-money debtor, pursuant to which creditor purported to “retain” a purchase-money security interest in collateral which was subject of earlier agreement, in accordance with terms of earlier agreement, did not result in “novation” or affect purchase-money nature of debtor's indebtedness; collateral which was subject of earlier security agreement continued to be impressed with purchase-money lien, which debtor could not avoid under bankruptcy lien avoidance provision. Bankr.Code, 11 U.S.C.A. § 522(f)(2).—*In re Butler*, 160 B.R. 155.—Bankr 2576.5(2); Nova 4; Sec Tran 4.

Bkrcty.D.Idaho 1993. Under Idaho law, refinancing agreement executed by purchase-money debtor which purported to “create” in creditor a purchase-money security interest in all collateral described in that or earlier agreements, subject to terms of refinancing agreement, was in nature of “novation”; accordingly, to the extent that creditor had previously held a purchase-money security interest in collateral that was subject of earlier agreements, that interest was converted into a “nonpurchase-money security interest,” which debtor could avoid pursuant to bankruptcy lien avoidance provision. Bankr.Code, 11 U.S.C.A. § 522(f)(2).—*In re Butler*, 160 B.R. 155.—Bankr 2576.5(1); Nova 4.

Bkrcty.C.D.Ill. 1990. Whether refinancing of loan secured by a purchase money security interest is a “novation” extinguishing the purchase money character of the loan or a “renewal” allowing purchase money character to survive depends on degree to which original obligation of debtor is changed and, to some extent, on any additional consideration which was conveyed by debtor to creditor; the greater the degree of change in obligation or increase in obligation, the more likely a novation will be found. U.C.C. § 9-107.—*In re Hatfield*, 117 B.R. 387.—Nova 1; Sec Tran 146.

Bkrcty.W.D.Ky. 1982. Under Kentucky law, a “novation” is substitution of a new obligation for an old one, with intent to extinguish the old one, or a substitution of a new debtor for an old one, with intent to release the latter, or substitution of a new creditor, with intent to transfer rights of the old one to him.—*In re Harris*, 17 B.R. 210.—Nova 1.

Bkrcty.W.D.Mich. 1998. “Novation” is simply the substitution of one debtor for another, or the substitution of a new obligation for an old one,

which is thereby extinguished.—*In re Fleming*, 226 B.R. 3.—Nova 1.

Bkrcty.D.Minn. 2002. “Novation” is an agreement whereby one party removes itself from the middle of a conduit transaction.—*In re MJK Clearing, Inc.*, 286 B.R. 862.—Nova 1.

Bkrcty.D.Minn. 2002. A “novation” is an agreement where one party removes itself from the middle of a conduit transaction with a conduit transaction being a securities lending transaction in which party B borrows securities from party A, and then re-lends those securities to party C; consequently, in that context, a novation agreement removes party B from the transaction, so that the transaction becomes a stock loan directly from party A to party C.—*In re MJK Clearing, Inc.*, 286 B.R. 109.—Contracts 193; Nova 1, 10.

Bkrcty.D.N.J. 1990. Although term “novation” is generally used to describe change of parties to contract, it is also used where purchase price of transaction is changed.—*Matter of Timberline Property Development, Inc.*, 115 B.R. 787.—Nova 1.

Bkrcty.S.D.N.Y. 1990. Surety’s issuance of new workers’ compensation surety bond in response to request of Pennsylvania Bureau of Workers’ Compensation, following merger of three companies for which surety had issued three bonds, was a “substituted contract” or “novation” discharging surety’s obligation on prior bonds, rather than “termination” not limiting surety’s retroactive liability on prior bonds.—*In re Chateaugay Corp.*, 116 B.R. 887.—Nova 4; Princ & S 89.

Bkrcty.D.N.D. 1985. “Novation,” which is substitution of new obligation for existing one, may arise by mutual agreement of parties that an existing obligation be discharged by substitution of new obligation.—*In re Miller*, 54 B.R. 710.—Nova 4.

Bkrcty.D.N.D. 1985. Intent of parties to effect discharge of original obligation by “novation” must be clear and definite.—*In re Miller*, 54 B.R. 710.—Nova 7.

Bkrcty.N.D.Ohio 2000. “Novation” occurs when parties’ original rights and obligations cease to exist and are replaced by new contractual obligations.—*In re Cantrill*, 247 B.R. 429.—Nova 1.

Bkrcty.E.D.Pa. 1985. A “novation” is the acceptance of a new promise for a previously existing one.—*In re Schwartz*, 52 B.R. 314.—Nova 4.

Bkrcty.W.D.Pa. 1990. Under Pennsylvania law, “novation” is acceptance of new promise for previously existing claim.—*In re Brendlinger*, 116 B.R. 42.—Nova 4.

Bkrcty.W.D.Tenn. 1993. Under Tennessee law, “novation” constitutes new contractual relationship based upon new contract by all parties interested.—*In re O’Brien*, 154 B.R. 480.—Nova 4.

Bkrcty.E.D.Va. 2001. Under Virginia law, “novation” results from mutual agreement among all parties involved for discharge of valid existing obligation by substitution of new valid obligation of

debtor or other party.—*In re Twin B. Auto Parts, Inc.*, 271 B.R. 71.—Nova 4.

Bkrcty.E.D.Va. 2001. Basic elements that must be proven to establish “novation” under Virginia law are a prior valid obligation, the agreement of all parties to new contract, extinguishment of old contract, and validity of new contract.—*In re Twin B. Auto Parts, Inc.*, 271 B.R. 71.—Nova 1.

Ala. 1999. “Novation” requires: (1) a previous valid obligation; (2) an agreement of the parties thereto to a new contract or obligation; (3) an agreement that it is an extinguishment of the old contract or obligation; and (4) the new contract or obligation must be a valid one between the parties thereto.—*Boh Bros. Const. Co., Inc. v. Nelson*, 730 So.2d 132.—Nova 1.

Ala. 1999. Subcontractor’s assignment of proceeds of contract was not a “novation”; subcontractor remained as a subcontractor, fully obligated to perform all of the work it had agreed to perform under its contract with contractor.—*Boh Bros. Const. Co., Inc. v. Nelson*, 730 So.2d 132.—Nova 5.

Ala. 1994. “Novation” is substitution of one contract for another; novation releases party bound by original contract.—*Golden v. Bank of Tallahassee*, 639 So.2d 1366.—Nova 1.

Ala. 1992. A “novation” is the substitution of one contract for another which extinguishes the preexisting obligations and releases those bound thereunder.—*Marvin’s, Inc. v. Robertson*, 608 So.2d 391.—Nova 4.

Ala. 1989. “Novation” is the substitution of one contract for another, which extinguishes the preexisting obligation and releases those bound thereunder.—*Pilalas v. Baldwin County Sav. and Loan Ass’n*, 549 So.2d 92.—Nova 1.

Ala. 1943. Transaction between mortgagor, mortgagor’s husband, mortgagor’s son and mortgagee whereby mortgagor conveyed mortgaged premises to son who gave mortgagee new mortgage for full amount of mortgage debt and original mortgagor stipulated for surrender of the old note and mortgage, constituted a “novation” of son in lieu of original mortgagor, as mortgagee’s debtor.—*Burks v. Citizens Bank of Moulton*, 12 So.2d 415, 244 Ala. 169.—Nova 5.

Ala. 1939. Where mortgage was assigned under tripartite agreement between mortgagor, mortgagee and assignee fixing the amount of the mortgage debt, a new contract was created by “novation” whereby the old mortgage debt was extinguished and a new one created between the mortgagor and assignee.—*Taylor v. Federal Land Bank of New Orleans*, 191 So. 211, 238 Ala. 366.—Nova 6.

Ala. 1937. To constitute a “novation,” extinguishment of original contract and liability thereunder must be result of new, independent contract.—*American Nat. Bank & Trust Co. v. Powell*, 178 So. 21, 235 Ala. 236.—Nova 1.

Ala. 1930. For order given by debtor to payee to constitute “novation” resulting in payment on acceptance, there must be agreement that order

shall extinguish old obligation.—Standard Sanitary Mfg. Co. v. Aird, 129 So. 285, 221 Ala. 520.—Nova 4.

Ala. 1928. “Novation” requires three or more parties, previous valid obligation, agreement to validate new contract, and extinguishment of old contract.—A.M. Robinson Co. v. Anniston Land Co., 117 So. 29, 217 Ala. 648.—Nova 1.

Ala. 1918. “Novation” is the substitution of one debtor for another, and requires: (1) A previous valid obligation, (2) the agreement of all parties to the new contract, (3) the extinguishment of the old contract, and (4) the validity of the new one.—Hopkins v. Jordan, 77 So. 710, 201 Ala. 184.—Nova 1.

Ala. 1888. A “novation,” under the rules of the civil law, whence the term has been introduced into the modern nomenclature of our common-law jurisprudence, was a mode of extinguishing one obligation by another; the substitution, not of a new paper or note, but of a new obligation in lieu of an old one, the effect of which was to pay, dissolve, or otherwise discharge it. If, since the debt was contracted, a new agreement has taken place between the creditor and debtor by which a longer time of payment has been given, or a new place for the payment appointed, or the debtor allowed the liberty of paying to another person than the creditor, or even by which the debtor should have bound himself to pay a larger sum or a lesser one, to which the creditor was willing to confine his demand, in all these cases and the like, according to the principle that the novation is not to be presumed, it must be decided that there is no novation, and the parties intended only to modify, diminish, or augment the debt, rather than extinguish it in order to substitute a new one to it, if they did not explain themselves.—McDonnell v. Alabama Gold Life Ins. Co., 5 So. 120, 85 Ala. 401.

Ala.Civ.App. 1979. “Novation” is the substitution of one contract for another, the effect of which is to release or discharge from liability him who is bound by original contract of which novation is asserted; i. e., the new independent contract extinguishes the old.—Bledsoe v. Cargill, Inc., 376 So.2d 735, appeal after remand 452 So.2d 1334.—Nova 1.

Ala.App. 1951. To establish a “novation”, there must have been a previous valid obligation, an agreement of all parties thereto to new obligation, agreement that it was an extinguishment of the old obligation and fact must be, that the new contract or obligation was valid between the parties thereto.—Butler v. Walton, 56 So.2d 369, 36 Ala.App. 319, certiorari denied 56 So.2d 379, 257 Ala. 714.—Nova 1.

Ala.App. 1951. In action to recover price of a tractor sold defendant, plea setting out an agreement of settlement between the parties, whereby all agreed that plaintiff would pay defendant for extra work and other parties would settle for the balance due under the contract, sufficiently pleaded a “novation”.—Butler v. Walton, 56 So.2d 369, 36 Ala.App. 319, certiorari denied 56 So.2d 379, 257 Ala. 714.—Nova 11.

Alaska 1989. “Novation” is a substitute contract that includes as a party one who is neither the obligor nor the obligee of the original duties.—Oaksmith v. Brusich, 774 P.2d 191.—Nova 1.

Ariz. 1995. “Novation” is but another contract and is thus subject to existing body of contract law.—Maxwell v. Fidelity Financial Services, Inc., 907 P.2d 51, 184 Ariz. 82.—Nova 1.

Ariz. 1961. “Novation” is the substitution by mutual agreement of one debtor or of one creditor for another, whereby whole debt is extinguished, or substitution of a new debt or obligation for an existing one which is thereby extinguished.—Steele v. Vanderslice, 367 P.2d 636, 90 Ariz. 277.—Nova 1.

Ariz. 1941. A “novation” is the substitution, by mutual agreement, of any debtor or creditor for another, or the substitution of a new debt or obligation for existing debt or obligation, whereby the old debt is extinguished.—Shiflet v. Marley, 118 P.2d 1107, 58 Ariz. 231.—Nova 1.

Ariz. 1941. To constitute a “novation” by substitution of a new debtor for an old debtor, there must be a mutual agreement among the creditor, the debtor and the intended new debtor, whereby liability of intended new debtor is substituted for that of original debtor and the original debt is extinguished, and creditor and new debtor must agree to the substitution and release, and original debtor must be consulted and consent to the new arrangement.—Shiflet v. Marley, 118 P.2d 1107, 58 Ariz. 231.—Nova 7.

Ariz. 1941. An agreement between mortgagees and grantees taking mortgaged property subject to mortgage, by which mortgagee extended time of payment of mortgage note and reduced interest, and by which grantees agreed to pay mortgage note, did not change position of mortgagors from position of primary liability to secondary liability, and did not constitute a “novation” which would release mortgagors from their primary liability on the note, where mortgagors did not participate in or consent to agreement. Code 1939, § 52-184 (A.R.S. § 44-519).—Shiflet v. Marley, 118 P.2d 1107, 58 Ariz. 231.—Nova 7.

Ariz. 1934. Essential requisites of “novation” are a previous valid obligation, the agreement of all the parties to the new contract, the extinguishment of the old contract, and the validity of the new one.—Buerger Bros. Supply Co. v. El Rey Furniture Co., 32 P.2d 1029, 43 Ariz. 472.—Nova 1.

Ariz. 1934. Correspondence between corporation and conditional buyer by which corporation agreed to make payments due on conditional sales contract, which correspondence was shown to conditional seller, and which accepted corporation's check in satisfaction of payment due on conditional sales contract and forbore to sue conditional buyer for further payments and understanding of conditional seller that conditional buyer did not thereafter owe anything, held to establish a valid “novation” and to make corporation debtor of conditional seller.—Buerger Bros. Supply Co. v. El

Rey Furniture Co., 32 P.2d 1029, 43 Ariz. 472.—Nova 1.

Ariz. 1927. To constitute “novation” by substitution of debtors, all parties must agree to release former debtor and substitution. To constitute “novation” by substitution of debtors, there must be mutual agreement among all parties whereby debtor and original creditor agree that new debtor may be substituted.—Redewill v. Matzenauer, 255 P. 486, 32 Ariz. 13.—Nova 7.

Ariz. 1927. To constitute “novation” by substitution of debtors, all parties must agree to release former debtor and substitution.—Redewill v. Matzenauer, 255 P. 486, 32 Ariz. 13.—Nova 7.

Ariz. 1927. To constitute “novation,” there must be extinguishment of previous valid obligation, and agreement of all parties to new valid contract. To constitute “novation,” there must be previous valid obligation, agreement of all parties to new contract, extinguishment of old contract, and validity of new one.—Dunbar v. Steiert, 253 P. 1113, 31 Ariz. 403.—Nova 1.

Ariz. 1927. To constitute “novation,” there must be extinguishment of previous valid obligation, and agreement of all parties to new valid contract.—Dunbar v. Steiert, 253 P. 1113, 31 Ariz. 403.—Nova 1.

Ariz.App. Div. 1 1993. For agreement to be “novation” which extinguishes parties’ rights and obligations under prior contract, party claiming novation must show previously valid obligation, agreement of all parties to new contract, extinguishment of old obligations, and validity of new one.—Maxwell v. Fidelity Financial Services, Inc., 880 P.2d 1090, 179 Ariz. 544, review granted, vacated 907 P.2d 51, 184 Ariz. 82.—Nova 1.

Ariz.App. Div. 1 1990. “Novation” is substitution of one debtor or creditor for another, or substitution of new debtor obligation for existing debtor obligation.—Cely v. DeConcini, McDonald, Brammer, Yetwin & Lacy, P.C., 803 P.2d 911, 166 Ariz. 500, review denied.—Nova 4, 5, 6.

Ariz.App. Div. 1 1975. To constitute a valid “novation” there must be an extinguishment of a previously valid obligation and an agreement of all parties to a new valid contract; the essential elements of a valid novation are a previously valid obligation, agreement of all parties to a new contract, extinguishment of the old obligation and the validity of a new one.—United Sec. Corp. v. Anderson Aviation Sales Co., Inc., 532 P.2d 545, 23 Ariz.App. 273.—Nova 1.

Ark. 1979. One form of “novation” occurs when by mutual agreement a new obligation is substituted for an existing one.—First Nat. Bank in Blytheville v. Ellis Gin Co., Inc., 582 S.W.2d 271, 266 Ark. 11.—Nova 4.

Ark. 1979. A “novation” is the substitution by mutual agreement of one debtor or one creditor for another, whereby old debt is extinguished, or a substitution of a new debt or obligation for an existing one, which is thereby extinguished.—Barton

v. Perryman, 577 S.W.2d 596, 265 Ark. 228.—Nova 1.

Ark. 1972. In order to constitute a “novation,” there must be a clear and definite intention of the parties that such is the purpose of the agreement.—Alston v. Bitely, 477 S.W.2d 446, 252 Ark. 79.—Nova 1.

Ark. 1938. Where insurer, whose assets became impaired, transferred the assets to reinsurer which assumed liability on policies which were in good standing, under certain specified conditions, and insured, who was a stockholder, director and vice president of original insurer, did not dissent to the plan but as director aided in making the reinsurance contract, a “novation” occurred and reinsurer became liable as a substituted insurer, and the original insurer was released.—Home Life Ins. Co. v. Arnold, 120 S.W.2d 1012, 196 Ark. 1046.—Insurance 3611(2), 3629.

Ark. 1938. To constitute a “novation” the parties must enter into a contract whereby the creditor accepts a new debtor for an old one who is discharged.—Home Life Ins. Co. v. Arnold, 120 S.W.2d 1012, 196 Ark. 1046.—Nova 1.

Ark. 1937. A “novation” is the substitution by mutual agreement of one debtor or of one creditor for another, whereby old debt is extinguished, or the substitution of a new debt or obligation for an existing one, which is thereby extinguished.—Riddick v. White, 110 S.W.2d 9, 194 Ark. 1010.—Nova 1.

Ark. 1937. Where settlement at large discount was suggested by holders of notes, whereupon makers went to holders’ attorney who offered to take \$1,000 for notes, and several months later offer was reduced to \$750, whereupon makers offered \$500 and named a party who would pay that amount, which negotiations did not contemplate substitution of one debt for another but a sale of notes for agreed price, which sale was conditioned upon court’s approval and receipt of check, “novation” was not created, even if court approval was a mere formality, makers not having tendered purchase price until after offer had been withdrawn and suit on notes had been filed.—Riddick v. White, 110 S.W.2d 9, 194 Ark. 1010.—Nova 1.

Ark. 1932. Creditor’s contract to buy realty from debtor, who was to credit thereon amount owed, held not “novation,” superseding antecedent guaranty contract covering debtor’s indebtedness.—Hanson v. Louisiana Oil Refining Corp., 53 S.W.2d 430, 186 Ark. 331.—Nova 1.

Ark. 1916. “Novation” is the substitution by mutual agreement of one debtor or one creditor for another whereby the old debt is extinguished, or the substitution of a new debt or obligation for an existing one, which is thereby extinguished.—Elkins v. Henry Vogt Mach. Co., 187 S.W. 663, 125 Ark. 6.—Nova 1.

Ark.App. 1986. “Novation” is substitution, by mutual agreement, of new debt or obligation for existing one and, like any other contract, novation must be supported by mutual obligation.—McIll-

wain v. Bank of Harrisburg, 713 S.W.2d 469, 18 Ark.App. 213.—Contracts 10(1); Nova 1.

Ark.App. 1982. “Novation” is the substitution by mutual agreement of one debtor, or one creditor, for another, whereby the old debt is extinguished, or the substitution of a new debt or obligation for an existing one, which is thereby extinguished.—Harrison v. Benton State Bank, 642 S.W.2d 331, 6 Ark.App. 355.—Nova 1.

Ark.App. 1981. “Novation” is substitution by mutual agreement of new debt or obligation for an existing one, and, like any other contract, novation must be supported by valid consideration.—Sterling v. Sterling, 621 S.W.2d 1, 2 Ark.App. 168.—Nova 1.

Cal. 1942. Specific and residuary legatees’ memorandum of agreement, specifically limited to division of property distributable under will to residuary legatees and not inconsistent on its face with specific legatee’s prior oral contract to divide special legacy with residuary legatees, did not constitute “novation” of such contract.—Douillard v. Woodd, 128 P.2d 6, 20 Cal.2d 665.—Nova 1.

Cal. 1942. The essential requirements of “novation” are recognition of pre-existing contract and intention to substitute new agreement for old one. Civ.Code, §§ 1530–1532.—Douillard v. Woodd, 128 P.2d 6, 20 Cal.2d 665.—Nova 1.

Cal. 1941. Where assignment of contract for division of insurance commissions with an unlicensed person was merely of assignor’s interest in commissions and there was no assumption of obligations by the assignee, there was no “novation” and obligations of the agreement remained with such unlicensed person and precluded assignee from suing thereon. St.1935, p. 584, § 1714; Civ. Code, §§ 1608, 1667.—Fewel & Dawes v. Pratt, 109 P.2d 650, 17 Cal.2d 85.—Nova 1.

Cal. 1939. Conduct may form basis for “novation” although there is no express writing or agreement.—Silva v. Providence Hospital of Oakland, 97 P.2d 798, 14 Cal.2d 762.—Nova 1.

Cal. 1937. A policyholder consenting to rehabilitation plan for insolvent life, health and accident insurance company by which new company reinsurance policies of insolvent company enters into a “novation” with new company, and cannot thereafter complain that he has been treated unfairly. St.1935, p. 547, § 1043.—Carpenter v. Pacific Mut. Life Ins. Co. of Cal., 74 P.2d 761, 10 Cal.2d 307, certiorari granted Nebblett v. Carpenter, 58 S.Ct. 1039, 304 U.S. 555, 82 L.Ed. 1524, certiorari denied 59 S.Ct. 61, 305 U.S. 562, 83 L.Ed. 354, affirmed 59 S.Ct. 170, 305 U.S. 297, 83 L.Ed. 182, rehearing denied 59 S.Ct. 355, 305 U.S. 675, 83 L.Ed. 437.—Nova 1.

Cal. 1895. A “novation” is made by contract, and is subject to all the rules concerning contracts in general.—Market St. Ry. Co. v. Hellman, 42 P. 225, 109 Cal. 571.

Cal.App. 1 Dist. 1942. Where written agreement for sale of four presses to corporation was never amended or modified so as to release corporation

from obligation to pay for all such presses, but contract was intended to and did remain in full force and effect at all times, there was no valid “novation” and hence no valid written contract between seller and another corporation, which exchanged two presses owned by it to buyer for two of purchased presses. Civ.Code, § 1531.—Rietz v. Hovden Food Products Corp., 121 P.2d 775, 49 Cal.App.2d 376.—Nova 1.

Cal.App. 1 Dist. 1933. To effect “novation” involving introduction of new party into agreement, there must be mutual agreement among parties to old contract and parties to new contract, whereby new obligation is substituted for old one.—De Nure Land & Investment Corp. v. Security First Nat. Bank, 22 P.2d 530, 132 Cal.App. 256.—Nova 1.

Cal.App. 1 Dist. 1932. Contract between acceptor and payee constitutes a “novation,” and is subject to rules applicable to contracts in general.—H.D. Roosen Co. v. Pacific Radio Pub. Co., 11 P.2d 873, 123 Cal.App. 525.—Nova 1.

Cal.App. 1 Dist. 1930. Closing agreement in respect to partnership adventure, contemplating immediate fulfillment of terms, without any dispute between parties, constituted “novation”. Civ.Code, §§ 1530, 1531.—Richardson v. Hislop, 293 P. 168, 109 Cal.App. 440.—Nova 1.

Cal.App. 1 Dist. 1922. There is a “novation” within West’s Ann. Civ.Code, § 1531, whereby one becomes a substitute for bailee of cattle for pastureage where he receives the animals from the original bailee, and in consideration thereof agrees with him to return them to the bailor upon the latter’s demand in consideration of bailor’s cancellation of original bailee’s obligation and bailor’s acceptance of the substituted bailee’s promise to redeliver in lieu of such obligation of the original bailee.—Esponda v. Kelly, 207 P. 939, 57 Cal.App. 766.

Cal.App. 1 Dist. 1921. Where defendant, by agreement with a contractor, deposited checks for an amount due him with a third party for delivery to the contractor, when certain alleged defects in the work were remedied and the contractor regarded the deposit of the checks as the method adopted by defendant for discharging its obligation, and agreed to remedy the defects merely for the purpose of securing payment, there was no “novation” under West’s Ann.Civ.Code, §§ 1530, 1531, as there was neither a substitution of a new obligation nor a waiver of the original obligation.—Hallensleben v. Heine Piano Co., 201 P. 942, 54 Cal.App. 295.

Cal.App. 2 Dist. 1975. Nevada bank’s letter demanding payment of past-due automobile loan payment from California resident, who was given a few extra days by such letter within which to cure his default, was not new contract “novation” entered into in California. West’s Ann.Civ.Code, §§ 1530, 1531.—Nevada Nat. Bank v. Superior Court, 119 Cal.Rptr. 778, 45 Cal.App.3d 966.—Nova 1.

Cal.App. 2 Dist. 1967. Term “novation”, as applied to substitution of new termination clause for that contained in written contract between insurance company and general agents, is substitution of

new obligation between same parties with intent to extinguish old obligation. West's Ann.Civ.Code, § 1531.—Goodman v. Citizens Life & Cas. Ins. Co., 61 Cal.Rptr. 682, 253 Cal.App.2d 807.—Insurance 1634(1).

Cal.App. 2 Dist. 1951. Written contract by which parties to oral contract to sell two houses and move them to purchasers' lot, allegedly breached by vendor, agreed that fulfillment of written contract should constitute an effective release of all obligations from one party to the other, though executory, was a complete "novation" of all existing obligations of the parties to each other, canceling the oral contract and all obligations arising from it.—Davisson v. Faucher, 233 P.2d 567, 105 Cal.App.2d 445.—Nova 4, 10.

Cal.App. 2 Dist. 1949. A contractor's remark, that person addressed would be assured interest on money advanced by him pursuant to their oral agreement to buy, repair, and sell house and divide profits, was neither an offer, nor contract, and hence not a "novation". Civ.Code, §§ 1530–1532.—O'Reilly v. Johnson, 205 P.2d 716, 91 Cal.App.2d 729.—Nova 1.

Cal.App. 2 Dist. 1942. A complaint, which alleged that vendors induced purchaser to execute in vendors' favor a trust deed and note to replace a vendor's agreement, and that provisions of such deed were in violation of vendor's agreement, imposing new and onerous terms upon purchaser without any consideration, was sufficient as against a general demurrer to state cause of action for cancellation of trust deed and note and to restrain foreclosure proceedings as against contention that parties entered into a "novation" for execution of the trust deed. Code Civ.Proc. § 452.—Ybarra v. Solarz, 132 P.2d 880, 56 Cal.App.2d 342.—Can of Inst 37(5); Mtg 338.

Cal.App. 2 Dist. 1942. A "novation" is subject to the rule of contract and requires a consideration to support it.—Ybarra v. Solarz, 132 P.2d 880, 56 Cal.App.2d 342.—Nova 1.

Cal.App. 2 Dist. 1939. A "novation" is the substitution of a new obligation for an existing one and is made by the substitution of a new obligation between same parties with intent to extinguish old obligation, by substitution of a new debtor in place of former debtor with intent to release latter, or by substitution of a new creditor in place of former creditor with intent to transfer rights of former creditor to new creditor. Civ.Code, § 1531.—Eckart v. Brown, 93 P.2d 212, 34 Cal.App.2d 182.—Nova 1.

Cal.App. 2 Dist. 1939. Where third party, with defendant's consent, assigned to plaintiff his rights under a contract with defendant relating to transfer of stock to third party by defendant and contemporaneously defendant entered into agreement with plaintiff whereby defendant, in substance, agreed to repurchase stock mentioned in the agreement, the transaction was a "novation" whereby plaintiff was substituted in place of third party in contractual relation with defendant; and hence plaintiff could recover purchase price of stock from defendant

when defendant failed to repurchase stock in accordance with agreement. Civ.Code, § 1531.—Eckart v. Brown, 93 P.2d 212, 34 Cal.App.2d 182.—Nova 6.

Cal.App. 2 Dist. 1939. The effect of a "novation" is to make the original agreement a nullity and rights of new parties are governed solely by new agreement.—Eckart v. Brown, 93 P.2d 212, 34 Cal.App.2d 182.—Nova 10.

Cal.App. 2 Dist. 1939. A "novation," in legal contemplation, gives rise to a situation which is the same as if there had never been a former agreement or obligation.—Eckart v. Brown, 93 P.2d 212, 34 Cal.App.2d 182.—Nova 10.

Cal.App. 2 Dist. 1938. Where vendor conveyed lots to third party during pendency of vendor's action to quiet title in which judgment was entered directing vendor to convey lots to purchaser and it was not shown that an alleged agreement between third party and purchaser existed whereby purchaser was to quitclaim property to third party, if third party could secure for purchaser title to certain property involved and that vendor relied on such alleged agreement in making a settlement, vendor could not defeat liability in purchaser's action for rescission and recovery of purchase money on ground that a "novation" occurred, since purchaser was never a party to any agreement providing for the substitution of a new obligation for an existing one in so far as she and vendor were concerned. Civ.Code, §§ 1530, 1531.—Timm v. McCartney, 85 P.2d 920, 30 Cal.App.2d 241.—Nova 1.

Cal.App. 2 Dist. 1934. "Novation" implies a previous valid obligation, agreement of parties to new contract, extinguishment of old contract, and validity of new one.—U.S. Gypsum Co. v. Snyder-Ashe Co., 34 P.2d 767, 139 Cal.App. 731.—Nova 1.

Cal.App. 2 Dist. 1919. Where the parties agreed to cancel a real estate sales contract, and plaintiff purchaser was given an option to purchase part of the premises covered by the old contract, there was in effect a "novation" as defined by Civ.Code, §§ 1530 and 1531, and plaintiff cannot recover partial payments made under the old contract.—Hieatt v. Gassen, 183 P. 227, 41 Cal.App. 620.—Nova 4; Ven & Pur 334(3).

Cal.App. 3 Dist. 1990. A "novation" is the substitution of a new contractual obligation for an existing one; essential to a novation is that it clearly appear that the parties intended to extinguish rather than merely modify the original agreement; burden of proof is on party asserting that a novation has been consummated. West's Ann.Cal.Civ.Code § 1530.—Howard v. County of Amador, 269 Cal.Rptr. 807, 220 Cal.App.3d 962.—Nova 3, 4, 12.

Cal.App. 3 Dist. 1968. A "novation," which is the substitution of a new obligation for an existing one, necessarily requires the extinguishment of the old contract. West's Ann.Civ.Code, § 1530.—Amerson v. Christman, 68 Cal.Rptr. 378, 261 Cal.App.2d 811.—Nova 1.

Cal.App. 3 Dist. 1946. "Novation" is a bilateral contract requiring the mutual assent of all the

parties and, as between obligor and obligee, it is the intent of the latter that is controlling on the question of waiver or release of the obligation under the original agreement. Civ.Code, § 1530.—Ayoob v. Ayoob, 168 P.2d 462, 74 Cal.App.2d 236.—Nova 1.

Cal.App. 3 Dist. 1946. Where deceased had agreed to pay plaintiff a fixed amount of money out of his estate in consideration of plaintiff's agreement to marry deceased, subsequent acts of deceased in changing his life policy by naming plaintiff beneficiary, and inserting in his will provisions relative thereto, were revocable and insufficient to constitute a "novation." Civ.Code, § 1530.—Ayoob v. Ayoob, 168 P.2d 462, 74 Cal.App.2d 236.—Nova 2.

Cal.App. 3 Dist. 1946. A "novation" is the substitution of a new obligation for an existing one and may be made by substitution of a new obligation between the same parties with intent to extinguish the old, by substitution of a new debtor in place of the old with intent to release the old debtor, or by substitution of a new creditor in place of the old, with intent to transfer rights of the old creditor to the new creditor. Civ.Code, §§ 1530–1532.—Garthofner v. Edmonds, 167 P.2d 789, 74 Cal.App.2d 15.—Nova 1.

Cal.App. 3 Dist. 1946. Wife's oral promise to personally assume and pay joint and several obligation of herself and husband was without consideration and did not constitute a "novation" of original obligation. Civ.Code, §§ 158, 171, 1530–1532.—Garthofner v. Edmonds, 167 P.2d 789, 74 Cal.App.2d 15.—Nova 1.

Cal.App. 3 Dist. 1946. Wife's oral promise after husband's death to personally assume and pay joint and several obligation of husband and wife to repay money loaned to them was not a valid "novation" of original obligation, since it was not between all the same parties to original obligation. Civ.Code, §§ 1530–1532.—Garthofner v. Edmonds, 167 P.2d 789, 74 Cal.App.2d 15.—Nova 1.

Cal.App. 3 Dist. 1932. Agreement for compromise of judgment, made conditional on regular payment of monthly installments, with provision specifically withholding release of judgment, held not to constitute "novation" extinguishing judgment, where debtor failed to make required payments. Civ.Code, §§ 1521, 1522, 1524, 1531.—Blumer v. Madden, 16 P.2d 319, 128 Cal.App. 22.—Accord 16; Nova 1.

Cal.App. 3 Dist. 1932. To constitute "novation," extinguishment of old obligation must be contemporaneous with and result of consummation of new agreement. Civ.Code, § 1531.—Blumer v. Madden, 16 P.2d 319, 128 Cal.App. 22.—Nova 1.

Cal.App. 3 Dist. 1924. Corporation's execution of renewal note indorsed by stockholders held not to constitute "novation" under West's Ann.Civ. Code, §§ 1530, 1531, though original note, to secure which the notes sued on were pledged as collateral security, was signed by the corporation only.—People's State Bank v. Penello, 227 P. 190, 67 Cal.App. 103.

Cal.App. 3 Dist. 1917. Where an owner of property refused to pay a commission to a real estate broker, and the prospective purchaser promised to pay such commission in case the deal was closed, the transaction did not constitute a "novation."—Ryan v. Walker, 169 P. 417, 35 Cal.App. 116.

Cal.App. 3 Dist. 1916. Where a storekeeper released a subcontractor on his indebtedness, upon the contractor's assuming his bill, and thereafter looked only to the contractor, agreeing, as consideration of such assumption, to furnish the subcontractor necessary supplies for the work, this was a "novation".—Baxter v. Chico Const. Co., 160 P. 1084, 31 Cal.App. 492.—Nova 5.

Cal.App. 4 Dist. 1942. In order to successfully complete a "novation" by the substitution of one debtor for another, the creditor must consent to it.—University of Redlands v. Ford, 132 P.2d 238, 56 Cal.App.2d 151.—Nova 7.

Cal.App. 4 Dist. 1942. In action for declaratory relief directing executor to allow claim against deceased's estate based on note secured by trust deed, executor's answer, alleging that deceased sold the security to purchasers subject to lien of trust deed but not alleging agreement with creditor to release deceased from his obligation or promise of purchasers to be substituted therefor, did not properly plead a "novation".—University of Redlands v. Ford, 132 P.2d 238, 56 Cal.App.2d 151.—Nova 11.

Cal.App. 5 Dist. 1974. A "novation" is a substitution by agreement of a new obligation for existing one with the intent to extinguish the latter. West's Ann.Civ.Code, §§ 1530–1532, 1698; West's Ann. Com.Code, § 2209.—Davies Machinery Co. v. Pine Mountain Club, Inc., 113 Cal.Rptr. 784, 39 Cal.App.3d 18.—Nova 1.

Cal.App. 5 Dist. 1971. "Novation" is a substitution, by agreement, of a new obligation for an existing one with intent to extinguish the existing one. West's Ann.Civ.Code, §§ 1530, 1532.—Kleper v. Hoover, 98 Cal.Rptr. 482, 21 Cal.App.3d 460.—Nova 1.

Colo. 1990. Extinguishment of an old contract by the substitution of a new contract or obligation is known as a "novation," and is an "original promise" not within the statute of frauds. West's C.R.S.A. § 38–10–112.—Moffat County State Bank v. Told, 800 P.2d 1320.—Frds St of 23(1); Nova 1.

Colo. 1909. A "novation" is in the nature of a release or discharge and is new matter which must be specially pleaded. There can be no "novation" and substitution in law unless the original creditor and the new debtor all enter into such an agreement.—Temple v. Teller Lumber Co., 106 P. 8, 46 Colo. 497.

Colo.App. 1989. Agreement to alter or modify the terms of a written guaranty differs from a "novation," which is a new agreement accepted by a creditor in discharge of and in substitution for a previous valid obligation.—Moffat County State Bank v. Told, 780 P.2d 11, certiorari granted, af-

firmed and remanded 800 P.2d 1320.—Guar 23; Nova 4.

Colo.App. 1979. A “novation” is a substitution of a new contract between the same or different parties.—Lampley v. Celebrity Homes, Inc., 594 P.2d 605, 42 Colo.App. 359.—Nova 1.

Conn. 1967. Term “novation” refers to instances in which a new party is introduced into a new contract, and it requires proof that creditor has accepted a new debtor and agreed to discharge of old debtor’s obligation.—Mace v. Conde Nast Publications, Inc., 237 A.2d 360, 155 Conn. 680.—Nova 1.

Conn. 1927. “Novation” is usually used with reference to instances where new party is introduced into new contract, while “substitute contract” usually covers agreements between same parties.—Riverside Coal Co. v. American Coal Co., 139 A. 276, 107 Conn. 40.—Nova 1.

Conn. 1924. Where a subscriber to stock assigned his right to subscribe, and the assignee was accepted by the corporation as a subscriber, there was a “novation,” which is a substitution of debtors.—Butts v. King, 125 A. 654, 101 Conn. 291.—Nova 5.

Conn.App. 1993. Memorandum of understanding entered into by business partners whereby they agreed that one of them was to purchase the other’s interest in partnership and corporation pursuant to certain terms was not a “novation” with respect to previous buy-sell agreement, as partner in position of creditor was not accepting a new debtor to whom he looked for fulfillment of obligation owing to him; rather, memorandum was a modification of buy-sell agreement.—Spicer v. Spicer, 634 A.2d 902, 33 Conn.App. 152, certification denied 636 A.2d 850, 228 Conn. 920.—Nova 5.

Conn.Cir.A.D. 1967. “Novation” is usually used with reference to instances in which new party is introduced into new contract.—Tidewater Oil Co. v. Murphy Motors, Inc., 227 A.2d 443, 4 Conn.Cir.Ct. 160.—Nova 1.

D.C. 1980. A “novation” is generally defined as discharge of a valid existing contract by replacement of one debtor for another or substitution of a new obligation in lieu of an already existing responsibility.—Hemisphere Nat. Bank v. District of Columbia Ins. Guaranty Ass’n, 412 A.2d 31.—Nova 1.

D.C. 1979. A “novation” occurs by a three-party agreement whereby delegate assumes duty of original obligor and that assumption is accepted by obligee in substitution for original obligor’s liability.—Yasuna v. Miller, 399 A.2d 68.—Nova 5.

D.C.Mun.App. 1962. A “novation” is the substitution by mutual agreement of a new debt or obligation for an existing one, which is thereby extinguished, and the essentials are (1) a previous valid debt, (2) extinguishment of the old contract, (3) agreement of all parties to a new contract, and (4) validity of a new one.—Blyther v. Pentagon Federal Credit Union, 182 A.2d 892.—Nova 1.

Fla. 1932. To constitute “novation” discharging original mortgagor from obligation of principal debtor, there must be agreement between mortgagor, mortgagee, and grantee of mortgaged premises assuming indebtedness.—Bailey v. Inman, 140 So. 783, 105 Fla. 1.—Nova 7.

Fla. 1931. “Novation” is mutual agreement for discharge of existing obligation by substituting new one; “novation” does not result from mere substitution of one writing or evidence of debt for another, but only by substitution of new obligation for another with intent to extinguish old one.—Murphy v. Green, 135 So. 531, 102 Fla. 102.—Nova 1.

Fla. 1931. “Novation” does not result from mere substitution of one writing or evidence of debt for another, but only by substitution of new obligation for another with intent to extinguish old one.—Murphy v. Green, 135 So. 531, 102 Fla. 102.—Nova 1.

Fla. 1931. “Novation” is mutual agreement for discharge of existing obligation by substituting new one.—Murphy v. Green, 135 So. 531, 102 Fla. 102.—Nova 1.

Fla. 1913. In order to operate as a “novation,” a contract obligation, made to take the place of a prior valid obligation, should be agreed to by all the interested parties, and be valid and binding, and should extinguish the former contract.—Burke v. Maund, 63 So. 708, 66 Fla. 173.

Fla. 1908. “Novation” takes place by agreement of all the parties concerned, and, where A. undertakes to pay B.’s debt, the obligation assumed may be collateral to B.’s obligation rather than substituted therefor, and, if intended as collateral, B.’s debt continues to exist, and this distinguishes such a case from one of novation in which B.’s debt would be extinguished.—Hargadine-McKittrick Dry Goods Co. v. Goodman, 45 So. 995, 55 Fla. 361.

Fla.App. 1 Dist. 1977. A “novation” is a mutual agreement between the parties concerned for the discharge of a valid existing obligation by the substitution of a new valid obligation; it ordinarily consists of two stipulations, one to extinguish the old debt and the other to substitute a new one in its place.—Taines v. Capital City First Nat. Bank, 344 So.2d 273, certiorari denied 355 So.2d 517.—Nova 1.

Fla.App. 3 Dist. 1995. “Novation” is mutual agreement between parties for discharge of valid existing obligation by substitution of new valid obligation.—Jakobi v. Kings Creek Village Townhouse Ass’n, Inc., 665 So.2d 325.—Nova 1.

Fla.App. 3 Dist. 1987. Final contract between subcontractor and owner, which was originally designated “Release of Lien,” and by which contractor declared his mechanics’ lien fully satisfied in consideration for owner’s promise to pay \$5,000, was a “novation” which extinguished parties’ original contract and purported promissory note.—Bowleg v. Bowe, 502 So.2d 71.—Nova 4.

Fla.App. 4 Dist. 1992. Bank’s honoring of separate requests by husband and wife first to close and

then reopen home equity line of credit account, during time when both parties presented checks that consumed balance of equity line of credit, did not result in "novation" of equity line of credit agreement in mortgage, so as to bar subsequent foreclosure on mortgage.—Carteret Sav. Bank, F.A. v. Weiner, 601 So.2d 1310.—Nova 4.

Fla.App. 4 Dist. 1971. Where life policy delivered to insured in Cuba stipulated that payments were to be made in United States dollars in New Orleans, and after death of insured insurer, in return for release executed by beneficiary's mother, issued certificate changing medium of payment from dollars to pesos, a "novation" resulted and insurer's obligation under policy was extinguished and its liability became limited to payment specified under terms of the certificate.—Pan-American Life Ins. Co. v. Fuentes, 258 So.2d 8, adhered to as amended 274 So.2d 549.—Nova 3.

Fla.App. 5 Dist. 2002. A "novation" is a mutual agreement between the parties for the discharge of a valid existing obligation by the substitution of a new valid obligation.—Holiday Square Owners Ass'n, Inc. v. Tsetsenis, 820 So.2d 450.—Nova 1.

Fla.App. 5 Dist. 1995. Second floor plan loan agreement between bank and borrowers did not constitute "novation" that would preclude cause of action by borrowers against bank for breach of first loan agreement, where second loan agreement resulted when bank unilaterally decided to change formula for calculating loan advances ten months into first floor plan loan agreement contrary to agreement's express provisions.—Barnett Bank of Marion County, N.A. v. Shirey, 655 So.2d 1156, rehearing denied, review denied 663 So.2d 631.—Nova 1.

Fla.App. 5 Dist. 1987. "Novation" is mutual agreement between parties concerned for discharge of valid existing obligation by substitution of new valid obligation.—Electro-Protective Corp. v. Creative Jewelry by Kempf, Inc., 513 So.2d 190.—Nova 1.

Ga. 1949. A "novation" is complete contract within itself, and essential requisites thereof are previous valid obligation, agreement of all parties to new contract, extinguishment of old contract, and validity of new contract.—Williams v. Rowe Banking Co., 55 S.E.2d 123, 205 Ga. 770.—Nova 1.

Ga. 1949. A bank's acceptance of land grantee's note in lieu of grantor's note for amount loaned him by bank, leaving unchanged grantor's security deed, with power of sale, to bank, did not extinguish all terms of original contract, so that new contract did not constitute "novation" precluding bank from exercising such power.—Williams v. Rowe Banking Co., 55 S.E.2d 123, 205 Ga. 770.—Nova 3.

Ga. 1940. Under the Code, a promissory note taken in renewal of previous note or for balance on such note or on account will not, until previous note is actually paid, operate as "payment", or as "accord and satisfaction" or "novation" extinguishing previous note or indebtedness, unless parties so

agree. Code 1933, § 20-1004.—Blackshear Mfg. Co. v. Harrell, 12 S.E.2d 328, 191 Ga. 433.—Accord 1; Bills & N 430; Nova 7; Paynt 17.

Ga. 1940. The essential requisites of every "novation" are a previous valid obligation, an agreement of all parties to the new contract, the extinguishment of the old contract, and the validity of the new contract, and if any one of those essentials are wanting, there can be no "novation," and those essentials cannot be created by presumptions.—Savannah Bank & Trust Co. v. Wolff, 11 S.E.2d 766, 191 Ga. 111.—Nova 1.

Ga. 1940. A "novation" is itself a "contract" and must have all the elements of a de novo contract.—Savannah Bank & Trust Co. v. Wolff, 11 S.E.2d 766, 191 Ga. 111.—Nova 1.

Ga. 1940. The adoption of the child of another by the common-law wife of one who promised the mother to devise realty and personalty to the child, at the instance of the common-law husband, in the courts of another state, did not constitute a "novation" of the contract between the common-law husband of the adopting mother and the natural mother, even though it be assumed that the laws of the state in which the proceedings were had required notice to the proper parties, sufficient to comply with the Fourteenth Amendment, and even though it be assumed that the natural mother did actually receive notice. U.S.C.A.Const. Amend. 14.—Savannah Bank & Trust Co. v. Wolff, 11 S.E.2d 766, 191 Ga. 111.—Nova 1.

Ga. 1938. A creditor's acceptance by mutual agreement of a third person as substitute for original debtor and receipt of new note from third person in payment or cancellation of debtor's note is a "novation" and the extinguishment of the debt represented by the old note constitutes in itself a valuable consideration for the new obligation, and the new contract is not one of "suretyship."—Nalley Land & Inv. Co. v. Merchants & Planters Bank, 199 S.E. 815, 187 Ga. 142.—Nova 5.

Ga. 1936. Where guardian holding security deed note for benefit of two minor wards received payment of sum equal to share of one ward and settled with such ward at his majority, "novation" of remainder of debt resulting in loss of priority of original security deed held not effected by grantor's execution of new note and security deed conveying same property to other ward at her majority (Code 1933, §§ 20-115, 103-202).—Kelley v. Spivey, 185 S.E. 783, 182 Ga. 507.—Nova 1.

Ga. 1906. Where A. purchases a tract of land from B. and gives a purchase-money note therefor, payable to B. "or order," and B. transfers said note by indorsement, together with the reserved title to the land to C., C. becomes thereby a party both to the note and to the contract of purchase, and if said note becomes barred by the statute of limitations, and A. enters into a new agreement with C., whereby A. promises to pay to C. the balance due on said note by installments running through several years, the consideration remaining the same, and no new security being added, the fact that the holder of said note has been substituted as payee, and the

time of payment definitely extended, does not constitute such a "novation" between said maker and holder as would extinguish the original debt and create a new one.—American Mortg. Co. v. Rawlings, 56 S.E. 110, 127 Ga. 82.

Ga.App. 2001. "Novation" is a term of art, which signifies a very particular type of accord or modification of agreement; "novation" acts to extinguish the original obligation.—Paul Dean Corp. v. Kilgore, 556 S.E.2d 228, 252 Ga.App. 587, reconsideration denied.—Nova 1.

Ga.App. 1999. Renegotiated commercial lease that was executed before expiration of original lease and covered different and additional space at reduced rate was a "new lease" or "novation," rather than an "extension" or "renewal" within the meaning of landlord's agreement to pay commission to broker for lease extension; the material terms of the new lease were drastically different.—Branen/Goddard Co. v. Sheffield, Inc., 524 S.E.2d 534, 240 Ga.App. 667.—Brok 71.

Ga.App. 1997. New billboard lease contained different terms, and thus, was "novation," not "renewal," and consequently, prior leasehold right to occupy airspace above neighboring property expired, and billboard lessee was liable to neighbors for trespass; while printed form of new lease was identical to original lease, new lease provided for different rental amount and timing of payments, and under new lease, automatic renewals would become year-to-year five years later than under original lease.—Powell v. Norman Elec. Galaxy, Inc., 493 S.E.2d 205, 229 Ga.App. 99, reconsideration denied, and certiorari denied, appeal after remand 565 S.E.2d 591, 255 Ga.App. 407.—Nova 4, 10; Tresp 25.

Ga.App. 1997. There are four essential requisites of "novation": previous valid obligation; agreement of parties to new contract; mutual intention by parties to substitute new contract for old one; and validity of new contract.—Powell v. Norman Elec. Galaxy, Inc., 493 S.E.2d 205, 229 Ga.App. 99, reconsideration denied, and certiorari denied, appeal after remand 565 S.E.2d 591, 255 Ga.App. 407.—Nova 1.

Ga.App. 1997. Creditor's second renewal agreement with debtor was not "novation" in absence of any evidence of extinguishment of their old contracts.—Beasley v. Agricredit Acceptance Corp., 480 S.E.2d 257, 224 Ga.App. 372, reconsideration denied.—Nova 3.

Ga.App. 1997. "Novation" is new contract and must have following essential elements: (1) prior valid obligation; (2) agreement of all parties to new contract; (3) extinguishment of old contract; and (4) validity of new contract; if any of essential elements is lacking, there is no novation.—Beasley v. Agricredit Acceptance Corp., 480 S.E.2d 257, 224 Ga.App. 372, reconsideration denied.—Nova 1.

Ga.App. 1989. Modification of mortgage agreement between vendor and bank which raised interest rates was not "novation" where vendor remained obligated on existing mortgage and no

other debtor was substituted on obligation.—Randall v. Norton, 386 S.E.2d 518, 192 Ga.App. 734.—Nova 3, 5.

Ga.App. 1983. Employment termination agreement, which expressly applied only to "certain sales under contract, and leases now in effect" and which specified only two sales and several leases, did not constitute a "novation" in regard to oral compensation agreement, which provided that listing agent was to receive certain percentage of brokerage firm's commission on sales transactions involving purchasers found by the agent and under which agent sought to recover a commission on sale of certain commercial property, in view of fact that termination agreement did not purport to supersede all previous obligations between agent and brokerage firm and did not purport to cover such sale. O.C.G.A. § 13-4-5.—Farris v. Pazol, 305 S.E.2d 472, 166 Ga.App. 760.—Nova 4.

Ga.App. 1981. A "novation" is a complete contract in itself and has four essential elements: (1) a previous valid obligation; (2) agreement of all parties to new contract; (3) extinguishment of old contract; and (4) validity of new one.—Franchise Enterprises, Inc. v. Ridgeway, 278 S.E.2d 33, 157 Ga.App. 458.—Nova 4.

Ga.App. 1977. Where there was, by mutual agreement, a substitution for the original debtor, where new note was executed between creditors and debtors and it was the express intention of creditors that new note acted as cancellation of original debt, agreement constituted a "novation".—Chewning v. Huebner, 235 S.E.2d 573, 142 Ga.App. 112.—Nova 1.

Ga.App. 1966. Any change in nature or terms of a contract is a "novation" which, without consent of surety, discharges him. Code, § 103-202.—American Sur. Co. of New York v. Garber, 151 S.E.2d 887, 114 Ga.App. 532.—Princ & S 99.

Ga.App. 1952. A previous valid obligation, agreement of all the parties to new contract, extinguishment of old contract, and validity of new contract are essential elements of a "novation".—Miller-Terrell, Inc. v. Strother, 70 S.E.2d 160, 85 Ga.App. 763.—Nova 1.

Ga.App. 1948. The essential requisites to a "novation" are a previous valid obligation, the agreement of all the parties to the new contract, the extinguishment of the old contract, and the validity of the new contract. Code, § 20-115.—Cowart v. Smith, 50 S.E.2d 863, 78 Ga.App. 194.—Nova 1.

Ga.App. 1948. Where third party assumed contractual obligation of defendant to move a sawmill upon the home place of plaintiff and cut, log and saw a boundary of timber at a specified place, but no intention or agreement of plaintiff to release defendant and extinguish defendant's liability was shown, no "novation" was shown relieving defendant of his obligation under contract. Code, § 20-115.—Cowart v. Smith, 50 S.E.2d 863, 78 Ga.App. 194.—Nova 3.

Ga.App. 1945. A "novation" under the rules of the civil law is a mode of extinguishing one obli-

gation for another. Code, § 103–202.—*Bostwick v. Felder*, 35 S.E.2d 783, 73 Ga.App. 118.—Nova 1.

Ga.App. 1945. Conveyance of personality by judgment debtor to holder of judgment lien as security for subsequent independent loan did not constitute a “novation” extinguishing a judgment lien as to personality thus conveyed as security and subsequently levied upon under the judgment. Code, § 103–202.—*Bostwick v. Felder*, 35 S.E.2d 783, 73 Ga.App. 118.—Nova 1.

Ga.App. 1944. A contract of two persons as sureties to pay for goods sold to principal and all indebtedness of principal to seller under prior contract was not a “novation” of prior contract, and hence did not discharge sureties from liability thereunder. Code, § 103–202.—*W. T. Rawleigh Co. v. Overstreet*, 32 S.E.2d 574, 71 Ga.App. 873.—Nova 1.

Ga.App. 1943. Mere assumption of debt by third person is not sufficient to establish “novation”, but it is essential that an intention to release obligor and extinguish his liability should definitely appear, otherwise third person will be presumed to be merely additional surety.—*Leverette v. Harmo-ny*, 24 S.E.2d 856, 69 Ga.App. 126.—Nova 1.

Ga.App. 1943. A plea of “novation” by substitution of second debtor for first debtor must allege mutual agreement among all parties whereby first debtor and original creditor agree that new debtor be substituted and original debt be discharged.—*Leverette v. Harmony*, 24 S.E.2d 856, 69 Ga.App. 126.—Nova 11.

Ga.App. 1943. In action on note against maker, maker’s plea alleging that, after execution of contract for sale of personality for which note was given, maker, with seller’s knowledge and consent, assigned all interest in purchase contract and property described therein to corporation, that corporation assumed balance due under contract, and that seller ratified assignment by accepting principal and interest payments by corporation, was insufficient to allege a “novation”.—*Leverette v. Harmony*, 24 S.E.2d 856, 69 Ga.App. 126.—Nova 11.

Ga.App. 1942. The taking of notes by publishing company from newsboys for newspapers furnished to the newsboys was not such a “novation” as would discharge guarantors who guaranteed to pay the company for newspapers furnished to the newsboy.—*Bowers v. Atlanta Constitution Pub. Co.*, 21 S.E.2d 717, 67 Ga.App. 715.—Nova 5.

Ga.App. 1942. Buyer’s renewal of conditional sales contract with knowledge of defect in machinery covered by contract, unless fraudulently obtained, precludes buyer from defending action to foreclose the contract on ground of failure of consideration because of the defects, since the renewal constitutes a “novation”.—*Commerce Finance Co. v. Perry*, 21 S.E.2d 123, 67 Ga.App. 491.—Nova 4.

Ga.App. 1940. A parol agreement made after valid written agreement must be based on a valid consideration in order to be effective as a “novation” and to change the written agreement.—Alex-

ander Film Co. v. Brittain, 11 S.E.2d 66, 63 Ga. App. 384.—Nova 1.

Ga.App. 1940. Where valid written contract relating to film advertising service provided for service for a continuous period of 12 months, alleged subsequent parol agreement by film company that the service would be suspended during winter months was ineffective, for want of consideration, to operate as a “novation” and to change the written contract.—*Alexander Film Co. v. Brittain*, 11 S.E.2d 66, 63 Ga.App. 384.—Nova 1.

Ga.App. 1939. A new note, given in lieu of existing note between same parties and for same indebtedness, even at higher rate of interest and due at later date, is not given for new consideration, and therefore does not constitute a “novation.” Code 1933, §§ 20–115, 20–1004.—*Cohen’s Dept. Stores v. Siegel*, 2 S.E.2d 762, 60 Ga.App. 79.—Nova 4.

Ga.App. 1939. A renewal note is not a “novation” extinguishing first note unless there is agreement between parties to such effect. Code 1933, §§ 20–115, 20–1004.—*Cohen’s Dept. Stores v. Siegel*, 2 S.E.2d 762, 60 Ga.App. 79.—Nova 4.

Ga.App. 1939. Where lender canceled note and loan deed after principal and interest amounted to almost twice original indebtedness, and accepted in lieu thereof a series of unsecured, noninterest-bearing notes for amount of principal indebtedness, time being made the essence of new contract, new contract was a “novation” within statutory definition, which the Court of Appeals would not disturb. Code 1933, § 103–202.—*Collier v. Casey*, 1 S.E.2d 776, 59 Ga.App. 627.—Nova 1.

Ga.App. 1935. Defendants sued on agreement to guarantee faithful performance of contract whereby principal was to purchase medicines from plaintiff on credit for resale held discharged from liability, regardless of whether defendants were sureties or guarantors, where plaintiff agreed, without defendants’ consent, to allow principal to sell medicines sold principal on defendants’ credit under partial and conditional guaranty to customers by principal and to allow principal to put out medicines on approval, since such alteration of original contract constituted a “novation”. Code 1933, § 103–202.—*H. C. Whitmer Co. v. Sheffield*, 181 S.E. 119, 51 Ga.App. 623.—Guar 53(1); Princ & S 99.

Ga.App. 1935. Where creditor on note accepts third person as substitute for original debtor and receives new note of substitute in return for canceling old note, “novation” is effected and original debt is abrogated.—*Dunnaway v. Fort*, 178 S.E. 163, 50 Ga.App. 330.—Nova 5.

Ga.App. 1934. Renewal of note by taking new note between same parties in same relationship, at same rate of interest, but in lesser amount, with time of payment extended, held not to constitute “novation”. Civ.Code 1910, § 4226.—*First Nat. Bank of Commerce, Ga., v. Simmons*, 173 S.E. 241, 48 Ga.App. 728.—Nova 1.

Ga.App. 1932. To constitute "novation" releasing original debtor, contract must be made by which claim can be enforced against new debtor.—Smith v. Missouri State Life Ins. Co., 165 S.E. 168, 45 Ga.App. 383.—Nova 8.

Ga.App. 1925. Where a purchaser has rejected a tender of delivery which under the terms of the contract he was not at the time bound to accept, and where he afterwards, by a valid agreement, waives his right to reject, and agrees to accept the property, the latter agreement constitutes a "novation" of the original contract in so far as it affects the particular property.—Carolina Portland Cement Co. v. Roper-Strauss-Ferst Co., 126 S.E. 860, 33 Ga.App. 511.

Ga.App. 1924. A new note, given in lieu of an existing note between the same parties and for the same indebtedness, even at a higher rate of interest and due at a later date, is not given for a new consideration, and therefore does not constitute a "novation." Civil Code 1910, § 4226. This is true, notwithstanding that the payee retains possession of a dishonored check, which he received from the maker in part payment on the original note, but the amount of which is included in the new note. The check is merely cumulative proof of the obligation. This is further true, notwithstanding that the new note is given for a debt which had been discharged in bankruptcy. The new note merely revives or extends the original liability. Civil Code 1910, § 4386. The check not constituting the original obligation, but being cumulative of the new note, a novation cannot result from the new note being a different contract from the check. It not appearing that the original note was not under seal, and there being no presumption that it was not under seal, the new note, which is under seal, does not for that reason appear to be a novation.—Georgia Nat. Bank v. Fry, 124 S.E. 542, 32 Ga.App. 695.

Ga.App. 1922. Under Civ.Code 1910, § 3543, any change in the terms of a contract by which a new and materially different contract is created is a "novation," and, when made without a surety's consent, discharges him, though the new contract is more favorable to him than the original contract.—Paulk v. Williams, 110 S.E. 632, 28 Ga.App. 183.—Princ & S 101(2).

Ga.App. 1922. A change in a promissory note so that it bears interest from maturity instead of from date is a material alteration, and creates a new contract and constitutes a "novation" within Civ.Code 1910, § 3543.—Paulk v. Williams, 110 S.E. 632, 28 Ga.App. 183.—Princ & S 101(6).

Ga.App. 1917. Where the payee of a promissory note for the purchase price of personal property, in which title is reserved in the vendor, takes a new note and cancels and surrenders the old note, the consideration of the new note being partly a renewal of the old note and partly the sale of additional property, and title to both the original and the additional property being reserved therein, these facts constitute such a "novation" of the first contract as will work a discharge of the original lien, in favor of an intervening purchaser for value of any

part of the original property.—Foy-Adams Co. v. Smith, 91 S.E. 242, 19 Ga.App. 172.

Ga.App. 1913. Under the express provisions of Civ.Code 1910, § 3543, a change in the terms of a contract is called a "novation."—Little Rock Furniture Co. v. Jones & Co., 79 S.E. 375, 13 Ga.App. 502.—Nova 1.

Idaho 1924. Assent of all parties to a contract is necessary to constitute a novation. A new promise from the substituted debtor and a release of the claim against such substituted debtor, the consent of the original debtor, and the consent of the original creditor are essential elements of the "novation."—Independent School Dist., Class A, No. 1, in Cassia County, v. Porter, 228 P. 253, 39 Idaho 340.

Ill. 1940. To constitute "novation" by substitution of debtors, creditor must have consented to substitution of new debt and debtor, and agreed to release original debtor and accept new party in his stead.—Burnett v. West Madison State Bank, 31 N.E.2d 776, 375 Ill. 402.—Nova 1.

Ill. 1940. The fact that depositor continued deposit in new bank after consolidation, accepted dividends in liquidation proceedings, and delayed in pressing claim against stockholders of old bank did not constitute "novation" as a matter of law, so as to preclude recovery from stockholders of old bank. S.H.A.Const. art. 11, § 6.—Burnett v. West Madison State Bank, 31 N.E.2d 776, 375 Ill. 402.—Nova 1.

Ill. 1928. Essentials of "novation" are previous valid obligation and its extinguishment, and agreement of all parties to new valid contract. Essentials of "novation" are, first, previous valid obligation; second, valid agreement of all parties to new contract; third, extinguishment of old contract; and, fourth, validity of new contract.—Kiefer v. Reis, 162 N.E. 157, 331 Ill. 38.—Nova 1.

Ill. 1928. Essentials of "novation" are previous valid obligation and its extinguishment, and agreement of all parties to new valid contract.—Kiefer v. Reis, 162 N.E. 157, 331 Ill. 38.—Nova 1.

Ill. 1926. Agreement by insured in proof of loss that payment of claim to insurer's local agents should be settlement thereof held not to constitute "novation." Agreement by insured in proof of loss that payment of claim to insurer's local agents should be settlement thereof held not to constitute "novation," where there was no mutual agreement among parties concerned for discharge of a valid existing obligation by substitution of a new valid obligation or for discharge of debtor to his creditor by substitution of a new creditor.—Toffenetti v. Mellor, 153 N.E. 744, 323 Ill. 143.—Nova 1.

Ill.App. 1 Dist. 1980. "Novation" may be broadly defined as substitution of new contract or obligation for existing one which is thereby extinguished; more specifically, it is the substitution by mutual agreement of one debtor or of one creditor for another, whereby existing debt is extinguished.—Greenbaum & Browne, Ltd. v. Braun, 43

Ill.Dec. 303, 410 N.E.2d 303, 88 Ill.App.3d 210.—Nova 1.

Ill.App. 1 Dist. 1980. Essential elements of “novation” are previous, valid obligation, subsequent agreement of all parties to the new contract, extinguishment of the old contract, and validity of the new contract.—Greenbaum & Browne, Ltd. v. Braun, 43 Ill.Dec. 303, 410 N.E.2d 303, 88 Ill.App.3d 210.—Nova 1.

Ill.App. 1 Dist. 1957. A “novation” is a substitution by mutual agreement of one debtor or of one creditor for another, whereby the old debt is extinguished, or the substitution of a new debt or obligation for an existing one, which is thereby extinguished.—Printing Machinery Maintenance, Inc. v. Carton Products Co., 147 N.E.2d 443, 15 Ill.App.2d 543.—Nova 1.

Ill.App. 1 Dist. 1950. It is an essential element of “novation” that parties must intend to substitute the new for an old contract.—Day v. Wallace, 90 N.E.2d 666, 339 Ill.App. 573.—Nova 1.

Ill.App. 1 Dist. 1950. In forcible detainer for possession of rented apartment, where trial judge stayed writ of restitution and ordered defendant to pay increased rent for use and occupancy of the premises, there was no “novation” of contract creating a new relation of landlord and tenant between the plaintiff and defendant.—Day v. Wallace, 90 N.E.2d 666, 339 Ill.App. 573.—Nova 4.

Ill.App. 1 Dist. 1939. A property owner’s failure to protest against payment of condemnation judgment without including interest on the judgment, and acceptance of the amount of the judgment allegedly without knowledge of the right to interest, did not constitute “waiver,” “novation,” “accord and satisfaction,” or “gift” so as to preclude subsequent recovery of interest. S.H.A. ch. 24, § 84–32; ch. 74, § 3.—Northwestern Yeast Co. v. City of Chicago, 22 N.E.2d 781, 301 Ill.App. 303.—Accord 7(3); Em Dom 247(3); Gifts 5(1); Nova 1.

Ill.App. 1 Dist. 1939. A “novation” is a contract that discharges immediately the previous contractual duty or a duty to make compensation and creates a new contractual duty, including as a party one who neither owed the previous duty nor was entitled to its performance.—Interstate Folding Box Co. v. La Mode Garment Mfg. Co., 22 N.E.2d 769, 301 Ill.App. 283.—Nova 1.

Ill.App. 2 Dist. 1974. “Novation” is the substitution of a new debt or obligation for an existing one, which is thereby extinguished, and the extent to which the old contract has been extinguished is dependent upon an interpretation of the extent to which the new agreement operates as a discharge.—Faith v. Martoccio, 316 N.E.2d 164, 21 Ill.App.3d 999.—Nova 1.

Ill.App. 3 Dist. 1961. “Novation” means substitution of new agreement for existing obligation and must be effected by contract with consent of all parties to both old and new agreements and intent to extinguish original obligation as consideration for new agreement.—Evans v. Owens, 173 N.E.2d 850, 30 Ill.App.2d 114.—Nova 1, 7.

Ill.App. 3 Dist. 1947. A “novation” is the substitution by mutual agreement of one debtor or of one creditor for another, whereby old debt is extinguished, or the substitution of a new debt or obligation for existing one, which is thereby extinguished, and whether novation has been accomplished depends upon parties’ intention.—Lechleiter v. Lechleiter, 71 N.E.2d 845, 330 Ill.App. 517.—Nova 1.

Ill.App. 5 Dist. 1987. “Novation” is substitution by mutual agreement of one debtor or of one creditor for another by which old debt is extinguished, or the substitution of new debt or obligation for existing debt by which existing debt or obligation is extinguished; essential elements of novation are previous, valid obligation, subsequent agreement of all parties to new contract, extinguishment of old contract, and validity of new contract.—Thomas v. Frederick J. Borgsmiller, Inc., 108 Ill.Dec. 658, 508 N.E.2d 1235, 155 Ill.App.3d 1057.—Nova 1.

Ill.App. 5 Dist. 1984. “Novation” is the substitution by mutual agreement of one debtor or of one creditor for another, whereby the old debt is extinguished, or the substitution of a new debt or obligation for an existing one which is thereby extinguished.—Phillips and Arnold, Inc. v. Frederick J. Borgsmiller, Inc., 78 Ill.Dec. 805, 462 N.E.2d 924, 123 Ill.App.3d 95.—Nova 4, 5, 6.

Ind. 1994. To effect a “novation” requires a valid existing contract, agreement of all parties to new contract, valid new contract, and extinguishment of old contract in favor of the new one; novation may not be achieved unilaterally, but agreement may be expressed or implied.—Winkler v. V.G. Reed & Sons, Inc., 638 N.E.2d 1228.—Nova 1, 4, 7.

Ind. 1913. To constitute a “novation” it is essential that the obligation of the debtor to the creditor shall be extinguished by a new contract, the debtor discharged, and a third person substituted for him as debtor, with the consent of the creditor, and where the obligation of the debtor is not discharged, but the debtor merely promises to pay the debt with money he is expecting to receive from a third person on a final settlement with him, and the creditor never agreed to the substitution of the third person as debtor, there is no novation.—Kitchell v. Schneider, 103 N.E. 647, 180 Ind. 589.

Ind. 1913. To constitute a “novation” of a contract, there must be a valid obligation to be replaced, a consent by all parties to the substitution, a new consideration moving to the promisor, the extinction of the old obligation, and the creation of a new one.—Cox v. Baltimore & O.S.W.R. Co., 103 N.E. 337, 180 Ind. 495, 50 L.R.A.N.S. 453.

Ind.App. 1999. A “novation” is a new contract made with the intent to extinguish one already in existence.—Columbia Club, Inc. v. American Fletcher Realty Corp., 720 N.E.2d 411, transfer denied 735 N.E.2d 229.—Nova 1.

Ind.App. 1 Dist. 1986. “Novation” is a new contract made with the intent to extinguish one already

in existence, and requires an existing and valid contract, that all parties agreed to the new contract, that the new contract is valid, and that the new contract extinguishes the old one.—*Rose Acre Farms, Inc. v. Cone*, 492 N.E.2d 61, rehearing denied, and transfer denied.—Nova 1.

Ind.App. 2 Dist. 1980. “Novation” simply means substitution of one debtor for another by mutual agreement of parties.—*Boswell v. Lyon*, 401 N.E.2d 735.—Nova 5.

Ind.App. 1930. One essential of “novation” is new and sufficient consideration moving to promisor.—*State v. Traylor*, 173 N.E. 461, 98 Ind.App. 290.—Nova 1.

Ind.App. 1930. New promise by entire new firm, after retirement of partner, in respect to payment of old debt with consent of old partners and creditor, amounts to “novation.”—*State v. Traylor*, 173 N.E. 461, 98 Ind.App. 290.—Nova 5.

Iowa 1942. The essentials of “novation” are a previous, valid obligation, the agreement of all parties to new contract, the extinguishment of old contract, and validity of the new one.—*Eitzen’s Estate v. Lauman*, 3 N.W.2d 546, 231 Iowa 1169.—Nova 1.

Iowa 1942. In suit to foreclose a lien created on realty by will of plaintiff’s deceased father which devised realty to plaintiff’s brothers upon condition that they pay plaintiff a certain sum, evidence justified decree giving plaintiff a judgment in rem and directing that realty be sold for satisfaction of judgment as against defendants’ contention that there had been a “novation” of bequest to plaintiff by contracts executed in connection with settlement of father’s estate.—*Eitzen’s Estate v. Lauman*, 3 N.W.2d 546, 231 Iowa 1169.—Nova 12.

Iowa 1939. The necessary legal elements to establish a “novation” are parties capable of contracting, a valid prior obligation to be displaced, consent of all parties to the substitution, based on sufficient consideration, extinction of old obligation, and creation of a new one.—*Wade & Wade v. Central Broadcasting Co.*, 288 N.W. 439, 227 Iowa 422.—Nova 1.

Iowa 1939. A broadcasting corporation which entered into a contract of employment with acrobatic team was not relieved of liability under contract on ground that acrobatic team’s subsequent entry into a contract with a corporation to which broadcasting corporation had allegedly assigned contract of employment constituted a “novation” where second contract was not a contract of employment but merely authorized corporation to act as booking agent for acrobatic team and acrobatic team did not agree to relieve broadcasting corporation of liability under contract.—*Wade & Wade v. Central Broadcasting Co.*, 288 N.W. 439, 227 Iowa 422.—Nova 5.

Iowa 1939. It is sometimes difficult to determine in cases of this kind whether the facts show an “accord and satisfaction” or a “novation.” The terms are often used interchangeably, and by some authorities it has been held that the term “nova-

tion” is frequently applied to transactions in which a substitution of obligation is effected as the result of an “accord and satisfaction,” so it may be said that “novation” is a species of “accord and satisfaction,” and it may be that in the present case the term “novation” would be a more accurate designation.—*Munn v. Town of Drakesville*, 285 N.W. 644, 226 Iowa 1040.

Iowa 1935. Essential of “novation” are a previous valid obligation, agreement of all parties to new contract, extinguishment of old contract, and validity of new one.—*Des Moines Joint Stock Land Bank of Des Moines, Iowa v. Allen*, 261 N.W. 912, 220 Iowa 448.—Nova 1.

Iowa 1935. To constitute “novation” of contract, original debt must be extinguished.—*Des Moines Joint Stock Land Bank of Des Moines, Iowa v. Allen*, 261 N.W. 912, 220 Iowa 448.—Nova 3.

Iowa 1935. To constitute “novation” of contract, all of parties must agree thereto.—*Des Moines Joint Stock Land Bank of Des Moines, Iowa v. Allen*, 261 N.W. 912, 220 Iowa 448.—Nova 7.

Iowa 1935. Under “novation” new debtor is substituted for original debtor with consent of both parties, it being necessary that creditor assent to substitution, but consent may be legal result of his action or conduct even though he has not either expressly or impliedly agreed thereto.—*Andrew v. American Sav. Bank & Trust Co. of Davenport*, 258 N.W. 921, 219 Iowa 1059.—Nova 7.

Iowa 1930. Essentials of “novation” are previous valid obligation, agreement of all parties to new contract, extinguishment of old contract, and validity of new one.—*Hakes v. Franke*, 231 N.W. 1, 210 Iowa 1169.—Nova 1.

Iowa 1930. As regards continuing personal primary liability of mortgagor and immediate grantee assuming mortgage, remote grantee’s procuring time extension from mortgagee was not “novation” (Code 1927, §§ 9457, 9458).—*Hakes v. Franke*, 231 N.W. 1, 210 Iowa 1169.—Nova 1.

Iowa 1929. Extension agreement entered into, without knowledge or consent of mortgagor and intervening grantees, by mortgagee with grantee assuming mortgage, held not “novation.”—*Royal Union Life Ins. Co. v. Wagner*, 227 N.W. 599, 209 Iowa 94.—Nova 7.

Iowa 1929. “Novation” requires parties capable of contracting, valid prior obligation, consent of all parties, sufficient consideration, extinction of old obligation, and creation of new one.—*In re Talbott’s Estate*, 224 N.W. 550, 209 Iowa 1.—Nova 1.

Iowa 1927. Transaction by which grantor’s note was canceled and grantee executed her note to grantor’s creditor held “novation.”—*Commercial Sav. Bank of Lohrville v. McLaughlin*, 214 N.W. 542, 203 Iowa 1368.—Nova 1.

Iowa 1924. Essentials of “novation” are previous valid obligation, agreement of all parties to new contract, extinguishment of old contract, and validi-

ty of new one.—*Hannan v. Murphy*, 200 N.W. 418, 198 Iowa 827.—Nova 1.

Kan. 1974. A “novation” is a substitution of a new contract or obligation for old one and has four requisites: (1) a previous valid obligation, (2) agreement of parties to the new contract, (3) the valid new contract and (4) extinguishment of old obligation by the substitution for it of the new one.—*Elliott v. Whitney*, 524 P.2d 699, 215 Kan. 256.—Nova 1.

Kan. 1973. A “novation” is either the substitution of a new debt or obligation for an existing one which is thereby extinguished or it is the substitution by mutual agreement of one debtor or one creditor for another where the old debt is extinguished; in either case, the old debt must be extinguished.—*Davenport v. Dickson*, 507 P.2d 301, 211 Kan. 306.—Nova 1.

Ky. 1948. Where ward was assigned note executed to guardian by third party to repay, to the estate, funds misappropriated by third party and guardian, assignment of note by guardian to ward to enable ward to proceed jointly with his guardian against the maker did not constitute a “novation” in absence of actual receipt by ward of sum stated therein so as to prevent ward from recovering his entire estate, less admitted credit for money received after he became of age.—*Clark v. Thompson*, 219 S.W.2d 22, 309 Ky. 850.—Nova 1.

Ky. 1943. Insurer’s agreement in settlement of obligation under fire policy to place damaged truck in as good condition as it was before the fire was a complete “novation” so that insurer’s liability for breach of such agreement to repair was not limited by limit of liability expressed in policy.—*Trinity Universal Ins. Co. v. Mills*, 169 S.W.2d 311, 293 Ky. 463.—Nova 1.

Ky. 1939. An agreement, granting borrower more liberal terms with respect to amortization payments and leaving original obligation otherwise unaffected, did not constitute a “novation” or otherwise affect borrower’s original liability.—*Bracken-Robertson Nat. Farm Loan Ass’n v. Downing*, 135 S.W.2d 421, 281 Ky. 167.—Nova 1.

Ky. 1939. To constitute a “novation” it is necessary that there be a new contract which, by agreement of the parties, extinguishes the existing contract or obligations, and it must appear that the creditor unconditionally released the original obligor and accepted a third person in his stead.—*National Bank of Lima v. Deaton*, 131 S.W.2d 495, 279 Ky. 606.—Nova 1.

Ky. 1939. Where mortgagor sold timber and purchaser agreed to turn purchase money over to mortgagee to be applied in payment of mortgage notes, the transaction did not constitute a “novation” so as to relieve mortgagor of obligation to pay mortgage notes, since mortgagee was not a party to contract, and did not agree to substitute contract for obligation to pay promissory notes.—*National Bank of Lima v. Deaton*, 131 S.W.2d 495, 279 Ky. 606.—Nova 1.

Ky. 1939. Where indorsee of payee of note, on which plaintiff was indorser and had provided mortgage as security, accepted a new note made directly payable to indorsee, which was signed only by maker, and, upon maker becoming bankrupt, filed claim in bankruptcy on second note and received a dividend, acceptance of second note accomplished a “novation” releasing indorser from all liability, and hence indorser was entitled to have mortgage and first note, so far as he was concerned, canceled.—*Stevie v. Stevie*, 128 S.W.2d 946, 278 Ky. 489.—Bills & N 256; Nova 1.

Ky. 1939. Where payee of note accepted third person as her obligor in consideration of maker’s release, a “novation” was effected releasing maker from liability on note, and not a mere acceptance by payee of third person as surety.—*Cable v. McCoun*, 126 S.W.2d 818, 277 Ky. 410.—Nova 5.

Ky. 1938. The signing of renewal notes by personal representative of deceased who signed original note as surety did not discharge the obligation of the original note and was not a “novation,” notwithstanding that personal representative had no power to bind deceased’s estate by signing renewal notes as surety, where intention of payee and personal representative was to execute and accept renewal notes as evidential of the original debt and not to discharge the original debt or create a new indebtedness.—*State Nat. Bank of Frankfort v. Thompson*, 126 S.W.2d 412, 277 Ky. 527.—Bills & N 430; Nova 1.

Ky. 1937. To effect a “novation,” new debtor must be substituted for old one, with intent to release latter.—*Owensboro Banking Co. v. Lewis*, 106 S.W.2d 1000, 269 Ky. 277.—Nova 1.

Ky. 1936. Mere knowledge of mortgagee that land has been sold and purchaser has assumed mortgage debt does not create a “novation,” notwithstanding mortgagee accepts payments from purchaser, but to constitute novation, mortgagee must accept payments with intent to substitute purchaser in place of original debtor.—*White v. Hanes*, 99 S.W.2d 170, 266 Ky. 386.—Nova 1.

Ky. 1936. Where purchaser executed bonds directly to trustee for part of purchase price and vendor retained second lien for balance and became purchaser’s guarantor and trustee’s collecting agent, transaction was “novation” of purchaser’s prior debt to vendor.—*Elbert v. Louisville Trust Co.*, 97 S.W.2d 26, 265 Ky. 522.—Nova 1.

Ky. 1936. Where purchaser executed bonds directly to trustee for part of purchase price and vendor retained second lien for balance and became purchaser’s guarantor and trustee’s collecting agent, transaction was “novation” of purchaser’s prior debt to vendor, so that, in trustee’s suit to foreclose first lien upon vendor’s bankruptcy, purchaser could not set off amount due purchaser on notes executed by vendor.—*Elbert v. Louisville Trust Co.*, 97 S.W.2d 26, 265 Ky. 522.—Ven & Pur 274(3).

Ky. 1936. “Novation” is the substitution of new obligation for an old one with intent to extinguish

old obligation, substitution of new debtor for old one with intent to release latter, or substitution of new creditor with intent to transfer rights of old creditor to him.—Truscon Steel Co. v. Thirlwell Electric Co., 96 S.W.2d 1023, 265 Ky. 414.—Nova 1.

Ky. 1936. Where baseball company had agreed to pay materialman for steel furnished contractor installing towers for floodlighting field if contractor did not, materialman's acceptance of baseball company's note on failure of contractor to answer materialman's letters after completion of work held not to constitute "novation" and hence did not preclude recovery from contractor, since note merely changed form of obligation of baseball company.—Truscon Steel Co. v. Thirlwell Electric Co., 96 S.W.2d 1023, 265 Ky. 414.—Nova 1.

Ky. 1935. Joint use of rented road machinery by contractor and surety on its bond in performance of highway construction contract after order of state highway commission that proceeds of contract should be paid to contractor and surety held not "novation" or to render surety liable for rental and freight paid in transportation of machinery used by contractor.—The Shovel Co. v. Massachusetts Bonding & Ins. Co., 88 S.W.2d 960, 261 Ky. 712.—Nova 1.

Ky. 1933. "Novation" is contract whereby creditor, for valuable consideration, agrees to cancel old obligation and substitute new one.—Watt's Adm'r v. Smith, 63 S.W.2d 796, 250 Ky. 617, 91 A.L.R. 1206.—Nova 4.

Ky. 1932. "Novation," within French Civil Code provision that obligations are extinguished by payment, by novation, and by voluntary extinguishment, means a new meeting of the minds, and an instrument is discharged by novation when the parties agree on some other contract to take its place. It is a new agreement, and includes a pure novation, an accord and satisfaction, a covenant not to sue, and a release. A discharge by novation results from acts of both debtor and creditor.—Gannon v. Bronston, 55 S.W.2d 358, 246 Ky. 612, 86 A.L.R. 324.

Ky. 1931. To constitute a "novation" such as will release the obligation of the original debtor to his creditor, it is necessary that there should be a new and valid contract, which, as agreed between the parties, extinguishes the assumed existing contract or obligation.—Aetna Cas. & Sur. Co. v. U. S. Gypsum Co., 39 S.W.2d 234, 239 Ky. 247.

Ky. 1930. "Novation" may be effected by substitution of new debtor in place of old with intent to release latter.—Combs v. Jameson, 33 S.W.2d 686, 236 Ky. 733.—Nova 5.

Ky. 1914. A "novation," being a contract which, like other contracts, must be supported by a valid consideration, the execution of a new note in place of an old one, to which the wife of one of the signers added her name as surety, does not constitute a novation and discharge the old obligation, for, the wife not being liable, there was no consideration for a release of the old obligation.—Mutual

Benefit Life Ins. Co. v. First Nat. Bank, 169 S.W. 1028, 160 Ky. 538.

Ky. 1913. An instrument executed by one of two debtors to one of two creditors, which recites "due (name of creditor) \$100 balance on mortgage," is not a "novation," when the purpose of the instrument was merely to show the balance due.—Russell v. Centers, 155 S.W. 1149, 153 Ky. 469.—Nova 1.

Ky. 1908. A "novation" is the making of a new contract, its elements being essentially the same as in the first contract, which are parties, a meeting of the minds, and a consideration.—Daviess County Bank & Trust Co. v. Wright, 110 S.W. 361, 129 Ky. 21, 33 Ky.L.Rptr. 457, 17 L.R.A.N.S. 1122.

La. 1956. "Novation" is a contract that consists of two stipulations which extinguish an existing obligation and substitute another obligation in its place.—Russ v. United Farm Equipment Co., 89 So.2d 380, 230 La. 889.—Nova 1.

La. 1942. Where transferee of buyer's equity in automobile, with consent of holder of chattel mortgage notes, assumed payment of notes and agreed to carry out all provisions of mortgage, but original notes were not surrendered and canceled and buyer remained bound to pay them if transferee defaulted, transferee did not become a "mortgagor" and there was not a "novation" of the debt and mortgage, and hence mortgage, which had been recorded in parish where it was executed, was not required to be recorded in parish where transferee was domiciled in order to affect third persons without notice. LSA-R.S. 9:5351; LSA-C.C. arts. 2185, 2187.—Holley v. Owens, 7 So.2d 46, 199 La. 752.—Chat Mtg 150(2).

La. 1940. In action for price of gas, plea that gas company agreed to assign mineral leases to defendant if defendant would drill a test well on certain land and pay a past-due gas bill, and that until gas company tendered assignment of leases, action to recover price of gas was premature, could not be sustained unless obligation to pay gas bill was novated or extinguished and a conditional obligation substituted for it, and there being no allegations indicating that parties to agreement intended to extinguish or impair unconditional obligation of the defendant to pay past-due gas bill, "novation" was not shown. Civ.Code, arts. 2130, 2185, 2187, 2190.—Arkansas Louisiana Gas Co. v. R.O. Roy & Co., 198 So. 768, 196 La. 121.—Gas 14.6; Nova 11.

La. 1939. Deposit by widow and heirs of deceased guarantor, of securities in lieu of an administration bond, pursuant to agreement with payee as a creditor, did not constitute a "novation" releasing other guarantors of note from further responsibility. LSA-C.C. arts. 2185, 2190, 2232.—Brock v. First State Bank & Trust Co., 187 So. 60, 192 La. 77.—Nova 1.

La. 1939. An agreement whereby two of three heirs agreed to settle contest of legality of special legacies to them by acceptance of cash payment from proceeds of sale of succession properties extinguished obligation under will covering legacies by

"novation."—Carbajal v. Bickmann, 187 So. 53, 192 La. 56.—Nova 1.

La. 1939. In suit by heir for partition by licitation of remaining succession property, other heirs could not litigate validity of special legacies which they had renounced pursuant to valid agreement in consideration of cash payment from proceeds of sale of succession property which agreement had been adjudicated to be unenforceable because of action of defendants, since obligation under will covering legacies had been extinguished by "novation." LSA-C.C. arts. 2130, 2185.—Carbajal v. Bickmann, 187 So. 53, 192 La. 56.—Nova 10.

La. 1936. "Novation" is contract, consisting of stipulations to extinguish existing obligation and substitute new one therefor. LSA-C.C. art. 2185.—R. F. C. v. Thomson, 171 So. 553, 186 La. 1.—Nova 1.

La. 1934. "Novation," though not necessary consequence of creditor's taking new note in substitution of one which he returns to debtor, does take place if circumstances or character of transaction show that parties intended to extinguish existing debt and to substitute new one. LSA-C.C. arts. 2185, 2187, 2190.—White Co. v. Hammond Stage Lines, 158 So. 353, 180 La. 962.—Nova 4.

La.App. 1 Cir. 1985. Evidence that second note and mortgage issued by corporation privately owned by maker of first note did not contain language extinguishing maker's personal obligation as to first note, that maker of first note did not request return of first note upon issuance of second note to payee, and that all demands by payee for payment were made to maker, not corporation supported trial court's finding that no "novation" took place.—Dunaway v. Spain, 468 So.2d 771, writ granted 475 So.2d 346, set aside 493 So.2d 577.—Nova 12.

La.App. 1 Cir. 1965. "Novation" is contract having as its object extinguishment of existing obligation and substitution of new obligation in its place. LSA-C.C. art. 2185.—Hartson, Inc. v. Brawley & Watson, Inc., 180 So.2d 588.—Nova 1.

La.App. 1 Cir. 1964. "Novation" is contract consisting of stipulation to extinguish existing obligation and stipulation to substitute new obligation in its place. LSA-C.C. art. 2185.—Polk Chevrolet, Inc. v. Vicaro, 162 So.2d 761.—Nova 4.

La.App. 1 Cir. 1941. The original debt must be extinguished in full before there can be a "novation".—McConnell Motors Co. v. Succession of Tompkins, 4 So.2d 566.—Nova 1.

La.App. 1 Cir. 1941. The taking of a new note does not constitute a "novation" of the prior debt.—McConnell Motors Co. v. Succession of Tompkins, 4 So.2d 566.—Nova 1.

La.App. 1 Cir. 1941. The payment by mortgagor of \$300 in cash and giving of a \$200 note did not operate as a "novation" of a note for \$500 secured by chattel mortgage on automobile, where it did not appear that parties intended to substitute new debt for the old one, but rather that it was intended that

original note should remain outstanding and that new note would be nothing more than evidence of the balance due thereon. LSA-C.C. arts. 2187, 2190.—McConnell Motors Co. v. Succession of Tompkins, 4 So.2d 566.—Nova 1.

La.App. 1 Cir. 1941. Even if evidence established that mortgagor understood that payment by him of \$300 in cash and the giving of \$200 note was to operate as payment and satisfaction of a note for \$500 secured by chattel mortgage on automobile, evidence was insufficient to establish a "novation", in absence of showing that holder of chattel mortgage note also understood and intended that chattel mortgage note also understood and intended that chattel mortgage note was to be discharged. LSA-C.C. arts. 2187, 2190.—McConnell Motors Co. v. Succession of Tompkins, 4 So.2d 566.—Nova 12.

La.App. 1 Cir. 1939. The seller of a gas range could not be relieved of liability for injuries caused by an explosion on ground that plaintiff's father, who had bought range, by accepting an electric company's service in installing range, had permitted a "novation" of his contract to buy stove installed to take place, where nothing in record justified assumption that father had ever agreed to substitute seller or company with regard to any obligation contracted in installing range, and it did not appear that he ever intended to relieve seller of its obligation. LSA-C.C. arts. 2185, 2187, 2189.—McGuire v. Dalton Co., 191 So. 168.—Nova 12.

La.App. 1 Cir. 1931. Essential requisite to effect "novation" is express discharge of debtor from obligation. LSA-C.C. arts. 2189, 2192.—Baron v. Guidry, 134 So. 410, 17 La.App. 32.—Nova 1.

La.App. 2 Cir. 1989. Cotton buyer, who executed promissory note yearly, at end of the bank's audit year, for amount of overdraft due the bank, in order to extinguish his margin account debt to the bank, accomplished a "novation." LSA-C.C. art. 1879.—Bank of Oak Grove v. Robinson, 543 So.2d 121.—Nova 4.

La.App. 2 Cir. 1971. Mere change in form of debt does not work as "novation".—Insured Lloyds Ins. Co. v. Woodle, 248 So.2d 862.—Nova 1.

La.App. 2 Cir. 1941. Where finance company's representative, subject to approval of company, orally agreed to an extension of time within which transferee of mortgagor was to pay balance due on chattel mortgage on automobile and an agreement was signed in blank with understanding that it was to be filled out at company's branch office, if approved, and agreement providing for monthly payments in amount of \$61.38 and that terms of original contract, except as modified by extension, were to remain in full force was approved, and transferee paid two installments before defaulting, transferee could not defeat foreclosure of mortgage on ground that oral agreement provided for monthly payments of \$35 per month and was a "novation". LSA-C.C. arts. 2185, 2190.—General Motors Acceptance Corp. v. Bordelon, 5 So.2d 184.—Nova 1.

La.App. 2 Cir. 1940. "Novation" does not invariably imbue the new obligation with virtues indispensable to its legal existence and enforceability not possessed by the old obligation, and for the new debt to be free of attack against legal integrity the old indebtedness must have also been impregnable in that respect since the old obligation is the basic foundation of the new one. LSA-C.C. §§ 2185, 2186.—W. T. Rawleigh Co. v. Coen, 195 So. 660.—Nova 1.

La.App. 2 Cir. 1940. Where itinerant vendor of wholesalers' products including drugs gave note with signatures of guarantors to liquidate indebtedness to wholesaler on open account which existed at time of termination of the contract between the parties, the note was unenforceable, even though purpose of execution of note was to novate the account, since there was no "valid obligation" at time of execution of note because contract for sale of drugs by itinerant vendor was illegal, and basic obligation of the note was "void" within statute providing that if obligation which is basis of a "novation" is void the new obligation is of no effect. LSA-R.S. 37:1288; LSA-C.C. arts. 2185, 2186.—W. T. Rawleigh Co. v. Coen, 195 So. 660.—Nova 1.

La.App. 2 Cir. 1936. Writing whereby defendant agreed to assume responsibility for buyer's debt held not a "novation," in view of lack of stipulation therein indicating extinguishment of debt or discharge of original debtor. LSA-C.C. art. 2185 et seq.—Louisiana Store & Market Equipment Co. v. Moore, 167 So. 477.—Nova 1.

La.App. 2 Cir. 1935. Agreement by judgment creditor to withhold execution of judgment in consideration of note executed by debtor and accommodation maker did not constitute a "novation" so as to relieve debtor from liability on judgment which was assigned by creditor to accommodation maker who paid note, especially where it was stipulated in note that note was given as collateral security for judgment. LSA-C.C. art. 2190.—Beaubœuf v. McGehee, 161 So. 634.—Nova 2.

La.App. 3 Cir. 1987. Agreement by which debtor and creditor reduced debt amount on open account was "novation" which extinguished original obligation and prevented creditor from subsequently claiming original amount following debtor's default on substituted amount. LSA-C.C. art. 1881.—C & A Tractor Co. v. Branch, 520 So.2d 909.—Nova 4.

La.App. 3 Cir. 1971. "Novation" is a contract consisting of stipulations to extinguish an existing obligation and to substitute a new obligation in its place. LSA-C.C. arts. 2185, 2189, 2190.—Antoine v. Elder Realty Co., 255 So.2d 625.—Nova 1.

La.App.Orleans 1936. Transaction by which prospective purchaser accepted broker's notes indorsed by third person in final settlement of damages agreed upon as having been caused by broker's breach of contract to sell lots constituted "novation."—Manale v. Harris, 165 So. 339.—Nova 4.

Me. 1949. Where defendant accepted delivery of interstate shipments of bananas without written notice to delivering carrier that it was an agent only without any beneficial title to the property, and returned freight bills to carrier with request that freight charges be collected from defendant's principal, acceptance of returned bills and attempts to collect from defendant's principal did not amount to a "novation" discharging defendant from liability for transportation charges. Interstate Commerce Act, § 3(2), 49 U.S.C.A. § 3(2).—Boston & Maine R. R. v. Hannaford Bros. Co., 68 A.2d 1, 144 Me. 306.—Nova 5.

Me. 1913. The doctrine of "novation" implies the substitution of a debtor or a creditor and the making of a new contract. It can never be presumed, but must be proved, and did not exist where plaintiffs never agreed to accept any other debtor than defendant and no other debtor ever agreed to pay the bill sued on.—Patzowsky v. Mutual Shoemakers, 89 A. 61, 111 Me. 585.

Me. 1912. The doctrine of "novation" cannot apply to an action for use and occupation of land to which plaintiff had no legal title, where neither defendant nor the lessee of the land was indebted to plaintiff, she being a stranger to the transaction, since novation implies a substitution of a debtor of a creditor and of a new contract.—Pennington v. Gartley, 83 A. 701, 109 Me. 270.

Me. 1898. "Novation" is a foreign word, and has its natural meaning only in the civil law. It implies the substitution of a debtor, of a creditor, and of a new contract.—Hamlin v. Drummond, 39 A. 551, 91 Me. 175.

Md. 1976. A "novation" is a new contractual relation made with intent to extinguish a contract already in existence and it contains as its four essential requisites a previous valid obligation, agreement of all parties to a new contract, validity of such new contract and extinguishment of old contract by substitution of the new one.—Dahl v. Brunswick Corp., 356 A.2d 221, 277 Md. 471.—Nova 1.

Md. 1975. "Novation" is a new contractual relation made with intent to extinguish a contract already in existence; its four essential requisites are a previous valid obligation, agreement of all the parties to the new contract, the validity of the new contract, and the extinguishment of the old contract by the substitution of the new one.—I. W. Berman Properties v. Porter Bros., Inc., 344 A.2d 65, 276 Md. 1.—Nova 1.

Md. 1975. "Novation" is new contractual relation made with intent to extinguish existing contract.—BarGale Industries, Inc. v. Robert Realty Co., Inc., 343 A.2d 529, 275 Md. 638.—Nova 1.

Md. 1955. Substitution of a new agreement for an old one between the same parties is termed a "merger" or "substituted contract" rather than "novation" and term "novation" is applied to agreement in which one or more new parties are introduced.—Hudson v. Maryland State Housing Co., 114 A.2d 421, 207 Md. 320.

Md. 1936. A “novation” is a new contractual relation, and contains four essential requisites: A previous valid obligation; the agreement of all the parties to the new contract; the validity of such new contract; and the extinguishment of the old contract by the substitution for it of the new one.—County Trust Co. of Maryland v. Stevenson, 185 A. 435, 170 Md. 550.

Md. 1935. Transaction by which notes of sole heir and third person were taken by bank in place of notes signed by deceased and third person held “novation,” relieving estate of liability on notes signed by deceased, notwithstanding that original notes of deceased and third person remained in bank’s possession.—Harford Bank of Bel Air v. Hopper’s Estate, 181 A. 751, 169 Md. 314.—Nova 5.

Md. 1935. “Novation” may occur by change of parties to contract, or by change of subject-matter or terms and conditions thereof, but mere extension of time for payment of obligation does not create novation.—Baltimore Academy of Visitation v. Schapiro, 181 A. 731, 169 Md. 332.—Nova 1.

Md. 1935. To constitute “novation,” there must exist previous valid obligation, agreement of all parties to new contract, validity of new contract, and extinguishment of old contract by substitution of the new.—Baltimore Academy of Visitation v. Schapiro, 181 A. 731, 169 Md. 332.—Nova 1.

Md. 1935. Agreements altering provisions of land contract by extension of time for payment of purchase price, change in interest rate on deferred payments, provision for payment of interest on partial payments, extension of time for giving mortgage, and change in amount thereof, provision for improvement of property to extent of \$25,000 rather than \$100,000 as provided in original contracts held “novation” which relieved original vendee from obligations with regard to improvement of property to extent of \$100,000, and giving of bond therefor.—Baltimore Academy of Visitation v. Schapiro, 181 A. 731, 169 Md. 332.—Nova 1.

Md. 1935. Evidence that land was sold with knowledge and consent of mortgagee, that amount of mortgage was deducted in settlement memorandum between vendors and purchasers, and that mortgagee thereafter gave purchasers two extensions without notice to vendors until some six years after original mortgage was due, though no interest had been paid by vendors since some months before maturity of original mortgage, held to show “novation” releasing original mortgagors at time of sale.—Chatterley v. Safe Deposit & Trust Co. of Baltimore, 178 A. 854, 168 Md. 656.—Mtg 283(3).

Md.App. 1999. “Novation” is a new contractual relation that extinguishes contract that was previously in existence between parties.—Holzman v. Fiola Blum, Inc., 726 A.2d 818, 125 Md.App. 602.—Nova 1.

Md.App. 1999. To establish “novation,” party asserting it must prove four requirements: (1) previous valid obligation; (2) agreement of all parties to new contract; (3) validity of such new contract; and

(4) extinguishment of old contract, by substitution of new one.—Holzman v. Fiola Blum, Inc., 726 A.2d 818, 125 Md.App. 602.—Nova 1.

Md.App. 1999. Contract for sale of home and addendum to contract providing that buyers would pay broker’s real estate commission did not constitute “novation” or modification of exclusive listing agreement under which sellers were required to pay commission to broker upon entering into written contract for sale, and thus, sellers were not relieved of contractual duties under listing agreement and broker was not required to pursue buyers for commission, where broker was not party to sales contract and there was no evidence that broker agreed to anything.—Holzman v. Fiola Blum, Inc., 726 A.2d 818, 125 Md.App. 602.—Brok 63(3).

Md.App. 1995. Four essential requirements for a “novation,” a new contractual relation that extinguishes contract that was previously in existence between parties, are as follows: (1) previous valid obligation; (2) agreement of all parties to new contract; (3) validity of such new contract; and (4) extinguishment of old contract, by substitution of new one.—Mercantile Club, Inc. v. Scherr, 651 A.2d 456, 102 Md.App. 757.—Nova 1.

Md.App. 1992. “Novation” is substitution of new contract or obligation for existing one, between same or different parties, by mutual agreement.—Homa v. Friendly Mobile Manor, Inc., 612 A.2d 322, 93 Md.App. 337, certiorari granted 617 A.2d 1085, 329 Md. 168, certiorari dismissed 624 A.2d 490, 330 Md. 318.—Nova 4.

Md.App. 1992. “Novation” may, by agreement of all parties, substitute new party and discharge one of original parties to a contract.—Petals Factory Outlet of Delaware, Inc. v. EWH & Associates, 600 A.2d 1170, 90 Md.App. 312.—Nova 4.

Md.App. 1974. A “novation” is a new contractual relation, and contains four essential requisites: (1) a previous valid obligation; (2) agreement of all parties to new contract; (3) validity of such new contract; and (4) extinguishment of old contract, by substitution for it of the new one.—Russ v. Barnes, 329 A.2d 767, 23 Md.App. 691.—Nova 1.

Mass. 1936. Board of directors appointment of plaintiff as manager of corporation without reference to his term or bonus was insufficient to show that corporation assumed contractual obligation of defendant that plaintiff should be manager of corporation for three-year term at specified salary and bonus, and plaintiff’s acceptance of salary check from corporation was insufficient to show that plaintiff intended to release defendant from his obligation, and hence there was no “novation” by which defendant’s obligation was discharged.—Mansfield v. Lang, 200 N.E. 110, 293 Mass. 386.—Nova 12.

Mass. 1935. Agreement between judgment debtor and creditor and creditor’s assignees, under which debtor was to satisfy judgment by making payments direct to assignees regardless of priority of assignment, held not “novation” equivalent to payment of fund to assignees who were parties to

agreement which would preclude prior assignee not party to agreement from claiming share of balance which remained, since debtor assumed no new and absolute obligation in place of its liability on judgment.—*Goodyear Tire & Rubber Co. v. Bagg*, 197 N.E. 481, 292 Mass. 125.—Nova 4.

Mass. 1934. Acceptance of new liability in place of old one and release of old liability are essential to “novation.”—*Coral Gables v. Granara*, 189 N.E. 604, 285 Mass. 565.—Nova 1.

Mass. 1932. To constitute “novation,” there must be existing valid original obligation, agreement of all parties to new contract, extinguishment of old contract, and formation of valid new contract.—*Larson v. Jeffrey-Nichols Motor Co.*, 181 N.E. 213, 279 Mass. 362.

Mich. 1942. Notes executed by an administrator without probate court’s consent at request of bank’s vice president did not constitute “payment” of bank’s allowed claims on other notes against estate on theory of “novation”, where administrator admitted that it was the understanding that bank was not relinquishing its claim against estate, and it was not intended to substitute personal liability on part of administrator for liability of estate.—*In re Dunneback’s Estate*, 4 N.W.2d 472, 302 Mich. 73.—Ex & Ad 275.

Mich. 1939. The assignment of land contract to assignee who did not agree to assume and pay contract, although he did take charge of property, make payments on contract and carry out extensive repairs, did not constitute a “novation” releasing vendee from liability to vendor on contract.—*Taylor v. Groll*, 286 N.W. 88, 288 Mich. 590.—Nova 5.

Mich. 1939. A receipt, reciting that contract under which corporation made payment received for had been assigned to and assumed by such corporation and named individuals, and that payment was made without prejudice to their rights to recover amounts advanced by them to creditor, did not amount to agreement or recognition of agreement by such creditor’s assignee to accept new debtor and release original promisor from liability, as required to constitute “novation.”—*Hutchings v. Securities Exchange Corp.*, 284 N.W. 614, 287 Mich. 701.—Nova 7.

Mich. 1939. The mere fact that payments on amount due under contract are made by third party and accepted by creditor is insufficient to establish “novation.”—*Hutchings v. Securities Exchange Corp.*, 284 N.W. 614, 287 Mich. 701.—Nova 12.

Mich. 1936. Elements necessary to establish “novation” are that the parties are capable of contracting; a valid prior obligation to be displaced exists; consent of all parties to the substitution, based on sufficient consideration, is had; and the obligation is extinguished and a valid new one created.—*George Realty Co. v. Gulf Refining Co.*, 266 N.W. 411, 275 Mich. 442.—Nova 1.

Mich. 1936. The necessary legal elements to establish a “novation” are parties capable of contracting, a valid prior obligation to be displaced, the consent of all the parties to the substitution, and

the extinction of the old obligation and the creation of a valid new one.—*Moore v. Capital Nat. Bank of Lansing*, 264 N.W. 288, 274 Mich. 56.

Mich. 1935. Contract between vendor and assignee of land contract inconsistent with original contract, which changes rights of vendee against vendor or assignee, or their obligations to each other or to vendee, constitutes “novation” of parties to purchase by means of novation of contract.—*Gorman v. Butzel*, 262 N.W. 302, 272 Mich. 525.—Nova 5.

Mich. 1934. Vendor’s acceptance of payments under land contract from vendee’s assignee did not establish “novation” so as to relieve vendee from liability on contract, on assignee’s default, since there was no privity of contract between vendor and assignee and there was no agreement relieving vendee from liability.—*Bigelow v. MacCrone*, 255 N.W. 191, 267 Mich. 217.—Nova 1.

Mich. 1933. Vendors’ acceptance of payments under land contract from vendee’s assignee did not establish “novation” so as to relieve vendee from liability on contract on assignee’s default.—*Fender v. Feighner*, 251 N.W. 536, 265 Mich. 536.—Nova 12.

Mich. 1933. Written agreement between conditional seller of half interest in book business and buyer’s transferee held “novation” discharging buyer from liability under contract.—*Smitter v. Geurink*, 247 N.W. 105, 261 Mich. 697.—Nova 1.

Mich. 1932. To constitute “novation,” old debtor or must be discharged and new debtor substituted with creditor’s consent.—*Kahn v. Green*, 245 N.W. 539, 260 Mich. 632.—Nova 1.

Mich. 1930. “Novation” is substitution of one debtor for another or substitution of new obligation for old, which is thereby extinguished.—*Husted v. Pogue*, 228 N.W. 737, 249 Mich. 410.—Nova 1.

Mich. 1929. Evidence that one assuming payment of notes under conditional sale agreement had paid some of notes was insufficient to establish “novation.”—*Neureither v. Hansen*, 226 N.W. 226, 247 Mich. 527.—Nova 12.

Mich. 1912. Essentials of “novation” are previous valid obligation, agreement of all parties to new contract, extinguishment of old contract, and validity of new one.—*Gillett v. Ivory*, 139 N.W. 53, 173 Mich. 444.—Nova 1.

Mich. 1911. Essentials of “novation” are previous valid obligation, agreement of all parties to new contract, extinguishment of old contract, and validity of new one.—*Harrington-Wiard Co. v. Blomstrom Mfg. Co.*, 131 N.W. 559, 166 Mich. 276.—Nova 1.

Minn. 1997. If other party consents to delegation of duties under contract, thus completely substituting one party for another, proper term for transaction is “novation.”—*Epland v. Meade Ins. Agency Associates, Inc.*, 564 N.W.2d 203, rehearing denied, certiorari denied 118 S.Ct. 181, 522 U.S. 869, 139 L.Ed.2d 121.—Nova 1.

Minn. 1940. Unless a debtor is released and another substituted in his stead, pursuant to agreement between the creditor and the two debtors, there is no "novation".—First & American Nat. Bank of Duluth v. Whiteside, 292 N.W. 770, 207 Minn. 537.—Nova 5.

Minn. 1936. Evidence held to support judgment denying bank recovery on guaranty of payment of deficiency arising in liquidation of bills receivable transferred to bank in consolidation transaction on ground that bank had failed to pay savings accounts of absorbed bank according to agreement; that bank had not been substituted as debtor on such accounts by "novation"; and that bank breached its duty to exercise diligence and care in collection of bills receivable as required by contract.—State Bank of Monticello v. Lauterbach, 268 N.W. 918, 198 Minn. 98.—Guar 91.

Minn. 1928. To constitute a "novation" of parties as to the debtor, there must be an extinguishment of the debt or liability as against the original debtor, and the shifting of the obligation to a new debtor by the explicitly expressed agreement of each of the three parties.—State v. Wood, 217 N.W. 360, 173 Minn. 406.

Minn.App. 1986. "Novation" extinguishes original debt or obligation against original debtor and shifts the debt, by mutual agreement, to a new party, and requires both mutual agreement and consideration.—Albany Roller Mills, Inc. v. Northern United Feeds and Seeds, Inc., 397 N.W.2d 430.—Nova 1.

Miss. 1978. A "novation" involving substitution of debtors is a contract that discharges at once an existing obligation and creates a new contractual obligation by including as a new obligor a party who was not previously obligated.—First American Nat. Bank of Iuka v. Alcorn, Inc., 361 So.2d 481.—Nova 1.

Miss. 1953. Where original parties to trust deed entered into transaction whereby beneficiary satisfied and cancelled record old trust deed, and one of the two original mortgagors executed, to same trustee, a new trust deed on the same realty for benefit of same trustee to secure note executed by second mortgagor for balance due on original debt, such new debt arrangement between beneficiary and second mortgagor constituted a "novation" of the old obligation.—Ainsworth v. Lee, 67 So.2d 905, 218 Miss. 813.—Nova 4.

Miss. 1953. "Novation" exists where debtor and creditor remain the same, but new debt takes place of old one, where debt remains same, but new debtor is substituted, or where debt and debtor remain, but new creditor is substituted.—Ainsworth v. Lee, 67 So.2d 905, 218 Miss. 813.—Nova 4, 5, 6.

Mo. 1936. Approval by land contract vendor of contract between vendee and assignee, which approval was not conditioned upon assumption of personal liability by assignee of the contract between vendor and vendee, held not a "novation."—State ex rel. Hoyt v. Shain, 93 S.W.2d 992,

338 Mo. 1208, conformed to Lampton Realty Co. v. Hoyt, 99 S.W.2d 145, 231 Mo.App. 143.—Nova 1.

Mo.App. E.D. 1994. "Novation" of debtors occurs when creditor agrees to release and extinguish claim against debtor, accepting promise of third party to discharge obligation, and it entails mutual assent among parties to old and new obligations.—Commerce Bank of St. Louis, N.A. v. Findley, 874 S.W.2d 409, rehearing denied.—Nova 3.

Mo.App. E.D. 1990. A "novation" is the substitution of a new contract or obligation for an old one which is thereby extinguished.—Ponze v. Guirl, 794 S.W.2d 699.—Nova 4.

Mo.App. E.D. 1989. Transaction in which creditor agrees to release a debtor in consideration of assumption of debt by third party is generally referred to as a "novation," a species of accord and satisfaction, and ordinarily would constitute a defense to an action against debtor.—Steffens v. Forbes, 778 S.W.2d 22.—Nova 1.

Mo.App. W.D. 1999. Plaintiff corporation pleaded facts inconsistent with a novation and did not otherwise establish a "novation" of its consultation agreement and promissory note with defendant corporation, and thus, out-bound forum selection clause in consultation agreement was enforceable, and circuit court was without subject matter jurisdiction, where petition sought recovery under note and agreement and not novation, petition referred to a demand on note and agreement two years after alleged novation, and the alleged novation was unsigned document calling for a \$2,000 per month payment, but payments allegedly pursuant to novation were for \$1,000 each, the payment amount due under original note.—State ex rel. Premier Marketing, Inc. v. Kramer, 2 S.W.3d 118, rehearing, transfer denied.—Nova 2.

Mo.App. W.D. 1999. A "novation" is the substitution of a new contract or obligation for an old one that is thereby extinguished.—State ex rel. Premier Marketing, Inc. v. Kramer, 2 S.W.3d 118, rehearing, transfer denied.—Nova 1.

Mo.App. W.D. 1989. A "novation" is a type of substituted contract that includes as a party one who was neither the obligor nor the obligee of the original duty; its elements are a previous valid obligation, the agreement of all the parties to the new contract, the extinguishment of the old contract, and the validity of the new contract.—Wilson v. Midstate Industries, Inc., 777 S.W.2d 310.—Nova 1.

Mo.App. 1977. Term "novation" has been described as a substitution of a new contract or obligation for an old one which is thereby extinguished; it is an affirmative defense, with burden of proof on party asserting it.—Moley v. Plaza Properties, Inc., 549 S.W.2d 633.—Nova 1, 12.

Mo.App. 1974. Essential elements of a "novation" are a previous valid obligation, agreement of all of the parties to the new contract, the extinguishment of the old contract and validity of the new one.—General Ins. Co. of America v. Klein, 517 S.W.2d 726.—Nova 1.

Mo.App. 1968. "Novation" may be broadly defined as substitution of a new contract or obligation for an old one which is thereby extinguished; more specifically, the substitution by mutual agreement of one debtor or of one creditor for another, whereby the old debt is extinguished, or substitution of a new debtor or obligation for an existing one, which is thereby extinguished.—W. Crawford Smith, Inc. v. Watkins, 425 S.W.2d 276.—Nova 1.

Mo.App. 1965. Acceptance of new agreement, rather than its performance or execution, in satisfaction of original obligation results in a "novation", by which original obligation is discharged.—Long v. Weiler, 395 S.W.2d 234.—Nova 9.

Mo.App. 1965. "Novation" exists only by reason of agreement, and there must be a creditor, original debtor and third person who was to become the new debtor, and they must all agree that original debtor be released and that third person be substituted in his stead.—Oddo v. Associated Wholesale Grocers, Inc., 387 S.W.2d 169.—Nova 5, 7.

Mo.App. 1944. To constitute "novation" there must be three parties, the creditor, the original debtor, and the third person who is to be new debtor, and all must agree that original debtor be released and that third person be substituted in his stead, and creditor must consent to release of original debtor and such consent must be contemporaneous with assumption by new debtor of the debt, and there must be valid consideration.—Di Franco v. Steinbaum, 177 S.W.2d 697.—Nova 1.

Mo.App. 1944. Evidence that announcement was made by debtor to plaintiff and other creditors at auction place in presence of defendant that defendant would pay claims of persons having money coming to them from debtor, followed immediately by defendant's act in delivering to plaintiff a check to pay debt of the debtor and plaintiff's acceptance thereof, was sufficient to warrant a finding of "novation" of defendant as a new debtor.—Di Franco v. Steinbaum, 177 S.W.2d 697.—Nova 12.

Mo.App. 1943. A "novation" embraces "accord and satisfaction".—Barber v. Mallon, 168 S.W.2d 177.

Mo.App. 1942. The basis of "novation" is a substitution of a new agreement for an old.—Wolfson v. Baltimore Bank of Kansas City, 157 S.W.2d 560.—Nova 1.

Mo.App. 1942. The acceptance of a new form of obligation may be a "payment" if the debtor is thereby discharged from further obligation; but since it is primarily the substitution of a new form of credit in lieu of an old, it may also be treated as a "novation".—Wolfson v. Baltimore Bank of Kansas City, 157 S.W.2d 560.—Nova 4; Paynt 24.

Mo.App. 1940. The doctrine of "novation" has no application unless creditor, original debtor and new debtor all agree contemporaneously that new debtor is to be substituted for original debtor, who is discharged.—Morriess v. Finkelstein, 145 S.W.2d 439.—Nova 1.

Mo.App. 1940. In action for rent under lease against corporation and individual as cotenants, evidence failed to establish a "novation" discharging corporation from liability under lease.—Morriess v. Finkelstein, 145 S.W.2d 439.—Nova 12.

Mo.App. 1935. Where customer of stock broker ordered purchase of stock without disclosure that he was acting for brother, subsequent transfer of purchase to brother's account pursuant to instructions from customer and brother and mailing to brother of confirmation of purchase for his account held "novation" under which customer's brother would be liable for payment for stock.—Wieselman v. Mercantile-Commerce Bank & Trust Co., 88 S.W.2d 212.—Nova 5.

Mo.App. 1934. To constitute "novation" there must be agreement between creditor, his immediate debtor, and intended new debtor whereby proposed new debtor is accepted in place of original debtor in discharge of original debt.—Robertson v. Vandalia Trust Co., 66 S.W.2d 193, 228 Mo.App. 1172.—Nova 1.

Mo.App. 1933. Arrangement between assignee and sublessor terminating sublease at assignee's request whereby assignee agreed to indemnify sublessor against liability to sublessee did not constitute "novation" as to sublessee.—Home Trust Co. v. Shapiro, 64 S.W.2d 717, 228 Mo.App. 266.—Nova 1.

Mo.App. 1933. Agreement between materialman, contractor, and building owner whereby materialman received 60 per cent. of debt in cash and bonds of owner as collateral security for remainder did not constitute "novation."—Negbaur v. Fogel Const. Co., 58 S.W.2d 346.—Nova 1.

Mo.App. 1933. To constitute "novation" creditor must have consented to discharge of original debtor, accepting in his stead new debtor.—Negbaur v. Fogel Const. Co., 58 S.W.2d 346.—Nova 1.

Mo.App. 1931. To constitute "novation" of existing debt, creditor, original debtor, and new debtor must all agree contemporaneously that new debtor is to be substituted for original debtor, who is discharged.—Swift & Co. v. Madden, 35 S.W.2d 59.—Nova 7.

Mo.App. 1930. Unless agreement was intended to operate as release of original debt, there is no "novation".—Farmers' Bank of Billings v. Oetker, 31 S.W.2d 568, 224 Mo.App. 664.—Nova 3.

Mo.App. 1928. Debtor's transfer of goods to another who assumed obligation to creditor with creditor's consent constituted "novation".—Heinrich Chemical Co. v. Welch, 300 S.W. 1001.—Nova 5.

Mo.App. 1920. To constitute a "novation" of a debt, there must be three parties to the agreement, the creditor, the original debtor, and the third person who is to become the new debtor, and they must all agree that the original debtor be released and that the third person be substituted in his stead, and the consent of the creditor must be contemporaneous with the assumption by the new

debtor of the debt, and the agreement must be based upon a valid consideration.—Hicksville Handle Co. v. Herb, 226 S.W. 63.—Nova 1.

Mo.App. 1914. To constitute a “novation,” the creditor, debtor, and the third persons must all agree that the original debtor be released and the third person substituted in his stead.—L. & A. Scharff Distilling Co. v. Springfield Coal, Ice & Transfer Co., 166 S.W. 654, 180 Mo.App. 497.

Mo.App. 1913. The essentials of a “novation” being a previous valid obligation, the agreement of all the parties to the new contract, the extinguishment of the old contract, and the validity of the new, there was no novation where third persons agreed to pay defendants’ note in favor of plaintiff bank, and the bank, with knowledge of the agreement, extended the time of payment in favor of third persons, there being no release of defendants or extinguishment of the old obligation.—Citizens Bank of Senath v. Douglass, 161 S.W. 601, 178 Mo.App. 664.

Mo.App. 1910. The essence of “novation” is that all the three parties assent to or concur in the agreement whereby the new debtor is substituted for the old and the old debt extinguished.—Elliott v. Qualls, 130 S.W. 474, 149 Mo.App. 482.

Mo.App. 1908. A “novation” occurs when a debtor makes an arrangement with his debtor, for a valuable consideration, whereby the second debtor assumes and is to pay the first debtor’s debt, and if, before passing of the consideration, or completion of the transaction, either of the debtors explains the proposed transaction to the first debtor’s creditor, and the creditor consents to the substitution and agrees to accept the new debtor and release the old one, the novation is complete.—Bank of St. James v. Walker, 111 S.W. 829, 132 Mo.App. 117.

Mont. 1980. Buy-sell agreement, which was entered into by real estate broker as a seller in an effort to sell lot when he was in default on a contract to buy lot but which failed to effectuate a binding contract due to failure to fulfill condition precedent of obtaining financing, was not a “novation” of the contract on which he had defaulted so as to extinguish his obligations under such contract. MCA 28-1-1501, 28-1-1502.—Management, Inc. v. Mastersons, Inc., 616 P.2d 356, 189 Mont. 435.—Nova 5.

Mont. 1943. Where contract for remodeling of home was assigned by engineering company to plaintiff with owners’ consent with intent to transfer all rights of the company to plaintiff, a “novation” was made and owners after accepting benefits thereof could not, in defense of plaintiff’s action to foreclose mechanic’s lien, question plaintiff’s right to include labor and materials supplied by him prior to assignment of contract. Rev.Codes 1935, §§ 7461, 8339, 8340.—Smith v. Gunniss, 144 P.2d 186, 115 Mont. 362.—Mech Liens 206; Nova 1.

Mont. 1930. Agreement that employer would pay judgment against employee who was to be released *held* a “novation” (Rev.Codes 1921,

§§ 7460-7462).—Tannhauser v. Shea, 295 P. 268, 88 Mont. 562, 74 A.L.R. 1021.—Nova 5.

Mont. 1930. That lessors accepted rent from assignee of lease and permitted assignee to sublease premises, still looking to assignee for rent, held not to constitute “novation,” as regards lessee’s liability for rent on assignee’s default.—Harrison v. Fregger, 294 P. 372, 88 Mont. 448.—Land & Ten 208(1).

Mont. 1930. In “novation,” obligation between original parties is extinguished, and new obligation between transferee and obligor is created and substituted for previous one.—Harrison v. Fregger, 294 P. 372, 88 Mont. 448.—Nova 5.

Mont. 1920. Where the purchaser of a building which plaintiff had wired for electricity agreed with the vendor that he would assume payment for the work, and the two notified plaintiff that the wires should be left, etc., *held*, that there was a “novation” within Rev.Codes, § 4959, subd. 2, and the purchaser became liable to plaintiff for payment of the wiring; the purchaser clearly substituting himself as a principal debtor instead of the vendor.—Sullivan v. Marshall, 187 P. 1013, 56 Mont. 568.—Nova 7.

Mont. 1916. Where it was not agreed that renewals of notes should constitute a payment, they do not work a “novation” within Rev.Codes, §§ 4958, 4959, declaring that a novation is made by the substitution of a new obligation with intent to extinguish the old, for it will be presumed in the absence of such showing that the renewal notes were not given in discharge of the original obligation.—First Nat. Bank of Missoula v. Cottonwood Land Co., 154 P. 582, 51 Mont. 544.

Mont. 1914. Rev.Codes, § 4892, defines an “obligation” as a legal duty by which a person is bound to do or not to do a certain thing, and section 4959 declares that a “novation” is the substitution of a new obligation for an existing one. Plaintiff purchased an automobile from defendant giving a chattel mortgage to secure the unpaid purchase money. Held, that a subsequent agreement that plaintiff should run the automobile for hire and turn over to defendant all moneys received until the balance due on the purchase price should be fully paid did not work a novation; the original obligation not being extinguished.—Kinsman v. Stanhope, 144 P. 1083, 50 Mont. 41, L.R.A. 1916C,443.

Mont. 1910. To constitute a “novation” by substitution of creditors or debtors, there must be a mutual agreement between three or more persons, whereby a debtor, in consideration of being discharged from his liability to the original creditor, contracts a new obligation in favor of the new creditor, and the new creditor must have consented to the discharge of his original debtor, and have accepted the new debtor.—McAllister v. McDonald, 106 P. 882, 40 Mont. 375.—Nova 1.

Neb. 1994. Two conditions must be met in order for agreement to constitute “novation”: (1) agreement must completely extinguish existing liability, and (2) new liability must be substituted in its

place.—*Mackiewicz v. J.J. & Associates*, 514 N.W.2d 613, 245 Neb. 568.—Nova 3, 4.

Neb. 1988. Agreement under which creditor agreed to accept \$140,000 from proceeds of sale of collateral in full satisfaction of claim on condition that \$15,000 would be maximum amount of liability should proceeds be deficient could be viewed as “novation,” so that failure to give debtors notice of sale of collateral did not preclude creditor from recovering deficiency.—*Kearney State Bank and Trust Co. v. Scheer-Williams*, 428 N.W.2d 888, 229 Neb. 705.—Nova 1.

Neb. 1944. In order to result in a “novation”, agreement must contain stipulations extinguishing existing liability and substituting a new one in its place.—*In re Wise's Estate*, 13 N.W.2d 146, 144 Neb. 273.—Nova 1.

Neb. 1939. Where creditor accepts from debtor any form of new agreement in place of prior contract or obligation between them, with intent to cancel prior contract or obligation and substitute new one therefor, “novation” by substitution of obligation takes place.—*American Loan Plan v. Frazell*, 283 N.W. 836, 135 Neb. 718.—Nova 1.

Nev. 1989. A “novation” consists of four elements: there must be existing valid contract, all parties must agree to new contract, new contract must extinguish old contract, and new contract must be valid.—*United Fire Ins. Co. v. McClelland*, 780 P.2d 193, 105 Nev. 504.—Nova 1.

N.J.Err. & App. 1941. Where contractor agreed to renovate building for a fixed sum to be paid in installments and owners failed to make payments, and before completion of work a prospective purchaser agreed to pay balance due contractor under contract with owners, and contractor finished work and received part of sum due from prospective purchaser, owners who were not parties to prospective purchaser's contract and did not concur in it, could not escape liability for balance due under their contract on ground that contract between prospective purchaser and contractor constituted a “novation” relieving owners of further obligation.—*J. Shlainsey, Inc., v. Aitken*, 21 A.2d 764, 127 N.J.L. 246.—Nova 7.

N.J.Err. & App. 1941. Where new debtor enters into a contract with a creditor to pay obligation of old debtor, all three parties must concur in the substitution of the new debtor for the old debtor and the release of the old debtor from obligation to constitute the contract between the new debtor and the creditor a “novation”.—*J. Shlainsey, Inc., v. Aitken*, 21 A.2d 764, 127 N.J.L. 246.—Nova 7.

N.J.Err. & App. 1939. Generally, a “novation” means a new contract is substituted for an old, either by the same or different parties, the consideration mutually being the discharge of the old contract.—*Sixteenth Ward Bldg. & Loan Ass'n of Newark v. Reliable Loan, Mortgage & Security Co.*, 5 A.2d 753, 125 N.J.Eq. 340.—Nova 1.

N.J.Err. & App. 1939. To effect a “novation” there must be a clear and definite intention by all concerned that such is the purpose of the agree-

ment, since a “novation” is never presumed.—*Sixteenth Ward Bldg. & Loan Ass'n of Newark v. Reliable Loan, Mortgage & Security Co.*, 5 A.2d 753, 125 N.J.Eq. 340.—Nova 1.

N.J.Err. & App. 1939. To effect a “novation,” the intention by the obligor that the existing debt should be discharged by the new obligation must be concurred in by both debtor and creditor, but the intention may be implied from facts attending the transaction and from the conduct of the parties thereafter.—*Sixteenth Ward Bldg. & Loan Ass'n of Newark v. Reliable Loan, Mortgage & Security Co.*, 5 A.2d 753, 125 N.J.Eq. 340.—Nova 7.

N.J.Err. & App. 1939. Where mortgagee, when it agreed to refund loan, had no intention to impair its security by releasing the individual obligors, and obligors apparently had no such purpose when the request was made, the original obligation was not extinguished by “novation.”—*Sixteenth Ward Bldg. & Loan Ass'n of Newark v. Reliable Loan, Mortgage & Security Co.*, 5 A.2d 753, 125 N.J.Eq. 340.—Nova 7.

N.J.Err. & App. 1914. “Novation” means that, there being a contract in existence, some new contract is substituted therefor either between the same or different parties; the consideration mutually being the discharge of the old contract. Every novation embraces, necessarily, an accord and satisfaction; the principal distinguishing feature between them being that a novation implies the extinguishment of an existing debt by the parties thereto and its transition into a new existence between the same or different parties, whereas, an “accord and satisfaction” relates solely to the extinguishment of the debt or obligation.—*Cooke v. McAdoo*, 90 A. 302, 85 N.J.L. 692, 56 Vroom 692.

N.J.Super.A.D. 1957. A “novation” is a contract which discharges immediately a previous contractual duty or a duty to make compensation, creates a new contractual duty, and includes as a party one who neither owed the previous duty nor was entitled to its performance.—*Tolland v. Lista*, 134 A.2d 601, 46 N.J.Super. 272.—Nova 1.

N.J.Super.A.D. 1954. A “novation” is a contract.—*Gordon v. Stevens Institute of Technology*, 106 A.2d 15, 31 N.J.Super. 177.—Nova 1.

N.J.Sup. 1944. “Novation” means that there being a valid contract in existence some new contract is substituted therefor between same or different parties, the consideration mutually being the discharge of the old contract.—*Alexander v. Manza*, 36 A.2d 142, 22 N.J.Misc. 88.—Nova 1.

N.J.Sup. 1933. Where executrix in representative capacity gave note in payment of past-due note of testator, there was “novation” discharging original debt and making executrix personally liable on note.—*Trust Co. of New Jersey v. Bream*, 167 A. 163, 11 N.J.Misc. 569.—Nova 1.

N.J.Sup. 1931. “Novation” implies extinguishment of existing debt or obligation by parties thereto and its transition into new existence between same or different parties, consideration being discharge of old contract.—*New Miami Shores Corp.*

v. Duggan, 155 A. 262, 9 N.J.Misc. 620, affirmed 160 A. 515, 109 N.J.L. 220.—Nova 1.

N.J.Sup. 1931. Where maker of notes assigned contract to purchase to another, but no new contract was substituted by assignee with holders of notes, there was no "novation."—New Miami Shores Corp. v. Duggan, 155 A. 262, 9 N.J.Misc. 620, affirmed 160 A. 515, 109 N.J.L. 220.—Nova 5; Nuis 5.

N.J.Sup. 1930. Generally, to effect "novation," there must be mutual agreement among parties to old and new obligations substituting new obligation for prior one.—Hunt v. Gorenberg, 155 A. 881, 9 N.J.Misc. 463.—Nova 1.

N.J.Sup. 1930. In absence of agreement that original obligation be extinguished and new one substituted, participated in and assented to by all parties concerned, there can be no "novation."—Hunt v. Gorenberg, 155 A. 881, 9 N.J.Misc. 463.—Nova 1.

N.J.Sup. 1930. Extension agreement between mortgagee and mortgagors' grantees, not consented to by mortgagors, held not "novation."—Hunt v. Gorenberg, 155 A. 881, 9 N.J.Misc. 463.—Nova 2.

N.J.Sup. 1927. Creditor and old and new debtor must concur in substitution of new, and release of old, debtor to constitute "novation." To constitute "novation," creditor and old and new debtors must concur in substitution of new debtor for old and release of latter.—Mooney v. Newbern, 137 A. 567, 5 N.J.Misc. 585.—Nova 7.

N.J.Sup. 1927. Creditor and old and new debtor must concur in substitution of new, and release of old, debtor to constitute "novation."—Mooney v. Newbern, 137 A. 567, 5 N.J.Misc. 585.—Nova 7.

N.J.Sup. 1909. "Novation" consists of a bilateral agreement for the substitution of one obligation for another, and may take place either by the substitution of a new for an old party, or by the substitution of a new agreement between the parties, or by a change of parties and agreement at the same time.—Parsons Mfg. Co. v. Hamilton Ice Mfg. Co., 73 A. 254, 78 N.J.L. 309, 49 Vroom 309.—Nova 1.

N.J.Co.Prob.Div. 1968. To constitute "novation," there must be an agreement between creditor, old debtor, and new debtor to substitute new debtor for old debtor and to release old debtor.—In re Carpentiero's Estate, 246 A.2d 72, 102 N.J.Super. 395.—Nova 1.

N.M.Terr. 1911. Where a divorced husband and wife entered into an agreement that the wife would pay the husband's attorneys in consideration of his transferring certain property to her, and the husband's attorneys agreed to look to the wife for compensation, and the property was transferred, and the wife drew a check in favor of the attorneys, there was a complete "novation."—Dougherty v. Van Riper, 120 P. 333, 16 N.M. 600.—Nova 5.

N.Y.A.D. 1 Dept. 1937. For new agreement to constitute "novation," it must appear that parties intended to substitute new agreement for old.—

Tavs v. Wyckoff, 296 N.Y.S. 895, 251 A.D. 464.—Nova 1.

N.Y.A.D. 1 Dept. 1937. Where engineering company hired contractor to obtain government building contracts and superintend construction and executed contract whereby building company took over contract obtained through contractor's efforts engineering company, on breach of contract with contractor, could not deny liability on theory of "novation," in absence of evidence that contractor assented to substitution of building company for engineering company as respects contractor's contract.—Tavs v. Wyckoff, 296 N.Y.S. 895, 251 A.D. 464.—Nova 1.

N.Y.A.D. 1 Dept. 1909. The owner of real estate contracted for its sale for a specified amount; a certain portion of the purchase price to be paid on the execution and delivery of the agreement, another on the delivery of the deed the balance payable in three years, with interest at 5 per cent. for the first year and 6 per cent. for the balance of the term, to be secured by a purchase-money mortgage. The purchaser paid the agreed sum at the execution of the contract, and on the passing of the deed paid the vendor an amount much greater than the contract required to be paid at that time, and gave the mortgage for the balance. Held, that the receipt by the vendor at the delivery of the deed of an amount in excess of the amount agreed upon, and the acceptance of a mortgage for the balance, constituted a "novation," and that the vendor was not entitled to interest under the terms of the first contract on the excess of the amount received at the delivery of the deed over the amount agreed upon.—Crimmins v. Carlyle Realty Co., 117 N.Y.S. 434, 132 A.D. 664, affirmed 89 N.E. 1098, 196 N.Y. 532.

N.Y.A.D. 1 Dept. 1907. Where a corporation, as creditor, accepts in payment of a debt the note of a third person, together with valuable security, a "novation" is effected, and it can thereafter look only to the substituted debtor for reimbursement.—Security Warehousing Co. v. American Exch. Nat. Bank, 103 N.Y.S. 399, 118 A.D. 350.

N.Y.A.D. 1 Dept. 1905. Where, after the sale of goods to an individual, the business was incorporated, and the corporation requested the delivery of the goods under the contract to it, and made payment on account of such goods, a "novation" was effected, and the corporation was substituted for the original purchaser, as debtor of the seller. An express agreement is not requisite for a "novation" or substitution of parties to a contract, as it may be implied.—J.H. Lane & Co. v. United Oilcloth Co., 92 N.Y.S. 1061, 103 A.D. 378.

N.Y.A.D. 2 Dept. 1994. Payments accepted by lender on promissory note, secured by assets and receivables of corporate debtor, from corporate debtor's successor, following sale by executor of individual debtor's estate of all operating assets of corporate debtor, was not "novation" or discharge of estate from personal liability.—Carrowkeel Inv. Co. v. Breed, 611 N.Y.S.2d 249, 203 A.D.2d 506.—Nova 5.

N.Y.A.D. 2 Dept. 1942. Where a check is certified at the request of the payee or holder, the certification is equivalent to an "acceptance" and a complete "novation" occurs creating a "debtor and creditor relationship" between payee or holder and drawee bank, and drawer is discharged from any further liability on check. Negotiable Instruments Law, § 324.—Welch v. Bank of Manhattan Co., 35 N.Y.S.2d 894, 264 A.D. 906.—Banks 145; Bills & N 437; Nova 6.

N.Y.A.D. 2 Dept. 1904. A "novation" requires the creation of new contractual relations, as well as the extinguishment of old. There must be the consent of all the parties to the substitution, resulting in the extinction of the old obligation and the creation of a valid new one.—Held v. Caldwell-Easton Co., 89 N.Y.S. 954, 15 N.Y. Ann.Cas. 257, 97 A.D. 301.

N.Y.A.D. 3 Dept. 1993. Husband's voluntary continuation of maintenance payments to wife for almost seven years after his obligation to do so ceased was not "novation"; husband testified that he provided wife with this additional sum because he thought it was "fair thing" to do and that his children would benefit as result.—Healey v. Healey, 594 N.Y.S.2d 90, 190 A.D.2d 965.—Nova 4.

N.Y.A.D. 3 Dept. 1908. To constitute a contract of "novation," the original indebtedness or obligation must be extinguished, and a mutual agreement made among the parties to the old and new obligations, whereby the new is substituted for the old.—Inman v. F.N. Burt Co., 108 N.Y.S. 210, 124 A.D. 73, affirmed 88 N.E. 1121, 195 N.Y. 558.

N.Y.A.D. 4 Dept. 1943. Where decedent, prior to his death, executed memorandum directing employer to pay money owing to decedent either to decedent or his wife or survivor, and employer placed account in name of decedent and his wife, transaction constituted a "novation", wife became a "donee beneficiary", her rights accrued upon making of new contract and, upon decedent's death, wife as survivor was entitled to moneys owing by employer.—In re Fairbairn's Estate, 40 N.Y.S.2d 280, 265 A.D. 431, appeal denied In re Fairbairn's Will., 42 N.Y.S.2d 576, 266 A.D. 821.—Nova 1.

N.Y.A.D. 4 Dept. 1916. Where a tire company knew that a garage business was transferred to new proprietors, and accepted them as the persons with whom it would fulfill its contract intending to release the old proprietor from further performance of the contract, and accept the new in his place as parties, there was a "novation."—Michelin Tire Co. v. Robbins, 159 N.Y.S. 256, 173 A.D. 955.

N.Y.Sup. 1948. To constitute a "novation", the original obligation must be extinguished, and there must be a mutual agreement among the parties to the old obligation and the new whereby the new obligation is substituted for the old.—Acetate Box Corp. v. Johnson, 80 N.Y.S.2d 134, 193 Misc. 54.—Nova 1.

N.Y.Sup. 1943. To constitute contract of "novation", original indebtedness or obligation must be extinguished and there must be a mutual agreement

among parties to old and new obligation, whereby new obligation is substituted for prior one.—General Meter Service Corp. v. Manufacturers Trust Co., 48 N.Y.S.2d 721, 182 Misc. 184, affirmed 48 N.Y.S.2d 455, 267 A.D. 992.—Nova 4.

N.Y.Sup. 1924. Where defendant bank agreed with its depositor and with plaintiff bank to substitute plaintiff as the owner of depositor's drafts entered for collection, there was a novation, and defendant was bound to remit the proceeds of the drafts to plaintiff; the statement in plaintiff's proof of claim against bankrupt depositor that such drafts had been "assigned" to it being at most an admission against interest, which could be explained, "assignment" being used as equivalent to "novation."—Bank of the U.S. v. Irving Nat. Bank, 203 N.Y.S. 906, 122 Misc. 815.

N.Y.Sup. 1908. The doctrine of "novation" is derived from the civil law, and a novation can neither be founded on an original claim, which was illegal, nor, under the civil law, be made by one incapable of contracting.—Wadsworth v. Board of Sup'r's of Livingston County, 115 N.Y.S. 8, reversed 124 N.Y.S. 334, 139 A.D. 832.

N.Y.Sup. 1902. It is a necessary incident of a "novation" that the old debt shall have been destroyed by the new arrangement. The discharge of the old debt must be contemporaneous with and result from the consummation of the arrangement with the new debtor.—Bowen v. Young, 75 N.Y.S. 1027, 37 Misc. 547.

N.Y.Sup.App.Term 1942. Plaintiff's pleading of an offset of plaintiff's claim against defendant interposed in an action against plaintiff by defendant's surety did not effect a "novation" which discharged the defendant.—McDonald v. Cluff & Pickering, 35 N.Y.S.2d 380.—Nova 1.

N.Y.Sup.App.Term 1923. To constitute a contract of "novation," the original indebtedness or obligation must be extinguished and a new one substituted by mutual agreement of all the parties to the original and to the new obligation.—Done-more Clothing Co. v. Shapiro, 202 N.Y.S. 258.—Nova 1.

N.Y.Co.Ct. 1936. Requisites of a "novation" are previous valid obligation, agreement of all parties to new contract, extinguishment of old contract, and valid new contract.—Taggart v. Graby, 286 N.Y.S. 382, 159 Misc. 155.—Nova 1.

N.Y.Mun.Ct. 1939. To constitute a "novation" the original obligation must be extinguished and a mutual agreement made among the parties to the old and new obligations whereby the new is substituted for the old.—Brooklyn Packing Co. v. Zasloff, 18 N.Y.S.2d 443.—Nova 1.

N.Y.Mun.Ct. 1939. A mere order to pay money drawn by debtor on third party in favor of creditor will not work a "novation", but the creditor must agree to release debtor and look to third party for creditor's demand and third party must bind himself to pay.—Brooklyn Packing Co. v. Zasloff, 18 N.Y.S.2d 443.—Nova 7.

N.Y.Mun.Ct. 1939. A true "novation" operates to take contractual obligation from one person and place it upon another by agreement of original parties and the person assuming the obligation.—*Brooklyn Packing Co. v. Zasloff*, 18 N.Y.S.2d 443.—Nova 5.

N.Y.Mun.Ct. 1939. A "novation" may not be presumed, but must be established by clear proof that the old obligation was extinguished and new party assumed the obligation of the former contract.—*Brooklyn Packing Co. v. Zasloff*, 18 N.Y.S.2d 443.—Nova 12.

N.Y.Mun.Ct. 1939. Where attorney in connection with sale of a store entered into written escrow agreement with buyer and seller under which attorney held money to be applied to payment of obligations owed by seller to creditors as indicated by seller's affidavit which set forth amount of the creditors' claims, the attorney was not personally liable for amount of claim of a creditor who presented claim for amount in excess of that shown by the seller's affidavit to be owed to the creditor, on ground that a "novation" existed.—*Brooklyn Packing Co. v. Zasloff*, 18 N.Y.S.2d 443.—Nova 1.

N.Y.Mun.Ct. 1937. Consent to the assignment of a lease forbidding assignment without the landlord's written consent did not release the original tenants from liability for rent or constitute a "surrender," nor was there any "novation" as matter of law.—*Durand v. Lipman*, 1 N.Y.S.2d 468, 165 Misc. 615.—Land & Ten 208(1).

N.Y.Mun.Ct. 1933. Vendor's conveyance to principal who assumed mortgage constituted "novation," releasing agent from liability for mortgage under executory contract which agent signed without disclosing principal.—*Voss v. Luzzo*, 267 N.Y.S. 403, 149 Misc. 65.—Nova 5.

N.Y.City Ct. 1933. Acceptance by holder of notes of assignment of mortgage executed by one of indorsers and holder's agreement with such indorser to extend time of payment and written acknowledgment stating that amount due holder from indorser under extension agreement included sum due on note did not constitute "novation" and discharge of maker of notes.—*Spiro v. Reade Pure Food*, 267 N.Y.S. 794, 149 Misc. 601.—Nova 1.

N.Y.City Ct. 1933. "Novation" requires that there be extinguishment of original obligation, and executed mutual covenant among parties to both old and new obligation, whereby new is substituted for old, and consent of all parties to substitution.—*Spiro v. Reade Pure Food*, 267 N.Y.S. 794, 149 Misc. 601.—Nova 1.

N.C. 1989. "Novation" occurs when parties to contract substitute new agreement for old one.—*Whittaker General Medical Corp. v. Daniel*, 379 S.E.2d 824, 324 N.C. 523, rehearing denied 381 S.E.2d 792, 325 N.C. 231, rehearing denied 384 S.E.2d 531, 325 N.C. 277.—Nova 4.

N.C. 1989. Intent of parties governs in determining whether there is "novation"; if parties do not say whether new contract is being made, courts will look to words of contracts and surrounding

circumstances to determine whether second contract supersedes first.—*Whittaker General Medical Corp. v. Daniel*, 379 S.E.2d 824, 324 N.C. 523, rehearing denied 381 S.E.2d 792, 325 N.C. 231, rehearing denied 384 S.E.2d 531, 325 N.C. 277.—Nova 7.

N.C. 1965. "Novation" is substitution of new contract for old one thereby extinguished.—*Carolina Equipment & Parts Co. v. Anders*, 144 S.E.2d 252, 265 N.C. 393.—Nova 1.

N.C. 1964. A "novation" means a substitution of a new contract or obligation for an old one which is thereby extinguished.—*Wilson v. McClenney*, 136 S.E.2d 569, 262 N.C. 121, appeal after remand 152 S.E.2d 529, 269 N.C. 399.—Nova 1.

N.C. 1959. "Novation" is a substitution of a new contract or obligation for an old one which is thereby extinguished and the essential requisites of a novation are a previous valid obligation, agreement of all parties to new contract, extinguishment of old contract, and validity of new contract, and transaction must have been intended to constitute a novation.—*Tomberlin v. Long*, 109 S.E.2d 365, 250 N.C. 640.—Nova 1.

N.C. 1941. Ordinarily, in order to constitute a "novation" the transaction must have been so intended by the parties, and in the absence of evidence that it was so intended, giving of note or additional security would not have effect of changing nature of original obligation or deprive creditor of remedies available.—*Growers Exchange v. Hartman*, 16 S.E.2d 398, 220 N.C. 30.—Nova 1.

N.C. 1930. Acceptance of additional security and extension of time did not constitute "novation."—*Walters v. Rogers*, 151 S.E. 188, 198 N.C. 210.—Nova 4.

N.C. 1930. Acceptance of additional security and extension of time did not constitute "novation," releasing surety on note, where payee reserved rights against surety.—*Walters v. Rogers*, 151 S.E. 188, 198 N.C. 210.—Princ & S 105(3).

N.C. 1922. "Novation" is a transaction whereby a debtor is discharged from his liability to his original creditor by contracting a new obligation in favor of a new creditor by the order of the original creditor.—*McNeill v. Mays Mfg. Co.*, 114 S.E. 698, 184 N.C. 421.—Nova 1.

N.C.App. 1994. Management agreement under which franchisees were to sell franchise to prospective purchaser constituted "novation" as to franchisees' agreement with franchisor, where franchisor was aware of negotiations between franchisees and prospective purchaser, purpose of management agreement was to relieve franchisees of further liability, franchisor acknowledged receipt of executed management agreement and check payable to franchisor, franchisor negotiated that check and applied it towards franchisees' accounts receivable balance, and prospective purchaser operated franchise for several weeks.—*Westport 85 Ltd. Partnership v. Casto*, 450 S.E.2d 505, 117 N.C.App. 198.—Nova 7.

N.C.App. 1994. A “novation” occurs when parties to contract substitute new agreement for old one.—*Forsyth Mun. Alcoholic Beverage Control Bd. v. Folds*, 450 S.E.2d 498, 117 N.C.App. 232.—Nova 4.

N.C.App. 1987. Under North Carolina law, “substitution” and “novation” are one and the same, in that both require substitution of a new contract for an old one, which is thereby extinguished; substitution may be effected only by acts or words wholly inconsistent with material terms of old contract, and whether new contract changes or supercedes prior agreement depends on parties’ intention as ascertained from the instrument, parties’ relation, and surrounding circumstances.—*Zinn v. Walker*, 361 S.E.2d 314, 87 N.C.App. 325, review denied 366 S.E.2d 871, 321 N.C. 747.—Nova 4.

N.C.App. 1987. Evidence did not support a real estate broker’s claim, that his conduct and the conduct of real estate developer with whom he had entered an offer to purchase agreement, after that agreement was entered into, resulted in a “novation”; only financing terms and means by which broker and developer obtained title to property differed from the original agreement, resulting in a “modification” rather than a “substitution” or “novation.”—*Zinn v. Walker*, 361 S.E.2d 314, 87 N.C.App. 325, review denied 366 S.E.2d 871, 321 N.C. 747.—Nova 4.

N.C.App. 1975. “Novation” is the substitution of new contract for an existing valid contract by agreement of the parties; ordinarily the parties must intend that the new agreement should be in substitution for, and in extinguishment of, the old.—*Allied Personnel of Raleigh, Inc. v. Alford*, 212 S.E.2d 46, 25 N.C.App. 27.—Nova 1.

N.C.App. 1974. A “novation” is generally described as substitution of a new contract for an existing valid contract by agreement of the parties.—*Port City Elec. Co. v. Housing, Inc.*, 209 S.E.2d 297, 23 N.C.App. 510, certiorari denied 211 S.E.2d 795, 286 N.C. 413.—Nova 1.

N.D. 1996. “Novation” is made by substitution of new debtor in place of old one with intent to release old debtor; there must be intent to extinguish old obligation, mutual assent, and sufficient consideration. NDCC 9-13-10, subd. 2.—*Matter of Estate of Murphy*, 554 N.W.2d 432.—Nova 1, 5.

N.D. 1992. When contracting party seeks approval of other original party for release, and substitutes new party in its place, transaction is no longer called an assignment; instead, it is called a “novation.”—*Rosenberg v. Son, Inc.*, 491 N.W.2d 71.—Nova 4.

N.D. 1989. “Novation” is created by substitution or new collateral between same parties with intent to extinguish old obligation.—*Butler v. Roberts*, 437 N.W.2d 839.—Nova 3.

N.D. 1989. For “novation”, parties must intend to extinguish old obligation, there must be mutual assent and there must be sufficient consideration.—*Butler v. Roberts*, 437 N.W.2d 839.—Nova 1, 7.

N.D. 1942. Where sureties on bond securing county deposit gave written consent to resolution of board of county commissioners outlining plan to close receivership of bank, under which county released bank from part of its liability and accepted in lieu thereof trust certificates issued by depositors’ committee, but did not release sureties for remainder of deposits, and the sureties participated in carrying out the plan, the sureties could not contend that the plan resulted in a “novation” and that the sureties were thereby released. Comp. Laws 1913, § 5830, subd. 2.—*Hettinger County v. Trousdale*, 5 N.W.2d 417, 72 N.D. 203.—Dep & Escr 37.

Ohio 1987. Reamortization agreement extending time for payment, adding principal and increasing amount of interest owed on promissory note secured by mortgage was ordinary rescheduling of late debt, rather than “novation” intended as substitution for original note; agreement stated that covenants and conditions of note and mortgage remained in full force and effect and that validity, priority and enforceability of mortgage or note would not be impaired thereby.—*Federal Land Bank of Louisville v. Taggart*, 508 N.E.2d 152, 31 Ohio St.3d 8, 31 O.B.R. 6.—Nova 4.

Ohio App. 1 Dist. 1947. Unless a creditor has agreed to accept one partner as solely liable for indebtedness of partnership to him, thus creating a “novation,” such creditor may maintain an action against all partners as such for the indebtedness, even though one partner has by contract with the others, taken all assets of the partnership and assumed all its liabilities.—*Reed v. Ramey*, 80 N.E.2d 250, 82 Ohio App. 171, 37 O.O. 529, 50 Ohio Law Abs. 596.—Partners 236, 237.

Ohio App. 1 Dist. 1930. The requisites of a “novation” are a valid obligation to be displaced, the consent of all parties to the substitution, a sufficient consideration, the extinction of the old obligation, and the creation of a valid new one.—*Garrett v. Lishawa*, 172 N.E. 845, 36 Ohio App. 129, 8 Ohio Law Abs. 718.—Nova 1.

Ohio App. 1 Dist. 1930. In action by contractor for particular work against owners, evidence held insufficient to establish “novation” substituting general contractor’s obligation for that of owners.—*Garrett v. Lishawa*, 172 N.E. 845, 36 Ohio App. 129, 8 Ohio Law Abs. 718.—Contracts 350(1); Nova 12.

Ohio App. 2 Dist. 1996. “Novation” of contract typically arises in situations where a third party is substituted for an obligation of one of the principals to a preexisting contract; however, there can be a novation where the parties to a contract make a subsequent agreement.—*Snell v. Salem Ave. Assoc.*, 675 N.E.2d 555, 111 Ohio App.3d 23.—Nova 4.

Ohio App. 2 Dist. 1950. A “novation” is the substitution of the new obligation for an old one, which is thereby extinguished.—*Baker v. All States Life Ins. Co.*, 96 N.E.2d 787, 46 O.O. 308, 58 Ohio Law Abs. 366.—Nova 1.

Ohio App. 2 Dist. 1950. A "novation" may arise where debtor and creditor remain the same, but a new debt takes the place of an old one.—*Baker v. All States Life Ins. Co.*, 96 N.E.2d 787, 46 O.O. 308, 58 Ohio Law Abs. 366.—Nova 4.

Ohio App. 5 Dist. 1926. Extinguishment of pre-existing obligation is necessary to "novation."—*Grant-Holub Co. v. Goodman*, 156 N.E. 151, 23 Ohio App. 540, 6 Ohio Law Abs. 470.—Nova 1.

Ohio App. 5 Dist. 1926. Alleged assumption of debt by another without showing creditor's assent to substitution of new debtor held not to constitute "novation."—*Grant-Holub Co. v. Goodman*, 156 N.E. 151, 23 Ohio App. 540, 6 Ohio Law Abs. 470.—Nova 7.

Ohio App. 5 Dist. 1926. New contract agreed to by all parties is necessary for "novation."—*Grant-Holub Co. v. Goodman*, 156 N.E. 151, 23 Ohio App. 540, 6 Ohio Law Abs. 470.—Nova 7.

Ohio App. 8 Dist. 1984. "Novation" is, in effect, a new contract between one of the original parties to a previous contract and a new party who is taken in by way of substitution.—*American Vineyards Co., Inc. v. Wine Group*, 486 N.E.2d 854, 20 Ohio App.3d 366, 20 O.B.R. 471.—Nova 5, 6.

Ohio App. 9 Dist. 1940. Where bank stockholders transferred their stock to their minor sons more than a year prior to insolvency of bank and no objection was made during that period by bank or its creditors, a "novation" was accomplished and stockholders were relieved from superadded liability upon stock. Const. art. 13, § 3.—*State ex rel. Squire v. Schulman*, 47 N.E.2d 913, 37 Ohio Law Abs. 296.—Banks 48(1); Nova 1.

Oklahoma. 1946. A "novation" may be effected by substitution of a new obligation between same parties with intent to extinguish old obligation, substitution of a new debtor with intent to release old debtor, or substitution of a new creditor with intent to transfer the right of old creditor to new creditor.—*State ex rel. Com'r's of Land Office v. Pitts*, 173 P.2d 923, 197 Okla. 644, 1946 OK 303.—Nova 4, 5, 6.

Oklahoma. 1946. Mortgagee's failure to notify mortgagor of maturity of interest or principal after sale of mortgaged land by mortgagor and assumption of mortgage by his grantee did not amount to a "novation" or relieve mortgagor from liability for the debt secured.—*State ex rel. Com'r's of Land Office v. Pitts*, 173 P.2d 923, 197 Okla. 644, 1946 OK 303.—Mtg 283(2); Nova 5.

Oklahoma. 1940. Where extension agreement between mortgagor's grantee and mortgagee's assignee did not extinguish the old mortgage, which by the terms of the extension agreement was to remain in full force and effect, there was no "novation" because there was no extinguishment of the old contract.—*Erwin v. Breese*, 109 P.2d 507, 188 Okla. 391, 1940 OK 460.—Nova 1.

Oklahoma. 1940. Where a creditor and debtor enter into an agreement with a third person whereby

creditor is to accept obligations of third person to debtor in payment of debtor's obligation to creditor, a "novation" is created, but the creditor is not obliged to accept claims against the third person, unless they are valid and enforceable.—*Oil Field Gas Co. v. International Supply Co.*, 103 P.2d 91, 187 Okla. 262, 1940 OK 250.—Nova 1.

Oklahoma. 1937. Lessee's assignment of lease on hotel to assignees who went into possession and paid rent held not "novation" by which assignees were substituted for lessee in lease contract, where lessors did not enter into assignment contract and did not agree to release lessee from lease contract.—*James v. Johnson*, 69 P.2d 51, 180 Okla. 106, 1937 OK 227.—Nova 1.

Oklahoma. 1935. Previous valid obligation, agreement of all parties to new contract, extinguishment of old obligation, and validity of new one held essential to constitute "novation."—*Lincoln Nat. Life Ins. Co. v. Rider*, 42 P.2d 842, 171 Okla. 262, 1935 OK 317.—Nova 1.

Oklahoma. 1928. To constitute "novation," there must be extinguishment of previous valid obligation, and agreement of all parties to new valid contract.—*Alkire v. Acuff*, 272 P. 405, 134 Okla. 43, 1928 OK 170.—Nova 1.

Oklahoma. 1919. In every "novation" it is essential that the new contract in which there is a substituted debtor shall be valid; that all parties thereto must agree to the substitution of the new contract and debtor, and that the old contract be a valid one and extinguished by the giving of a new contract. When such is the case, the substituted obligation is a new contractual relation and one in which the old obligation is in no way concerned.—*Burford v. Hughes*, 182 P. 689, 75 Okla. 150, 1919 OK 215.

Oklahoma. 1917. In the absence of evidence to the contrary, the substitution of new notes and mortgage on personal property in lieu of former notes secured by mortgage on same property, such new notes and mortgage being signed by a different obligor, the old notes being surrendered and the mortgage canceled of record, will be held to constitute a "novation" and to extinguish the former indebtedness and the lien created by virtue of the former mortgage.—*Ambrister v. Dalton*, 168 P. 231, 66 Okla. 158, 1917 OK 483.

Oklahoma. 1917. To constitute a written valid contract of "novation," the instrument must be executed by at least three parties, the creditor, his immediate debtor, and intended new debtor, each of whom must have the legal capacity to execute such contract.—*Fuller v. Stout*, 166 P. 898, 66 Okla. 15, 1917 OK 370, L.R.A. 1918B,108.

Oklahoma. 1916. In order to show a "novation" of a contract, there must be a substitution of the new and a release of the old tenant by the agreement of the parties or the existence of such facts and circumstances which create a surrender and acceptance of the leased premises by operation of law.—*McFarland v. Mayo*, 162 P. 753, 65 Okla. 28, 1916 OK 775, L.R.A. 1917C,901.

Okl. 1915. "Novation" is the substitution by mutual agreement of one debtor or one creditor for another whereby the old debt is extinguished, or the substitution of a new debt or obligation for an existing one, which is thereby extinguished.—Gaar, Scott & Co. v. Rogers, 148 P. 161, 46 Okla. 67, 1915 OK 190.—Nova 1.

Or. 1995. To constitute a "novation," discharge of old debt must be contemporaneous with formation of agreement that new debtor will pay creditor and result directly from that discharge.—Eagle Industries, Inc. v. Thompson, 900 P.2d 475, 321 Or. 398.—Nova 1.

Or. 1956. "Novation" is the substitution by mutual agreement of one debtor or of one creditor for another, whereby the old debt is extinguished, or the substitution of a new debt or obligation for an existing one, which is thereby extinguished.—Credit Bureaus Adjustment Dept., Inc. v. Cox Bros., 295 P.2d 1107, 207 Or. 253, 61 A.L.R.2d 750.—Nova 1.

Or. 1941. In action against buyer's transferee to recover balance due on sale of truck and trailer, record did not establish a "Novation" where it did not appear that seller agreed to release buyer from liability and accept transferee as the debtor in place of the buyer.—First Nat. Bank of Portland v. Ayott, 110 P.2d 243, 166 Or. 99.—Nova 5.

Or. 1934. Contract for purchase of bank stock in which buyer agreed to also buy stock of third person not party to contract did not amount to "novation" as regards rights of third person.—Haines v. Pacific Bancorporation, 30 P.2d 763, 146 Or. 407.—Nova 1.

Or. 1934. Theory of "novation" is that new debtor contracts with old debtor that he will pay debt, and also to same effect with creditor, while creditor agrees to accept new debtor for old.—Haines v. Pacific Bancorporation, 30 P.2d 763, 146 Or. 407.—Nova 1.

Or. 1933. "Novation" is substitution of new for former debt, and constitutes method of extinguishing debt.—Abrahamson v. Brett, 21 P.2d 229, 143 Or. 14.—Nova 1.

Or. 1933. Assignment of lease with consent of lessor held not to constitute "novation" extinguishing lessee's liability for rent under original lease.—Abrahamson v. Brett, 21 P.2d 229, 143 Or. 14.—Nova 1.

Or. 1933. Receipt of rent by lessor from assignee of lease held not "novation" of contract, but assertion of right accruing to lessor as incident of assignment.—Abrahamson v. Brett, 21 P.2d 229, 143 Or. 14.—Nova 1.

Or. 1915. A "novation" is a substitution of one obligation for another, and occurs by the exchange of a new party for an old one, or by commutation of a new agreement between the old parties, or it may be a simultaneous change both of parties and of agreement.—Clarke Woodward Drug Co. v. Hot Lake Sanitorium Co., 146 P. 135, 75 Or. 234.

Or. 1907. "Novation" is defined as the substitution of one obligation for another, and takes place

either by substitution of a new for an old party or by the substitution of a new agreement between the old parties, or it may be by a change both of parties and agreement at the same time. One of the essential elements to a "novation" is that there should have been an extinguishment of the old debt, and another is that there should have been a mutual agreement between all of the parties that the old debt should become the obligation of a new debtor.—Miles v. Bowers, 90 P. 905, 49 Or. 429.

Pa. 1970. Where supplement to original agreement incorporated in trial court's decree in party's action for violation of noncompetition provision of employment agreement made only minor changes in the original agreement and could not be read without reference to the original agreement, the supplemental agreement did not constitute a "novation" of the original agreement and did not deprive trial court of jurisdiction to enforce the agreement.—Advanced Management Research, Inc. v. Emanuel, 266 A.2d 673, 439 Pa. 385.—Nova 1.

Pa. 1961. Essentials of a "novation" are displacement and extinction of a valid contract, substitution for it of a valid new contract, either between the same parties or by introduction of a new creditor or debtor, a sufficient legal consideration for the new contract, and consent of the parties.—Yoder v. T. F. Scholes, Inc., 173 A.2d 120, 404 Pa. 242.—Nova 1.

Pa. 1949. The essentials of a "novation" are the extinction of the prior contract and the substitution by the new contract, supported by a sufficient consideration and the consent of the parties.—Lamb v. Allegheny County Inst. Dist., 69 A.2d 117, 363 Pa. 66.—Nova 1.

Pa. 1949. A "novation" is a contract that discharges immediately a previous contractual duty to make compensation, and creates a new contractual duty, and includes as a party, one who neither owed the previous duty nor was entitled to its performance.—Joseph Melnick Bldg. & Loan Ass'n, to Use of Melnick, v. Melnick, 64 A.2d 773, 361 Pa. 328.—Nova 1.

Pa. 1942. Where mortgagee entered into an extension agreement with grantee of mortgaged premises to whom conveyance was made subject to mortgage and there was no agreement that original obligation of the mortgagor should be extinguished and a new one substituted, extension agreement did not constitute a "novation" affecting liability of the mortgagor, but acceptance of obligation of a grantee would be considered as additional security.—In re Smith's Estate, 23 A.2d 450, 343 Pa. 539.—Nova 1.

Pa. 1934. To constitute valid "novation," there must be agreement of all parties to new contract, extinguishing old debt, and substituting new debt.—Wheatland Tube Co. v. McDowell & Co., 176 A. 217, 317 Pa. 295.—Nova 1.

Pa. 1934. Alleged oral agreement between corporation and former manager by which third party's indebtedness to corporation would be extinguished by cancellation of corporation's obligation to for-

mer manager held insufficient to establish “novation,” where third party was not party to agreement.—*Wheatland Tube Co. v. McDowell & Co.*, 176 A. 217, 317 Pa. 295.—Nova 7.

Pa. 1934. That former manager’s alleged assignee of contract under which corporation was obligated to former manager directed corporation by letter to extinguish third party’s indebtedness to corporation by cancellation of corporation’s obligation to former manager did not establish “novation.”—*Wheatland Tube Co. v. McDowell & Co.*, 176 A. 217, 317 Pa. 295.—Nova 12.

Pa. 1934. That former manager’s alleged assignee of contract under which corporation was obligated to former manager had understanding with assistant to president of corporation that third party’s indebtedness to corporation would be extinguished by cancellation of corporation’s obligation to former manager did not establish “novation,” where it did not appear that assistant to president was authorized to enter into such understanding.—*Wheatland Tube Co. v. McDowell & Co.*, 176 A. 217, 317 Pa. 295.—Nova 12.

Pa. 1932. Essential elements of “novation” are, displacement and extinction of prior contract, substitution of new contract, sufficient consideration, and consent of parties.—*Taylor v. Stanley Co. of America*, 158 A. 157, 305 Pa. 546.—Nova 1.

Pa. 1917. The essentials of a “novation” are the displacement and extinguishment of a former contract, and the substitution of a new agreement, a sufficient consideration therefor, and consent of the parties thereto.—*Jones v. Commonwealth Casualty Co.*, 100 A. 450, 255 Pa. 566.

Pa. 1895. “Novation” is a substitution of a new debt for an old one, or of a new debt instead of a former one. It is recognized in the law as a mode for the extinguishment of debt.—*McCartney v. Kipp*, 33 A. 233, 171 Pa. 644.

Pa.Super. 1997. Doctrine of “novation,” or substituted contract, applies if prior contract has been displaced, if new valid contract has been substituted in its place, if there exists sufficient legal consideration for new contract, and if parties consented to extinction of old and replacement by new contract.—*First Lehigh Bank v. Haviland Grille, Inc.*, 704 A.2d 135.—Nova 1.

Pa.Super. 1996. Requisites of “novation” are: displacement and extinction of existing valid contract; substitution for it of valid new contract, whereby new party replaces one of original parties; sufficient legal consideration for new contract; and agreement or consent of all parties to new contract.—*Refuse Management Systems, Inc. v. Consolidated Recycling and Transfer Systems, Inc.*, 671 A.2d 1140, 448 Pa.Super. 402.—Nova 1.

Pa.Super. 1996. Both a “substituted contract” and “novation” are affirmative defenses that must be raised under heading new matter in defendant’s responsive pleading, or defenses will be deemed waived. Rules Civ.Proc., Rule 1032(a), 42 Pa.C.S.A.—*Refuse Management Systems, Inc. v. Con-*

*solidated Recycling and Transfer Systems, Inc.*, 671 A.2d 1140, 448 Pa.Super. 402.—Nova 11.

Pa.Super. 1984. Required essentials of a “novation” are displacement and extinction of a valid contract, substitution for it of a valid new contract, sufficient legal consideration for new contract, and consent of parties.—*Buttonwood Farms, Inc. v. Carson*, 478 A.2d 484, 329 Pa.Super. 312.—Nova 1, 4, 7.

Pa.Super. 1943. The elements of a “novation” are essentially the same as in an original transaction and include a meeting of the minds of all parties as to the substitution of a new obligation for the old.—*Peoples Nat. Bank of Ellwood City v. Weingartner*, 33 A.2d 469, 153 Pa.Super. 40.—Nova 1.

Pa.Super. 1939. Generally, a “novation” requires a previous valid obligation, the agreement of all the parties to the new contract, the extinguishment of the old contract, and the validity of the new one.—*Kritz v. Axler*, 3 A.2d 943, 134 Pa.Super. 120.—Nova 1.

Pa.Super. 1939. Where seller under written contract sold store fixtures to buyer and subsequently for promotion of some interest of buyer executed another contract purporting to sell same fixtures to buyer’s son, and it was not shown that seller accepted obligation of son to pay for fixtures, obligation to pay for fixtures was not discharged either by “novation” or otherwise.—*Kritz v. Axler*, 3 A.2d 943, 134 Pa.Super. 120.—Nova 7.

Pa.Super. 1939. In action on written contract to recover for sale of store fixtures, whether subsequent contract between seller and buyer’s son, purporting to sell same fixtures, was a “novation” extinguishing original contract, was for the judge sitting as a jury.—*Kritz v. Axler*, 3 A.2d 943, 134 Pa.Super. 120.—Nova 13.

Pa.Super. 1937. Essential elements of a “novation” are previous valid obligation, agreement of all parties to new contract, extinguishment of old contract, and validity of new one, and burden is upon one who alleges novation to establish it by proper proof.—*New Eureka Amusement Co. v. Rosinsky*, 191 A. 412, 126 Pa.Super. 444.—Nova 1.

Pa.Super. 1937. Agreement whereby lessor did not waive any of rights under lease, but who merely stated generally that “he would go along” with lessee until lessee was able to pay rent, held not a “novation” so as to prevent lessor from exercising his rights under lease.—*New Eureka Amusement Co. v. Rosinsky*, 191 A. 412, 126 Pa.Super. 444.—Nova 1.

Pa.Super. 1936. Where creditor accepts third party’s note in payment of debt, “novation” takes place, but, in absence of some evidence that note was taken in satisfaction of debt, mere acceptance of note does not constitute novation but will be considered as additional security.—*Le Bar v. Patterson*, 187 A. 278, 123 Pa.Super. 491.—Nova 5.

Pa.Super. 1936. Where vendor sold realty subject to payment of judgment, and judgment creditor revived judgment by amicable scire facias against

terre tenants only, and five years later, while scire facias against original debtor was pending, revived latter judgment against terre tenants by amicable scire facias signed only by terre tenants as defendants, revival held not to constitute "novation" substituting the revived judgment for the original judgment, in absence of special agreement to extinguish original debtor's liability.—*Le Bar v. Patterson*, 187 A. 278, 123 Pa.Super. 491.—Nova 5.

Pa.Super. 1935. Promise of landlord to reduce to sum certain amount of rent payable under terms of written lease is binding where made for consideration and constitutes a "novation."—*Decker v. Richard J. Seltzer, Inc.*, 176 A. 29, 116 Pa.Super. 58.—Nova 4.

Pa.Super. 1935. Agreement of landlord that tenant might remain in possession and pay rent in accordance with his ability to pay was not a "novation" so as to prevent landlord from levying on tenant's goods for full amount of rent due under written lease without notice to tenant, since agreement was not for definite rental or for consideration advantageous to landlord and did not create a contract.—*Decker v. Richard J. Seltzer, Inc.*, 176 A. 29, 116 Pa.Super. 58.—Nova 4.

R.I. 1959. "Novation" is the substitution of a new obligation for an old one which is thereby extinguished and it requires the assent of all parties to both the old and new obligations.—*Philip Carey Mfg. Co. v. General Products Co.*, 151 A.2d 487, 89 R.I. 136.—Nova 1.

S.C. 1989. "Novation" is mutual agreement between all parties concerned for discharge of valid existing obligation by substitution of new valid obligation on part of debtors.—*Adams v. B & D, Inc.*, 377 S.E.2d 315, 297 S.C. 416.—Nova 1.

S.C. 1973. A "novation" is a mutual agreement between the parties concerned for the discharge of valid existing obligation by the substitution of a new valid obligation on part of debtor.—*Superior Auto. Ins. Co. v. Maners*, 199 S.E.2d 719, 261 S.C. 257.—Nova 1.

S.C. 1973. Modifying agreement which consolidated amounts due under two different prior notes into one sum and which provided that it was a modification of payments only and that all other features of note and mortgage were to remain as originally entered into was a "modification" and not a "novation" so that debt arose as of date of original note and not as of the date the modifying agreement was entered.—*Superior Auto. Ins. Co. v. Maners*, 199 S.E.2d 719, 261 S.C. 257.—Nova 1.

S.C. 1934. "Novation" is substitution by mutual agreement of one debtor or one creditor for another whereby the old debt is extinguished, or substitution of new debt or obligation for existing one which is thereby extinguished.—*Greenwood Cotton Mill v. Pace*, 174 S.E. 473, 172 S.C. 531.—Nova 1.

S.C. 1934. Where bank sold mortgage and later foreclosed mortgage and bought land for a small sum which it retained and executed new mortgage to buyer of original mortgage of which bank had guaranteed payment, "novation" did not occur,

since there was no agreement to substitute new mortgage of bank for original mortgage, and lien of original mortgage was prior to lien of judgment recorded before new mortgage.—*Greenwood Cotton Mill v. Pace*, 174 S.E. 473, 172 S.C. 531.—Nova 1.

S.C. 1931. To effect "novation" there must be agreement between parties.—*Ophuls & Hill v. Carolina Ice & Fuel Co.*, 158 S.E. 824, 160 S.C. 441.—Nova 7.

S.C. 1926. Substitution of one debtor for another or new obligation for old is "novation."—*Callaham v. Ridgeway*, 135 S.E. 646, 138 S.C. 10.—Nova 1.

S.C. 1926. "Novation" requires previous valid obligation, agreement of parties to new contract, and extinguishment of old.—*Callaham v. Ridgeway*, 135 S.E. 646, 138 S.C. 10.—Nova 1.

S.C. 1926. Purchaser's assumption of mortgage debt and mortgagee's release of mortgagor held to constitute a "novation."—*Callaham v. Ridgeway*, 135 S.E. 646, 138 S.C. 10.—Nova 5.

S.C. 1924. A "novation" of a contract is a mutual agreement between all parties concerned for discharge of a valid existing obligation by substitution of a new valid obligation on debtor's part.—*Smith Bros. Grain Co. v. Adluh Milling Co.*, 122 S.E. 868, 128 S.C. 434.—Nova 1.

S.C.App. 2000. A "novation" substitutes a new obligation for an old one which is extinguished.—*Parker v. Shecut*, 531 S.E.2d 546, 340 S.C. 460, rehearing denied, and certiorari granted, reversed 562 S.E.2d 620, 349 S.C. 226.—Nova 4.

S.C.App. 2000. An addendum that modified a pre-existing agreement, but did not extinguish it, was not a "novation."—*Parker v. Shecut*, 531 S.E.2d 546, 340 S.C. 460, rehearing denied, and certiorari granted, reversed 562 S.E.2d 620, 349 S.C. 226.—Nova 1.

S.C.App. 1990. "Novation" is an agreement between all parties concerned for the substitution of a new obligation between the parties with the intent to extinguish the old obligation.—*Wayne Dalton Corp. v. Acme Doors, Inc.*, 394 S.E.2d 5, 302 S.C. 93.—Nova 4.

S.C.App. 1988. "Novation" is defined as mutual agreement between all concerned parties for discharge of valid existing obligation by substitution of new valid obligation on part of debtor.—*Pee Dee State Bank v. Prosser*, 367 S.E.2d 708, 295 S.C. 229.—Nova 1.

S.D. 1986. "Novation," which is substitution by contract of new obligation for existing one, may be accomplished by substituting new debtor in place of old one, with intent to release old debtor from his obligation. SDCL 20-7-5, 20-7-7.—*Haggar v. Olfert*, 387 N.W.2d 45.—Nova 5.

S.D. 1986. Essential elements of "novation" are previous valid obligation, agreement of all parties to substitution under new contract based on sufficient consideration, extinguishment of old contract,

and validity of new contract.—*Haggar v. Olfert*, 387 N.W.2d 45.—Nova 1.

S.D. 1933. Reorganization agreement requiring stockholders in insolvent bank to take stock in reorganized bank in lieu of their liability held not “novation” relieving solvent stockholders from liability as against nonconsenting depositors. Laws 1925, c. 104; Const. art. 18, § 3.—*Sneve v. Hagen*, 250 N.W. 27, 61 S.D. 556.—Banks 47(3).

S.D. 1931. That makers executed note for loan and deposited check therefor with drawee constituted executed “novation”; drawee’s insolvency not discharging makers’ liability on note.—*Riggen v. Lindley*, 236 N.W. 280, 58 S.D. 343.—Nova 5.

S.D. 1916. Where the maker of notes transferred the goods for which they were given to another, who agreed to pay the notes and assume the maker’s liability, and the payee accepted the substitution, but no notes were made by the transferee, there was no “novation,” and the maker was liable on the notes, since novation requires an express or implied agreement by the creditor, not only to substitute a new debtor, but to release the original debtor.—*Klinkoosten v. Mundt*, 156 N.W. 85, 36 S.D. 595, L.R.A. 1918B,111.

Tenn. 1943. An incompetent’s new guardian’s acceptance of resigning guardian’s note for sum due ward and trust deed securing it, without court’s approval, but with knowledge and consent of sureties on resigning guardian’s bond, did not work “novation” discharging such sureties.—*Poe v. Fetzer*, 168 S.W.2d 600, 179 Tenn. 587.—Nova 1; Princ & S 129(1).

Tenn.Ct.App. 1995. “Novation” is substitution of new contract for existing one; it differs from assignment because it requires assent of all the parties while assignment requires neither knowledge nor assent of obligor and because assignment cannot change obligor’s performance.—*Pacific Eastern Corp. v. Gulf Life Holding Co.*, 902 S.W.2d 946, appeal denied.—Assign 58; Nova 1, 7.

Tenn.Ct.App. 1953. A “novation” is a contract substituting a new obligation for an old one which is thereby extinguished.—*Blaylock v. Stephens*, 258 S.W.2d 779, 36 Tenn.App. 464.—Nova 1.

Tenn.Ct.App. 1953. A “novation” is not, within the Statute of Frauds, a promise by the new debtor to answer for another’s debt, but is a promise by new debtor to pay his own debt, which is founded upon valid consideration and which need not be in writing in order to be enforceable. Code, § 7831(2).—*Blaylock v. Stephens*, 258 S.W.2d 779, 36 Tenn.App. 464.—Frds St of 32.

Tenn.Ct.App. 1935. Where debtor and creditor entered into settlement of debt and new note and mortgage was executed by debtor payable to creditor, new note constituted a “novation” of debt.—*Crabb v. Cole*, 84 S.W.2d 597, 19 Tenn.App. 201.—Nova 4.

Tenn.Ct.App. 1935. Where debtor and creditor entered into settlement of debt and new note and mortgage was executed by debtor payable to credi-

tor, new note constituted a “novation” of debt, but such novation did not deprive debtor of right to assert claims for usury contained in original note.—*Crabb v. Cole*, 84 S.W.2d 597, 19 Tenn.App. 201.—Usury 67.

Tenn.Ct.App. 1934. Where body of original note provided that makers and indorsers agreed that any extensions should not release makers or indorsers, holder’s acceptance, after maturity, of new note from party who had agreed to pay original note held not “novation” releasing makers or indorser, where original note was retained by holder and subsequent payments were credited thereon.—*Bogley v. McFall*, 72 S.W.2d 785, 18 Tenn.App. 66.—Nova 1.

Tenn.Ch.App. 1896. “Novation” is the substitution of a new obligation for the old one, which is thereby extinguished.—*Workingman’s Bldg. & Sav. Ass’n v. Williams*, 37 S.W. 1019.

Tex.Com.App. 1939. Where third renewal note represented in part renewal and extension of principal of prior usurious loans, renewal was not a “novation” sufficient to purge transaction from taint of usury especially where it did not appear that parties had any intention of purging the transaction by the third loan.—*Wallace v. D. H. Scott & Son*, 127 S.W.2d 447, 133 Tex. 293.—Nova 1; Usury 88.

Tex.Com.App. 1936. A “novation” is a new contract creating new contractual relations and is subject to the same requisites as to validity as other contracts, such as a legal subject-matter, competent parties, a mutual agreement or meeting of minds, and a sufficient consideration.—*Western Brokerage & Supply Co. v. Reclamation Co.*, 93 S.W.2d 393, 127 Tex. 386.

Tex.Com.App. 1929. “Novation” is mode of extinguishing one obligation for another, discharging it.—*Cooper Grocery Co. v. Strange*, 18 S.W.2d 609.—Nova 4.

Tex.App.-Houston [1 Dist.] 1999. A “novation” is the substitution of a new agreement between the same parties or the substitution of a new party on an existing agreement; only the new obligation may be enforced.—*Honeycutt v. Billingsley*, 992 S.W.2d 570, rehearing overruled, and review denied, and rehearing of petition for review overruled.—Nova 1.

Tex.App.-Houston [1 Dist.] 1999. The elements of “novation” are: (1) a previous, valid obligation; (2) an agreement of the parties to a new contract; (3) the extinguishment of the old contract; and (4) the validity of the new contract.—*Honeycutt v. Billingsley*, 992 S.W.2d 570, rehearing overruled, and review denied, and rehearing of petition for review overruled.—Nova 1.

Tex.App.-Houston [1 Dist.] 1991. Essential elements of “novation” are: previous, valid obligations; agreement of parties to new contract; extinguishment of old contract; and validity of new contract.—*Mandell v. Hamman Oil and Refining Co.*, 822 S.W.2d 153, writ denied.—Nova 1.

Tex.App.—Fort Worth 1986. “Novation” requires previous valid obligation, agreement of all parties to new contract, extinguishment of old contract, and validity of new contract with further consideration.—Koelzer v. Pizzirani, 718 S.W.2d 420.—Nova 1.

Tex.App.—San Antonio 1990. Although “accord and satisfaction” and “compromise and settlement” are closely analogous—accord and satisfaction defense rests upon new contract, express or implied, in which parties agree to discharge of existing obligation in manner otherwise than originally agreed, while compromise and settlement is conclusion of disputed or unliquidated claim through contract in which parties agree to mutual concessions in order to avoid resolving their controversy through litigation—essential difference is that latter must be based on disputed or unliquidated claim while former may be based on either disputed or undisputed claim; either may work “novation,” which is discharge and resulting bar of old obligation by contract that substitutes new and inconsistent obligation with intention to extinguish and bar old obligation.—Kerrville HRH, Inc. v. City of Kerrville, 803 S.W.2d 377, writ denied.—Accord 1; Compromise 2; Nova 1.

Tex.App.—Dallas 1989. “Novation” requires previous valid obligation, agreement of all parties to new contract, extinguishment of old contract or obligation, and validity of new contract.—Marynick v. Bockelmann, 773 S.W.2d 665, writ granted, reversed 788 S.W.2d 569.—Nova 1.

Tex.App.—El Paso 1990. “Novation” requires previous valid obligation, mutual agreement of all parties to accept new contract, substitution of contract for old contract, and valid, new agreement.—MBank El Paso Nat. Ass'n v. Featherlite Corp., 792 S.W.2d 472, writ denied.—Nova 1.

Tex.App.—Waco 1994. “Satisfaction” in accord and satisfaction is usually the performance of a new promise, rather than the new promise itself, but when the new promise itself is accepted as the satisfaction, the accord is more properly termed a “novation.”—Flanagan v. Martin, 880 S.W.2d 863, writ dismissed w.o.j.—Accord 15.1; Nova 4.

Tex.App.—Eastland 1992. Elements of “novation” are previous valid obligation, mutual agreement of all parties to acceptance of new contract, extinguishment of old contract or obligation, and validity of new contract.—Vivion v. Grelling, 837 S.W.2d 255, writ denied.—Nova 1.

Tex.App.—Corpus Christi 1995. Borrowers conclusively proved affirmative defense of “novation” in action by assignee of judgment to enforce judgment against borrowers; assignee of judgment did not contest borrowers’ summary judgment evidence that prior judgment was valid, uncontested sworn affidavit of one borrower provided proof of agreement with assignor to accept new loan contract, prior judgment was extinguished by obligation under subsequently executed forbearance agreements, and forbearance agreements were valid.—Rosedale Partners, Ltd. v. Walters, 905 S.W.2d 17.—Nova 12.

Tex.Civ.App.—Fort Worth 1935. Arrangement whereby creditor agreed with his debtors that debt be credited on hotel company’s account, owing to company owned by one of debtors and the indebtedness to creditor transferred from original debtors to hotel company, of which creditor was manager and large owner, constituted “novation” which completely extinguished former indebtedness owed by debtors.—Keith v. Connally, 85 S.W.2d 788.—Nova 10.

Tex.Civ.App.—Fort Worth 1933. Extinguishment of old obligation by giving and acceptance of new promise itself, as distinguished from performance thereof, is fundamental essential of “novation.”—Zweifel v. Keystone Pipe & Supply Co., 60 S.W.2d 1065, reversed 94 S.W.2d 412, 127 Tex. 392.—Nova 1.

Tex.Civ.App.—Fort Worth 1933. That trustee for benefit of creditors of buyer sold to himself as receiver of another casing belonging to seller, and requested seller to charge it to him as receiver and credit him as trustee, which seller did, held to constitute “novation” of seller’s pre-existing contract with buyer.—Zweifel v. Keystone Pipe & Supply Co., 60 S.W.2d 1065, reversed 94 S.W.2d 412, 127 Tex. 392.—Nova 1.

Tex.Civ.App.—Fort Worth 1915. “Novation” is the substitution by mutual agreement of one debtor or one creditor for another whereby the old debt is extinguished or the substitution of a new debt or obligation for an existing one, which is thereby extinguished.—Pierce Fordyce Oil Ass'n v. Woods, 180 S.W. 1181, writ refused.—Nova 1.

Tex.Civ.App.—Austin 1939. Where a third person contracts with debtor to assume, as an immediate substitution for debtor’s duty, a duty to creditor to render either the performance for which debtor was previously bound, or some other performance, and creditor agrees either with debtor or with third person to such substitution, there is a “novation” that discharges original debtor and subjects third person to duty to creditor.—Wright Titus, Inc. v. Swafford, 133 S.W.2d 287, writ dismissed, correct.—Nova 1.

Tex.Civ.App.—Austin 1939. Where holder of chattel mortgage on automobile accepted promise of third party to pay debt secured by mortgage upon receipt from mortgagee of note, mortgage, insurance policy and release of mortgage lien, there was a “novation” which discharged mortgagor’s debt to mortgagee.—Wright Titus, Inc. v. Swafford, 133 S.W.2d 287, writ dismissed, correct.—Nova 1, 10.

Tex.Civ.App.—Austin 1939. As regards contention that there was no “novation” discharging plaintiff’s debt to defendant which was secured by chattel mortgage on automobile because agreement whereby third party agreed to pay debt was conditional, fact that defendant was required to deliver insurance policy, the note, mortgage, and proper release of mortgage to third party before debt would be paid to it did not render agreement conditional.—Wright Titus, Inc. v. Swafford, 133 S.W.2d 287, writ dismissed, correct.—Nova 1.

Tex.Civ.App.—Austin 1939. In order to constitute “novation,” it is immaterial what consideration the original debtor gives for promise of third person to assume the indebtedness.—Wright Titus, Inc. v. Swafford, 133 S.W.2d 287, writ dismissed, correct.—Nova 1.

Tex.Civ.App.—Austin 1939. Where new debtor is substituted and accepted by creditor, who agrees to discharge the original indebtedness, such agreement is based upon valuable consideration, and the “novation” in such case consists in the mutual agreement substituting the new debtor for the old one in consideration of the extinguishment of the debt.—Wright Titus, Inc. v. Swafford, 133 S.W.2d 287, writ dismissed, correct.—Nova 1.

Tex.Civ.App.—San Antonio 1947. Defendant’s giving of check to plaintiff to make up shortage in accounts of plaintiff’s employee, with no understanding, express or implied, that employee’s indebtedness to plaintiff was thereby extinguished, did not constitute a “novation”.—Bailey v. M. G. Clark & Son, 206 S.W.2d 96.—Nova 3.

Tex.Civ.App.—San Antonio 1928. “Novation” is substitution of new obligation, extinguishing old obligation.—Commercial Nat. Bank of San Antonio v. Poulos, 8 S.W.2d 222.—Nova 1.

Tex.Civ.App.—Dallas 1979. Alleged execution of two subcontracts with essentially the same terms as letter of intent requiring subcontractor to obtain payment and performance bond was not a “novation” superseding letter of intent, so as to release subcontractor’s surety.—Balboa Ins. Co. v. K & D and Associates, 589 S.W.2d 752, ref. n.r.e.—Princ & S 99.

Tex.Civ.App.—Dallas 1952. “Novation” is a mode of extinguishing one obligation by another.—Chastain v. Cooper & Reed, 250 S.W.2d 652, affirmed in part, reversed in part 257 S.W.2d 422, 152 Tex. 322.—Nova 1.

Tex.Civ.App.—Dallas 1952. A “novation” is a substitution, not of a new paper, but of a new obligation in lieu of an old obligation and with effect of discharging the old obligation and acceptance of new obligation in old obligation’s place.—Chastain v. Cooper & Reed, 250 S.W.2d 652, affirmed in part, reversed in part 257 S.W.2d 422, 152 Tex. 322.—Nova 1.

Tex.Civ.App.—Dallas 1952. Where individual entered into an oral contract with oil well drilling company for drilling of well, and thereafter company drew up a written contract with respect to drilling of well, naming individual and individual’s assignee, but individual refused to sign the written contract, and thereafter company struck out individual’s name and executed the contract with individual’s assignee alone, there was a “novation” as a matter of law, and individual was no longer liable to company under the oral contract.—Chastain v. Cooper & Reed, 250 S.W.2d 652, affirmed in part, reversed in part 257 S.W.2d 422, 152 Tex. 322.—Nova 5, 10.

Tex.Civ.App.—Dallas 1922. A “novation” exists where, by mutual consent and on sufficient consid-

eration, the parties to an existing contract, intending to extinguish it, substitute therefor a new one, inconsistent with it.—St. Louis Southwestern Ry. Co. of Texas v. Seale & Jones, 247 S.W. 883, writ granted, modified 267 S.W. 676.

Tex.Civ.App.—Texarkana 1981. “Novation” is voluntary replacement of old obligation with new one and requires that both parties intend new arrangement to be substituted for old one.—Landrum v. Devenport, 616 S.W.2d 359.—Nova 4.

Tex.Civ.App.—Texarkana 1973. “Novation” is acceptance of new promise in lieu of and in extinguishment of old obligation.—DoAll Dallas Co. v. Trinity Nat. Bank of Dallas, 498 S.W.2d 396, ref. n.r.e.—Nova 1.

Tex.Civ.App.—Texarkana 1973. “Accord and satisfaction” may or may not be also a novation, but where new promise itself is accepted as satisfaction, transaction is more properly termed “novation.”—DoAll Dallas Co. v. Trinity Nat. Bank of Dallas, 498 S.W.2d 396, ref. n.r.e.—Accord 1; Nova 1.

Tex.Civ.App.—Texarkana 1937. A transaction whereby debtor executed deed to grantee who assumed debts with consent of debtor’s creditors, creditors released debts as against original debtor, and grantee mortgaged property to secure debts, constituted a complete “novation,” substituting a new debt and new debtor.—Red River Nat. Bank in Clarksville v. Latimer, 110 S.W.2d 232.—Nova 1.

Tex.Civ.App.—Amarillo 1958. A “novation” may result from substitution of a new obligation or contract between parties with intent to extinguish the old obligation of contract.—General Finance & Guaranty Co. v. Smith, 309 S.W.2d 531, ref. n.r.e.—Nova 4.

Tex.Civ.App.—Amarillo 1946. “Novation” requires that there must be a previous valid obligation, agreement of all parties to new contract, substitution of new contract for old, extinguishing old contract, and valid new contract.—Lincoln v. King, 193 S.W.2d 437.—Nova 1.

Tex.Civ.App.—Amarillo 1940. “Novation” requires that there must be a previous valid obligation, agreement of all parties to new contract, substitution of new contract for old, extinguishing old contract, and valid new contract.—Johnson v. Harrington, 139 S.W.2d 202, writ dismissed, correct.—Nova 1.

Tex.Civ.App.—Amarillo 1940. Evidence that land was conveyed to both husband and wife instead of wife as provided in contract of sale, and that deed was immediately delivered to husband because it was thought that husband with deed in his possession might have better success than vendor in persuading vendor’s tenant to vacate property, was insufficient to show a “novation” of contract of sale because of lack of consideration so as to prevent purchasers from maintaining an action for failure to deliver immediate possession as provided in contract.—Johnson v. Harrington, 139 S.W.2d 202, writ dismissed, correct.—Nova 12.

Tex.Civ.App.—Amarillo 1933. “Novation” is effected by contract, and is subject to all rules which cover field of contracts in general.—Money v. Dameron, 70 S.W.2d 291, writ refused.—Nova 1.

Tex.Civ.App.—Amarillo 1933. “Novation” requires previous valid obligation, agreement of all parties to new contract, extinguishment of old contract, and validity of new one.—Money v. Dameron, 70 S.W.2d 291, writ refused.—Nova 1.

Tex.Civ.App.—Amarillo 1932. To constitute “novation” there must be agreement of all parties to new valid contract extinguishing previous valid contract.—Erwin v. White, 54 S.W.2d 867.—Nova 1.

Tex.Civ.App.—Amarillo 1923. “Novation” is the substitution by mutual agreement of a new debt or obligation for an old, thereby extinguishing the original, and the obligor’s intention that the new obligation shall satisfy the old is not alone sufficient to constitute novation.—Darby v. Farmers’ State Bank of Burk Burnett, 253 S.W. 341.

Tex.Civ.App.—Amarillo 1919. “Novation” is effected by the substitution of a new obligation, between the same parties, with the intention to extinguish the old one, or by the substitution of a new debtor with the intention to release the old one, or by the substitution of a new creditor with the intention to transfer the rights of the old one to him.—Meador v. Rudolph, 218 S.W. 520, writ dismissed w.o.j.

Tex.Civ.App.—El Paso 1942. Where insured surrendered death assessment policy containing provision that in case of insured’s suicide within one year from date of certificate, policy should be void, and applied for a different policy at fixed annual charge, and new policy providing that it should be void if insured should ever commit suicide, and providing that it operated as cancellation of old policy, was issued, there was a complete “novation” and new policy became measure of insured’s rights, and hence there could be no recovery for insured’s death from self-inflicted gunshot wound more than one year after issuance of new policy.—Austin Mut. Life Ins. Co. v. Doerr, 170 S.W.2d 307, writ refused.—Nova 1.

Tex.Civ.App.—El Paso 1939. Where vendor agreed that damages resulting to vendee from vendor’s breach of warranty should be credited in payment of vendor’s lien notes with unpaid balance to be paid at a later date, there was no “novation” but a mere continuation of notes for unpaid balance.—Applewhite v. Sessions, 131 S.W.2d 301, writ dismissed, correct.—Nova 3.

Tex.Civ.App.—El Paso 1939. If an agreement whereby a vendor of land credited in partial payment of purchase-money notes damages resulting to vendee from vendor’s breach of warranty, with vendee agreeing to pay unpaid balance of notes constituted a “novation,” failure of vendee to promptly pay unpaid balance did not abrogate agreement, since time of payment was not of the essence.—Applewhite v. Sessions, 131 S.W.2d 301, writ dismissed, correct.—Nova 9.

Tex.Civ.App.—El Paso 1935. “Novation” is effected by contract, and is subject to all rules which cover field of contracts in general.—Tyler Co. v. Bellows, 78 S.W.2d 1100.—Nova 1.

Tex.Civ.App.—El Paso 1935. “Novation” requires that there must be a previous valid obligation, agreement of all parties to new contract, substitution of new contract for old, extinguishing old contract, and valid new contract.—Tyler Co. v. Bellows, 78 S.W.2d 1100.—Nova 1.

Tex.Civ.App.—El Paso 1926. “Novation” is agreement between all parties, with clear intention to discharge valid obligation by substituting new obligation, debtor, or creditor.—Currie v. Trammell, 289 S.W. 736, writ refused.—Nova 1.

Tex.Civ.App.—El Paso 1926. Agreement that creditor would surrender debtor’s notes on receipt of tally of cattle delivered to third party is “novation.”—Currie v. Trammell, 289 S.W. 736, writ refused.—Nova 1.

Tex.Civ.App.—Beaumont 1940. Though a paving certificate provided for a reasonable attorney’s fee, the execution by defendants to plaintiff of a contract lien evidenced by a written instrument constituting also a note promising to pay balance due on paving contract in five installments with interest at seven per cent. and with an attorney’s fee of 10 per cent., created a “novation” with respect to attorney’s fee and changed amount from a reasonable sum to the liquidated sum of 10 per cent.—Slattery v. Uvalde Rock Asphalt Co., 140 S.W.2d 987, writ refused.—Nova 1, 10.

Tex.Civ.App.—Beaumont 1937. An operating agreement, by parties to suit involving right to proceeds of oil and gas providing that oil company should continue operations on tract in question, and that interests of parties should be adjudged and concluded according to judgment, did not constitute “novation” of lease assignment covering land in controversy by which oil company would be entitled to recover interest in proceeds.—Mann v. Rio Bravo Oil Co., 107 S.W.2d 653, writ refused.—Nova 1.

Tex.Civ.App.—Beaumont 1933. Second series of notes given on cancellation of first series *held* not “novation” discharging original debt, where parties agreed that second series was in renewal and extension of original notes.—Warren Cent. R. Co. v. Texas Creosoting Co., 62 S.W.2d 691.—Nova 3.

Tex.Civ.App.—Beaumont 1933. Surrender of first series of notes in exchange for second series *held* not “novation” as matter of law; surrender being evidentiary on issue of novation.—Warren Cent. R. Co. v. Texas Creosoting Co., 62 S.W.2d 691.—Nova 13.

Tex.Civ.App.—Beaumont 1917. “Novation” is execution of a new obligation for an existing one either between same or different parties, the consideration being discharge of old contract.—Guaranty State Bank of Timpson v. Wm. D. Cleveland & Sons, 195 S.W. 939.—Nova 1.

Tex.Civ.App.—Waco 1948. Modifications of continuing contractual relationship between employer

and employee as to places where specified services were to be rendered and amount of hourly compensation therefor did not constitute "novation" terminating employee's status as such within workmen's compensation act. Vernon's Ann.Civ.St. arts. 8306–8309a.—Employers Mut. Liability Ins. Co. of Wis. v. Evins, 211 S.W.2d 359, ref. n.r.e.—Nova 4; Work Comp 80.

Tex.Civ.App.—Waco 1942. Where husband in contemplation of divorce executed an assignment of part of his salary to become due from defendant employer to his wife for support, and subsequent consent divorce decree approved the agreement but decreed that husband make alimony payments into the court registry and wife accepted benefits of decree for some three years, original contract was "merged" into the decree, and decree constituted a "novation" of the contract, and wife was "estopped" from asserting the continuing validity of the assignment against employer.—Beam v. Southwestern Bell Tel. Co., 164 S.W.2d 412, writ refused w.o.m.—Divorce 243.

Tex.Civ.App.—Waco 1942. If a creditor voluntarily accepts from his debtor a new agreement in lieu of a prior contract with intent to cancel the former contract and substitute therefor the latter, such action constitutes a "novation" by substitution of the parties.—Beam v. Southwestern Bell Tel. Co., 164 S.W.2d 412, writ refused w.o.m.—Nova 1.

Tex.Civ.App.—Waco 1928. A "novation" is effected by substitution, concurred in by both debtor and creditor, of new obligation between same parties, with intent that old obligation for which it is substituted shall be discharged.—Strange v. Cooper Grocery Co., 4 S.W.2d 232, writ granted, reversed 18 S.W.2d 609.

Tex.Civ.App.—Eastland 1939. Railroad's consent to contractor's assignment of moneys due under contract for improvement of railroad tracks could not result in implied "novation" of terms of contract, where railroad had no right to object to assignment.—Texas & P. Ry. Co. v. Citizens Nat. Bank in Abilene, 126 S.W.2d 765, reversed 150 S.W.2d 1003, 136 Tex. 333, certiorari denied Texas and Pacific Ry. Co. v. Citizens Nat. Bank of Abilene., 62 S.Ct. 109, 314 U.S. 656, 86 L.Ed. 526.—Nova 1.

Tex.Civ.App.—Eastland 1935. Modification of note making balance payable only from proceeds of oil and gas from certain lease if and when produced constituted a "novation" and not an "accord and satisfaction," so that failure to perform new promises would not revive original obligations.—Worth Petroleum Co. v. Callihan, 82 S.W.2d 1060.—Accord 1; Nova 4.

Tex.Civ.App.—Eastland 1927. "Novation" arises only by mutual agreement of all interested parties to substitute new obligation for old.—Reclamation Co. v. Simmons, 293 S.W. 194, writ refused.—Nova 1.

Tex.Civ.App.—Hous. [14 Dist.] 1967. Where corporate seller of petroleum products, seeking to recover on oral and written guaranties of insolvent

corporate buyer's accounts, did not accept buyer's note in substitution for debts on the contracts of sale, seller's acceptance of the note was not a "novation" extinguishing the debts under the contract and did not release guarantors.—Cooper Petroleum Co. v. LaGloria Oil & Gas Co., 423 S.W.2d 645, writ granted, reversed 436 S.W.2d 889.—Nova 7.

Tex.Civ.App. 1906. "Novation" is effected by the substitution of a new obligation between the same parties with the intention to extinguish the old one, or by the substitution of a new debtor with the intention to release the old one, or by the substitution of a new creditor with the intent to transfer the rights of the old one to him. There must be a mutual agreement among the parties for the substitution of the new debt in place of the old. There must be an extinguishment of the old debt and an agreement to look to the new debtor alone, and the mere taking of a new debtor will not, standing alone, amount to a "novation." The taking by a creditor of a note from one who has assumed the debt is not a "novation," releasing the old debtor; there being no agreement to this effect.—M. Gimbell & Sons v. King, 95 S.W. 7, 43 Tex.Civ.App. 188.

Utah 1976. A creditor's mere acceptance of the obligation of a third party without an agreement or intention to release the original debtor or extinguish the original debt does not amount to a "novation."—D.A. Taylor Co. v. Paulson, 552 P.2d 1274.—Nova 1.

Utah 1939. The agreement of real estate brokers selling farm for owners, that note given by owners as a part of the purchase price when owners purchased land, would be returned to owners, was not a "novation," inasmuch as payee did not discharge owners and accept brokers in their stead, but was a simple agreement to pay the debt of another which, when breached, gave rise to right of action against brokers, and so far as relationship between owners and brokers was concerned, the owners became the sureties and the brokers became the principals.—Kennedy v. Griffith, 95 P.2d 752, 98 Utah 183.—Indem 33(1); Nova 1; Princ & S 14.

Utah 1939. To establish "novation," it is essential that obligee discharge original debtor and accept new debtor in place of original debtor.—Kennedy v. Griffith, 95 P.2d 752, 98 Utah 183.—Nova 1.

Vt. 1939. A "novation" by substitution of new debtor requires mutual agreement between creditors, immediate debtor and intended new debtor, by which liability of intended new debtor is accepted in discharge of original debt.—F.I. Somers & Sons v. Le Clerc, 8 A.2d 663, 110 Vt. 408, 124 A.L.R. 1494.—Nova 1.

Vt. 1927. "Novation" occurs on substitution of new contract between same or different parties.—Manley Bros. Co. v. Somers, 137 A. 336, 100 Vt. 292.—Nova 1.

Vt. 1927. Mutual agreement of creditor, debtor, and third party to accept latter's liability in dis-

charge of original debt is necessary to constitute "novation."—Manley Bros. Co. v. Somers, 137 A. 336, 100 Vt. 292.—Nova 7.

Vt. 1927. Clear intent to accept new debtor's liability is necessary, though provable by circumstances, as "novation" is never presumed.—Manley Bros. Co. v. Somers, 137 A. 336, 100 Vt. 292.—Nova 12.

Vt. 1890. "Novation" takes place only when the contracting parties expressly disclose that their object in making the new contract is to extinguish the old contract, otherwise the old contract remains in force and the new contract is added to it, and each gives rise to an obligation still in force.—Hard v. Burton, 20 A. 269, 62 Vt. 314.

Va. 1976. A "novation" is a substitution by mutual agreement of one debtor for another or one creditor for another, whereby the old debt is extinguished, or the substitution of a new valid obligation for an existing one, which is thereby extinguished.—Dillenberg v. Thott, 229 S.E.2d 866, 217 Va. 433.—Nova 1.

Va. 1972. "Novation" is a mutual agreement upon all parties concerned for discharge of a valid existing obligation by the substitution of a new valid obligation on part of debtor or another.—Honeywell, Inc. v. Elliott, 189 S.E.2d 331, 213 Va. 86.—Nova 1.

Va. 1962. "Novation" is a mutual agreement among all parties concerned for discharge of a valid existing obligation by the substitution of a new valid obligation on the part of a debtor or another, or a like agreement for the discharge of debtor to his creditor by the substitution of a new creditor.—Arlington Towers Land Corp. v. McFarland, 124 S.E.2d 212, 203 Va. 387.—Nova 1.

Va. 1939. A "novation" is a contract, consisting of two stipulations, one to extinguish an existing obligation, the other to substitute a new one in its place and every "novation" embraces an "accord and satisfaction"; the principal distinguishing feature between them being that a novation implies the extinguishment of an existing debt by the parties thereto and its transition into a new existence between the same or different parties, whereas, an "accord and satisfaction" relates solely to the extinguishment of the debt.—Wheeler v. Wardell, 3 S.E.2d 377, 173 Va. 168.—Accord 1.

Va. 1939. Where one of joint makers of note transferred all of his interest in partnership property to other partner, and other partner with his wife then executed deed of trust to bank which was holder of two notes, such transactions inured to benefit of indorser as well as bank, and could not be regarded either as a "novation" or "accord and satisfaction," so as to relieve indorser of liability.—Wheeler v. Wardell, 3 S.E.2d 377, 173 Va. 168.—Accord 1; Bills & N 301; Nova 1.

Va. 1939. A note given by owners of house to subcontractors, for amount due to subcontractors from general contractor, was not enforceable as a "novation" of general contractor's debt, where general contractor was opposed to a novation and was

not released as debtor.—Hooff v. Paine, 2 S.E.2d 313, 172 Va. 481.—Nova 1.

Va. 1938. The execution and delivery of renewal notes by judgment debtor did not constitute a "novation" or cancellation of judgment, where parties expressly understood that lien of judgment was not to be released.—Gemmell v. Powers, 195 S.E. 501, 170 Va. 43.—Judgm 875; Nova 1.

Va. 1932. Vendor's conveyance to third person at purchaser's request held not a "novation," so as to relieve purchaser from assumption of trust deed.—Linbrook Realty Corp. v. Rogers, 163 S.E. 346, 158 Va. 181, 84 A.L.R. 1035.—Nova 1.

Wash. 1949. "Novation" means substitution, and it may be either the substitution of a new obligation for an old one between the same parties with intent to displace old obligation with new, or the substitution of a new debtor for the old with intent to discharge old, or the substitution of a new creditor with intent to transfer rights of old creditor to the new.—MacPherson v. Franco, 208 P.2d 641, 34 Wash.2d 179.—Nova 1.

Wash. 1949. A "novation" is a new contractual relation and must have necessary parties to the contract, a valid prior obligation to be displaced, a proper consideration, and a mutual agreement.—MacPherson v. Franco, 208 P.2d 641, 34 Wash.2d 179.—Nova 1.

Wash. 1929. New contract must cancel and supersede original contract to constitute "novation."—Mutual Reserve Ass'n v. Zeran, 277 P. 984, 152 Wash. 342.—Nova 4.

Wash. 1928. Giving of bill of sale constituting chattel mortgage in substitution of previous chattel mortgage held to constitute "novation."—Pacific States Securities Corp. v. Austin, 263 P. 732, 146 Wash. 492.—Nova 4.

Wash. 1915. An agreement between the holder of a note executed by two joint makers whereby one was released on payment of half the amount due, and the security was also released to that extent, an extension of time being given the other maker, did not constitute a "novation," which is the substitution by mutual agreement of one debtor or of one creditor for another whereby the old debt is extinguished, since the creditor did not release any of the parties to the note except one of the joint makers in which release the indorsers did not concur, whereby the debt was only partially paid and satisfied without the making of a new contract or the incorporation of new parties.—Davis v. Gutheil, 152 P. 14, 87 Wash. 596.

Wash. 1904. A "novation" is the substitution of one obligation for another.—Tilden v. Gordon & Co., 74 P. 1016, 34 Wash. 92.

W.Va. 1933. "Novation" is substitution of one debtor by mutual agreement for another, whereby old debt is extinguished.—Fredeking v. Read, 169 S.E. 387, 113 W.Va. 722.—Nova 1.

W.Va. 1926. Contract by corporation with third person to sell stock on commission, in which he agrees to bear expenses from certain period, to

which attorney is not party, is not "novation" of contract implied by law to pay attorney reasonable compensation for assisting in organizing corporation, rendering such third party liable to attorney.—*Ramsey v. Brooke County Building & Loan Ass'n*, 135 S.E. 249, 102 W.Va. 119, 49 A.L.R. 668.—Nova 5.

W.Va. 1914. In the opinions in actions by creditors of constituent corporations against consolidated ones, or against new corporations by creditors of old ones absorbed or extinguished by them, the word "novation" is often used as meaning no more than that the new corporation is liable and its use in such cases does not imply extinguishment of the original debt.—*Lowther v. Lowther-Kaufmann Oil & Coal Co.*, 83 S.E. 49, 75 W.Va. 171.—Corp 590(3); Courts 107.

W.Va. 1906. "Novation" is the substitution of one debtor by mutual agreement for another, whereby the old debt is extinguished.—*Chenoweth v. National Bldg. Ass'n*, 53 S.E. 559, 59 W.Va. 653.

Wis. 1986. If there is an agreement between obligor, obligee and a third party by which third party agrees to be substituted for obligor and obligee assents thereto, obligor is released from liability and third person takes place of obligor; such an agreement is known as a "novation."—*Brooks v. Hayes*, 395 N.W.2d 167, 133 Wis.2d 228.—Nova 5.

Wis. 1941. The essentials of "novation" are mutual agreement between debtor, his creditor, and third person, by which third person agrees to be substituted for debtor, and creditor assents thereto, extinguishing obligation of debtor to creditor, and creating obligation of third person to creditor.—*Banschbach v. Meuer*, 297 N.W. 402, 237 Wis. 454.—Nova 1.

Wis. 1916. "Novation" is the substitution of one debtor for another, and requires: (1) A previous valid obligation, (2) the agreement of all parties to the new contract, (3) the extinguishment of the old contract, and (4) the validity of the new one.—*T.W. Stevenson Co. v. Peterson*, 157 N.W. 750, 163 Wis. 258, L.R.A. 1918B, 105.—Nova 1.

Wis. 1909. "Novation" is the substitution of one debtor for another, and requires: (1) A previous valid obligation, (2) the agreement of all parties to the new contract, (3) the extinguishment of the old contract, and (4) the validity of the new one.—*Hemenway v. Beecher*, 121 N.W. 150, 139 Wis. 399.—Nova 1.

Wis. 1903. Where parties to an executory contract for work, acting with a third person, agree to substitute the third person, by consent of all, in place of the original contractor, there is a species of "novation."—*Security Nat. Bank v. St. Croix Power Co.*, 94 N.W. 74, 117 Wis. 211.

Wyo. 1977. A "novation" is mutual agreement between all parties concerned to discharge valid existing obligation by substitution of new valid obligation of the debtor.—*Tri-State Oil Tool Industries, Inc. v. EMC Energies, Inc.*, 561 P.2d 714.—Nova 1.

Wyo. 1938. "Novation" is mutual agreement between all parties concerned for discharge of valid existing obligation by substitution of new valid obligation of debtor or another or debtor's discharge from liability to creditor by substitution of new creditor.—*Scott v. Wyoming Oils*, 75 P.2d 764, 52 Wyo. 433.—Nova 1.

Wyo. 1938. The essential requisites of "novation" are previous valid obligation, agreement of all parties to new contract, extinguishment of old contract, and validity of new one.—*Scott v. Wyoming Oils*, 75 P.2d 764, 52 Wyo. 433.—Nova 1.

Wyo. 1938. A "novation" is contract which immediately discharges previous contractual duty or duty to make compensation, creates new contractual duty, and includes as party one who neither owed nor was entitled to performance of previous duty.—*Scott v. Wyoming Oils*, 75 P.2d 764, 52 Wyo. 433.—Nova 1.

Wyo. 1938. "Novation" necessarily involves discharge of old debt or part of it and creation of new one.—*Scott v. Wyoming Oils*, 75 P.2d 764, 52 Wyo. 433.—Nova 1.

Wyo. 1938. To constitute "novation," discharge of original obligation must be contemporaneous with, and result from, confirmation of agreement with new debtor.—*Scott v. Wyoming Oils*, 75 P.2d 764, 52 Wyo. 433.—Nova 1.

## NOVATION BY SUBSTITUTION OF DEBTORS

Mo.App. 1968. "Novation by substitution of debtors" is effected whenever a creditor agrees to release and extinguish claim against a debtor and to accept in lieu thereof the promise of a third person to discharge the obligation.—*W. Crawford Smith, Inc. v. Watkins*, 425 S.W.2d 276.—Nova 5.

## NOVATION OF DEBTORS

D.S.C. 1968. "Novation of debtors" is effected where creditor in release and satisfaction of his original debt, accepts note or other security of third person or promise of third person who has assumed obligations.—*Jay Cee Fish Co. v. Cannarella*, 279 F.Supp. 67.—Nova 5.

Mo.App. W.D. 1989. A "novation of debtors" occurs whenever a creditor agrees to release and extinguish a claim against a debtor and to accept in lieu the promise of a third person to discharge the obligation.—*Wilson v. Midstate Industries, Inc.*, 777 S.W.2d 310.—Nova 5.

N.Y.A.D. 2 Dept. 1931. "Novation of debtors" is effected where creditor, in release of original debt, accepts note or other security of third person.—*Henderson v. Sheppard*, 248 N.Y.S. 89, 231 A.D. 610.—Nova 5.

## NOVATIONS

Ga. 1931. Certificates of deposit issued in renewals of original certificates did not amount to "novations". Civ.Code 1910, § 3543.—*Bank of Norman Park v. Colquitt County*, 157 S.E. 469, 172 Ga. 109.—Nova 4.

Neb. 1994. Transactions whereby vendors and purchaser substituted notes and deeds of trust for land sale contracts were not “novations” since liens arising by the land contracts were never extinguished.—*Mackiewicz v. J.J. & Associates*, 514 N.W.2d 613, 245 Neb. 568.—*Nova* 3.

## NOVEL

C.A.11 (Ala.) 1996. Under *Teague*, rule is “new rule” if it is not dictated by prior precedent; on the other hand, rule is “novel,” and therefore cause for procedural default, only if petitioner did not have legal tools to construct claim before rule was issued.—*Waldrop v. Jones*, 77 F.3d 1308, rehearing and suggestion for rehearing denied 85 F.3d 645, certiorari denied 117 S.Ct. 247, 519 U.S. 898, 136 L.Ed.2d 175.—Hab Corp 461.

C.A.4 (Va.) 1992. Habeas petitioner’s claim that Virginia’s system of appointment of counsel for indigent defendants violated Constitution was not “novel,” and thus, claim was procedurally barred due to petitioner’s failure to raise it at trial or on direct appeal. U.S.C.A. Const.Amend. 6.—*Poyner v. Murray*, 964 F.2d 1404, certiorari denied 113 S.Ct. 419, 506 U.S. 958, 121 L.Ed.2d 342.—Hab Corp 407.

N.D.Ala. 1994. Rule announced in the United States Supreme Court *Cage* decision did not announce “novel” rule law that was mere application of prior United States Supreme Court *Winship* decision, and thus, claim based on *Cage* rule was available to habeas petitioner and his counsel prior to date of *Cage* decision, and thus, petitioner could not establish “cause” for procedural default for purposes of federal habeas review of jury instruction claim based on *Cage*.—*Waldrop v. Thigpen*, 857 F.Supp. 872, affirmed 77 F.3d 1308, rehearing and suggestion for rehearing denied 85 F.3d 645, certiorari denied 117 S.Ct. 247, 519 U.S. 898, 136 L.Ed.2d 175.—Hab Corp 407.

N.D.Ill. 1987. For “patent” to satisfy requirements of validity that it must be “novel” and “non-obvious” there must be difference between each prior art reference and challenged patent device so that device can be deemed new, and differences between subject matter of challenged device and prior art must be such that subject matter as whole would not have been obvious at time invention was made to person having ordinary skill in art to which subject matter of invention pertains. 35 U.S.C.A. §§ 102, 103.—*Pittway v. Black & Decker*, 667 F.Supp. 585.—Pat 16.1, 37.

E.D.La. 1988. Section 1983 action brought by black voters for reapportionment of congressional district, which was decided entirely at district court level and involved no appeals, was not so “novel” or “difficult” that fees awarded to voters’ attorneys could, on that basis, be enhanced. 42 U.S.C.A. §§ 1983, 1988.—*Major v. Treen*, 700 F.Supp. 1422.—Civil R 302.

D.Nev. 1987. Claims which defendant sought to raise for first time in habeas petition were not so “novel” as to excuse defendant’s procedural default, where evidence showed that similar claims

had been percolating in lower courts at time of defendant’s state court appeal.—*Deutscher v. Whitley*, 671 F.Supp. 1264.—Hab Corp 407.

S.D.N.Y. 1994. Product development company’s submission to toy manufacturer for production of airbrush toy was not sufficiently “novel” for idea to be protected from misappropriation under New York law, though product development company’s proposed toy differed from other airbrush systems on market insofar as it included mechanism for hand pumping air into canister to build pressure for continuous airflow; production company’s idea consisted of nothing more than clever or useful adaption of existing knowledge.—*AEB & Associates Design Group, Inc. v. Tonka Corp.*, 853 F.Supp. 724.—Copyr 102.

Bkrtcy.D.N.J. 1989. Under New Jersey law, “idea” is not “original” or “novel”, and cannot support claim for misappropriation or conversion, if it is already in use in industry at time of plaintiff’s submission.—*In re Elsinore Shore Associates*, 102 B.R. 958.—Copyr 102.

Ga.App. 2000. Marketer’s unpatented idea of using anthropomorphic polar bear to sell soft drink was not “novel” idea, and thus, soft-drink bottler’s alleged use of that idea in advertising campaign without compensating marketer did not subject bottler to liability to marketer for misappropriation of idea; bottler’s evidence showed that anthropomorphic bears, including polar bears, had been used to sell number of products, including its own, decades before marketer ever pitched his concept to bottler.—*Burgess v. Coca-Cola Co.*, 536 S.E.2d 764, 245 Ga.App. 206, reconsideration denied, and certiorari denied.—Copyr 108.

Ga.App. 1989. Newswriter’s idea of presenting good news on television broadcast as opposed to negative news was not “novel” when it was presented to broadcasting company and, hence, newswriter could not recover against broadcasting company for wrongful appropriation or conversion of an unpatented or unpatentable idea or product; any freshness arose solely from fact that something already known and in use was utilized in an extended context.—*Jones v. Turner Broadcasting System, Inc.*, 389 S.E.2d 9, 193 Ga.App. 768, certiorari denied, certiorari denied 111 S.Ct. 56, 498 U.S. 815, 112 L.Ed.2d 31, rehearing denied 111 S.Ct. 539, 498 U.S. 993, 112 L.Ed.2d 549.—Copyr 102.

Ill. 2002. Generally, for purposes of determining whether the *Frye* test should be applied to determine the admissibility of scientific evidence, a scientific technique is “new” or “novel” if it is original or striking or does not resemble something formerly known or used.—*Donaldson v. Central Illinois Public Service Co.*, 262 Ill.Dec. 854, 767 N.E.2d 314, 199 Ill.2d 63, rehearing denied.—Evid 555.2.

N.Y.Sup. 1994. Developer’s use of identification number for callers using interactive telephone game, to help track callers’ previous attempts at playing game and for identifying callers, was an adoption of existing knowledge in public domain, and therefore was not “novel” or “original,” as

required for misappropriation of idea claim under New York law.—*Oasis Music, Inc. v. 900 U.S.A., Inc.*, 614 N.Y.S.2d 878, 161 Misc.2d 627.—Copyr 101.

N.Y.Sup. 1912. A complaint, in an action for libel, which alleges that defendant published and circulated a “book or novel” in which he referred to plaintiff in terms set out, does not negative by reason of the use of the word “novel” the allegation that the article complained of referred to plaintiff, though strictly speaking the characters in a novel are fictitious.—*Dailey v. Bobbs-Merrill Co.*, 136 N.Y.S. 570.

Wash. 2000. Application of horizontal gaze nystagmus (HGN) test is not entirely “novel,” for purposes of determining admissibility of test results obtained through application of Drug Evaluation and Classification Program (DECP) incorporating HGN test as “novel scientific evidence,” as test has been in use for decades as field sobriety test in context of alcohol-related arrests, and test is performed in same manner regardless of whether officer is testing for alcohol impairment or drug impairment.—*State v. Baity*, 991 P.2d 1151, 140 Wash.2d 1.—Autos 411; Crim Law 388.2.

Wash.App. Div. 3 1999. To be a “trade secret” under the Uniform Trade Secrets Act (UTSA), information must be “novel” in the sense that the information must not be readily ascertainable from another source. West’s RCWA 19.108.010 et seq.—*Spokane Research & Defense Fund v. City of Spokane*, 983 P.2d 676, 96 Wash.App. 568, reconsideration denied, review denied 999 P.2d 1259, 140 Wash.2d 1001.—Torts 10(5).

## NOVEL AND PECULIAR

Ala.Crim.App. 1984. Manner in which two rapes were perpetrated were “novel and peculiar” and were “sufficiently similar” for “identity exception” to general rule of inadmissibility of evidence of other crimes to be applicable, where each woman was accosted by man previously unknown who used gun to force them to submit to sexual intercourse; therefore, testimony of each victim was admissible in prosecution of defendant for rape of other victim.—*Brumfield v. State*, 453 So.2d 1097.—Crim Law 369.15.

## NOVEL CLAIM

C.A.8 (Neb.) 2001. Defendant who failed to challenge his increased sentence for conspiracy to possess with intent to distribute crack cocaine based upon judge’s determination of quantity of crack involved on direct appeal could not obtain post-conviction relief from sentence on *Apprendi* grounds that drug quantity was an offense element, not a sentencing factor, which required determination by jury; the argument that drug quantity is an offense element was not “novel claim” which could be raised for first time in collateral proceeding. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b), 21 U.S.C.A. § 841(b); 28 U.S.C.A. § 2255.—*U.S. v. Moss*, 252 F.3d 993, certiorari denied 122 S.Ct. 848, 534 U.S. 1097, 151 L.Ed.2d 725.—Crim Law 1429(2), 1439.

## NOVEL CONCEPT

Ky.App. 1987. “Novel concept” from which expert makes deduction must be sufficiently established to have gained general acceptance in particular field in which it belongs before evidence derived from its use can be admitted.—*Onwan v. Com.*, 728 S.W.2d 536.—Crim Law 486(1).

Ky.App. 1987. Gynecologist’s use of colposcope, which magnifies an observed field anywhere from 2 to 30 times its normal size, in examining sexual abuse victim did not constitute “novel concept” such that State was required to sufficiently establish its general acceptance in field as prerequisite to admissibility of gynecologist’s testimony regarding her conclusion as to cause of damage to victim’s hymen and vaginal area.—*Onwan v. Com.*, 728 S.W.2d 536.—Crim Law 486(5).

## NOVEL DESIGN

U.S.N.Y. 1890. The words “novel design,” in the sense used in patent law, mean a thing of distinct and fixed individuality of appearance, a representation, a picture, a delineation, a device which addresses itself to the senses and taste, and produces pleasure or admiration in its contemplation.—*New York Belting & Packing Co. v. New Jersey Car-Spring & Rubber Co.*, 11 S.Ct. 193, 137 U.S. 445, 34 L.Ed. 741.

## NOVEL DISSEISIN

W.Va. 1989. Early actions for nuisance were brought under the writ of “novel disseisin” on the theory that one landowner could disturb the quiet possession and enjoyment of another landowner through activities lawful in themselves.—*Hendricks v. Stalnaker*, 380 S.E.2d 198, 181 W.Va. 31.—Nuis 1.

## NOVEL OR EXTRINSIC EVIDENCE

Wash.App. Div. 3 2002. “Novel or extrinsic evidence,” the introduction of which constitutes jury misconduct warranting new trial, is oral or documentary information outside the evidence admitted at trial.—*Chiappetta v. Bahr*, 46 P.3d 797, 111 Wash.App. 536, review denied 56 P.3d 991, 147 Wash.2d 1018.—New Tr 44(2).

## NOVEL SCIENTIFIC EVIDENCE

Mont. 1999. Microscopic hair comparison evidence proffered by state in rape prosecution was not “novel scientific evidence” so as to require application of *Daubert* factors in determining its admissibility. Rules of Evid., Rule 702.—*State v. Southern*, 980 P.2d 3, 294 Mont. 225, 1999 MT 94.—Crim Law 388.2.

N.Y.A.D. 2 Dept. 1997. Fluorescent marking powder transferred from prerecorded money to defendant’s hands and revealed by ultraviolet light was not “novel scientific evidence,” and, thus, hearing was not required on its reliability.—*People v. Persaud*, 665 N.Y.S.2d 671, 244 A.D.2d 577, appeal denied 672 N.Y.S.2d 855, 91 N.Y.2d 976, 695 N.E.2d 724.—Crim Law 388.2.

**NOVELTY**

C.A.6 (Mich.) 1962. Alleged abstract idea of putting old and known design consisting of wood grain background on which were superimposed log-marks on paper plates and cups for first time was not a protected property right; such idea did not possess "novelty" in sense that such word is employed in legal context of protected property rights.—*Stevens v. Continental Can Co.*, 308 F.2d 100, certiorari denied 83 S.Ct. 1702, 374 U.S. 810, 10 L.Ed.2d 1034.—Copyr 102.

C.A.8 (Minn.) 1966. "Novelty" for purpose of patent validity means new. 35 U.S.C.A. § 102(a).—*American Infra-Red Radiant Co. v. Lambert Industries, Inc.*, 360 F.2d 977, certiorari denied 87 S.Ct. 233, 385 U.S. 920, 17 L.Ed.2d 144.—Pat 37.

C.A.10 (Okla.) 1965. An invention or discovery is new or possesses requisite element of "novelty" if it involves the presence of some element, or the new position of an old element in combination, different from anything found in any prior structure.—*King-Seeley Thermos Co. v. Refrigerated Dispensers, Inc.*, 354 F.2d 533.—Pat 37, 41.

C.A.6 (Tenn.) 1974. "Novelty," in respect to design terminology, is present when the average observer takes the new design for a different and not just a modified already existing design. 35 U.S.C.A. §§ 102, 171.—*Schnadig Corp. v. Gaines Mfg. Co., Inc.*, 494 F.2d 383.—Pat 43.

C.A.6 (Tenn.) 1964. "Novelty" does not exist if a patented device has been anticipated by a prior device, whether patented or not.—*Monroe Auto Equipment Co. v. Heckethorn Mfg. & Supply Co.*, 332 F.2d 406, certiorari denied 85 S.Ct. 160, 379 U.S. 888, 13 L.Ed.2d 93.—Pat 37.

C.C.A.9 (Cal.) 1941. Patent No. 1,923,856, for display device, held invalid for lack of "novelty" or "invention".—*Pevely Dairy Co. v. Borden Printing Co.*, 123 F.2d 17.—Pat 328.

C.C.A.9 (Cal.) 1941. Patent No. 1,999,011, claim 3, for display device, held invalid for lack of "novelty" or "invention".—*Pevely Dairy Co. v. Borden Printing Co.*, 123 F.2d 17.—Pat 328.

C.C.A.10 (Colo.) 1939. "Novelty" justifying a patent must be found outside the field of the prior art. 35 U.S.C.A. § 31.—*Tropic-Aire v. Cullen-Thompson Motor Co.*, 107 F.2d 671.—Pat 37.

C.C.A.7 (Ill.) 1947. "Novelty", as prerequisite to patentable invention, involves presence of some element or the new position of an old element in combination different from anything found in any prior structure. 35 U.S.C.A. §§ 101, 102, 161.—*National Slug Rejectors v. A. B. T. Mfg. Corp.*, 164 F.2d 333, certiorari denied 68 S.Ct. 459, 333 U.S. 832, 92 L.Ed. 1116, rehearing denied 68 S.Ct. 658, 333 U.S. 850, 92 L.Ed. 1132.—Pat 37.

C.C.A.6 (Mich.) 1930. Where step forward was trivial in art and without commercial acceptance or use, existence of invention should not be inferred from "novelty" and "utility." Novelty within foregoing principle should be considered in sense of want of patent anticipation or even prior want of de-

signed use in the art, and utility should be considered as that founded only on inference and estoppel.—*Seymour v. Ford Motor Co.*, 44 F.2d 306.—Pat 16.

C.C.A.6 (Mich.) 1930. Where step forward was trivial in art and without commercial acceptance or use, existence of invention should not be inferred from "novelty" and "utility."—*Seymour v. Ford Motor Co.*, 44 F.2d 306.—Pat 16.5(1).

C.C.A.6 (Ohio) 1942. Patent No. 1,887,073, involving method of flavoring in canning, preserving and bottling operations by use of flavoring tablets instead of flavoring materials in the comminuted or granulated form, was invalid for lack of "novelty" and "invention".—*Scientific Tablet Co. v. Ossege*, 125 F.2d 151.—Pat 16.25.

D.Conn. 1931. Patentable "novelty" may exist in discovering difficulty with existing structure and what change in elements will correct it, although means for introducing element are old, and adaptation for purpose involves no patentable novelty.—*United Chromium v. International Silver Co.*, 53 F.2d 390, affirmed in part, reversed in part 60 F.2d 913, certiorari denied 53 S.Ct. 319, 288 U.S. 600, 77 L.Ed. 976.—Pat 37.

D.Md. 1941. There is neither "invention" nor "novelty" in merely placing metal reinforcement in concrete at places at which strains come, and "invention" in reinforcement is to be found only in discovering a new principle or in employing new means embodying the old principle, and hence one striving to find a new principle or to invent a new means of concrete reinforcement under the old principle enters a well known and widely practiced art and must do something more than care for tensile strains at places where they are known to come.—*Young v. John McShain, Inc.*, 39 F.Supp. 521, affirmed 130 F.2d 31.—Pat 16.18, 37.

D.Md. 1931. Law regards change as "novelty," and acceptance and utility of change as further evidence or demonstration of novelty.—*Kaplan v. Robertson*, 50 F.2d 617.—Pat 45.

D.Md. 1931. Patent law regards change as "novelty."—*Kaplan v. Robertson*, 50 F.2d 617.—Pat 37.

D.Mass. 1941. In order that there may be "novelty" so as to sustain a patent, the thing must not have been known to any one before, mere novelty of form being insufficient.—*Seaver v. Wm. Filene's Sons Co.*, 37 F.Supp. 762.—Pat 37.

E.D.Mich. 1934. In determining patentability, law regards a change as "novelty" and acceptance and utility of the change as further evidence, and even as demonstration, of novelty.—*Johnson Bros. Engineering Corporation v. Caille Bros. Co.*, 8 F.Supp. 198.—Pat 37.

S.D.N.Y. 1994. Under New York law, "novelty" cannot be found, such as is required for plaintiff to maintain claim for misappropriation of idea, if idea consists of nothing more than variation on basic theme.—*AEB & Associates Design Group, Inc. v. Tonka Corp.*, 853 F.Supp. 724.—Copyr 102.

S.D.N.Y. 1931. Design patent must have not only "novelty," meaning more than mere novelty of form, but also "ornamentation," which implies beauty, or giving of pleasing appearance. 35 U.S.C.A. § 73.—Kanne & Bessant v. Eaglelet Metal Spinning Co., 54 F.2d 131.—Pat 43.

S.D.N.Y. 1925. Design must possess "novelty" in the eyes of average observers. The question of novelty of a design, which will sustain a patent therefor, is a matter of appearance to the eyes of average observers.—Franklin Knitting Mills v. Gropper Knitting Mills, 7 F.2d 381, reversed 15 F.2d 375, certiorari denied 47 S.Ct. 476, 273 U.S. 761, 71 L.Ed. 878.—Pat 43.

D.Or. 1940. Veaux patent No. 2,002,102 for apple and pear box held invalid for lack of "novelty" and 'invention,' in view of anticipation by prior patents.—Veaux v. Southern Oregon Sales, 33 F.Supp. 605, affirmed 123 F.2d 455.—Pat 328.

N.Y.Sup. 1994. Idea that is variation on basic theme will not support finding of "novelty," as required for misappropriation claim.—Oasis Music, Inc. v. 900 U.S.A., Inc., 614 N.Y.S.2d 878, 161 Misc.2d 627.—Copyr 101.

N.Y.Sup. 1994. Developer of interactive telephone game, which was nontrivia based, which used sound effects, which used "skip logic" progression, and which involved antidrug theme, failed to demonstrate "originality" or "novelty" of its ideas or themes as required to assert misappropriation of idea claim under New York law.—Oasis Music, Inc. v. 900 U.S.A., Inc., 614 N.Y.S.2d 878, 161 Misc.2d 627.—Copyr 109.

### NOVELTY DOCTRINE

W.D.Tex. 1995. "Novelty doctrine" operates to excuse an otherwise abusive habeas petition that presents truly novel grounds for relief which were not knowable by competent counsel at the time of the original appeal. Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.—Lackey v. Scott, 885 F.Supp. 958, stay vacated 52 F.3d 98, certiorari dismissed, stay granted 115 S.Ct. 1818, 514 U.S. 1093, 131 L.Ed.2d 741.—Hab Corp 898(3).

### NOVEMBER ELECTION

Cal.App. 3 Dist. 1912. Local Option Law, St.1911, p. 601, § 6, provides that if a petition for an election is certified within six months, and not less than 40 days before the holding of the next general state or general municipal election, the question shall be submitted at said "general election" otherwise at a special election held within a certain time, and Primary Election Law, St.1911, p. 769, as amended by St.1911, Ex.Sess. p. 66, designates May 14, 1912, as the day on which the electors qualified to vote thereat shall select delegates to the national convention, and section 1, subd. 1, thereof, defines "primary election" as any and every primary nominating primary election provided for by this act, and subdivision 4 defines "election" as the general, or city, or city and county election as distinguished from a "primary election," and subdivision 5 defines "November election" as the presidential elec-

tion. To be general, in the sense implied by the Legislature, the election must be one where every qualified voter of the state or district or division of the state where required by law to be held has the right to vote for whomsoever he pleased, and hence the presidential primary election is not a "general election" within the meaning of that term as used in the local option law.—Bigelow v. Board of Supervisors of Sonoma County, 124 P. 554, 18 Cal. App. 715.

### NOVICE

N.M.App. 1995. "Novice" at monastery was not "worker" within meaning of Workers' Compensation Act, even though novice received room, board, training, and \$25 per month "vestry"; novice's application for membership, waiver of remuneration, letter to monastery, and trial testimony indicated that novice's motivation in joining monastery and performing services while there was religious devotion, primary purpose of monastery was to further spiritual development of its members, and novice was assigned tasks and received room, board, training, and vestry in order to facilitate that development. NMSA 1978, § 52-1-16, subd. A.—Joyce v. Pecos Benedictine Monastery, 895 P.2d 286, 119 N.M. 764.—Work Comp 252.

### NO VISITORS

N.C.App. 1979. Since entire matter of how "no visitors" sign was placed on deceased's hospital door was first raised by caveators and since their witness was allowed, without objection, to testify on cross-examination that deceased requested the sign, there was no error in permitting witness to explain, on cross-examination, how she reached such opinion, i.e., that decedent's wife, from whom he had separated, was getting on his nerves and he was tired of her saying that she was his legal wife and that he felt that she was no longer his wife. G.S. § 8-51.—Matter of Simmons' Will, 258 S.E.2d 466, 43 N.C.App. 123, review denied 262 S.E.2d 9, 299 N.C. 121.—Evid 502.

### NOW

C.A.5 (Miss.) 1970. Term "now" as used in statute authorizing county supervisors to change district lines but not to affect any supervisor now holding office until end of his term referred to year when statute was passed. Code Miss.1942, § 2870.—Taylor v. Monroe County Bd. of Sup'rs, 421 F.2d 1038.—Counties 38.

Ct.Cl. 1890. "Now," as used in the Bowman act, inhibiting the Court of Claims from exercising jurisdiction of congressional cases where the claim is "now" barred by virtue of any law, means at the present time; that is, at the time of the passage of the act.—Nutt v. U.S., 26 Ct.Cl. 15.

Ark. 1940. The word "now" in statute providing that municipalities "now" owning or operating facilities for supplying a public service or commodity to their citizens may, with approval of Department of Public Utilities, extend their service into rural territory contiguous to municipalities, means "now or hereafter owning or operating," etc. Pope's Dig.

§ 2108.—Arkansas Utilities Co. v. City of Paragould, 143 S.W.2d 11, 200 Ark. 1051.—Mun Corp 277.

Cal.App. 2 Dist. 1943. Where complaint alleged that plaintiff permitted city to discharge storm waters from city streets on land from 1912 to 1940, at which time permission was withdrawn, allegation that defendant "now" maintains without permission conduits for conducting storm water onto plaintiff's land meant that nuisance was maintained at present time.—Los Angeles Brick & Clay Products Co. v. City of Los Angeles, 141 P.2d 46, 60 Cal.App.2d 478.—Plead 34(5).

Cal.App. 2 Dist. 1919. Under contract providing that vendees were to have, with other enumerated personal property "now" situate upon the purchased premises, all trays, vendees were not entitled to trays not upon the premises when the contract was made, though they assumed and agreed to pay, as part of the purchase money, an existing mortgage on vendor's trays, which mortgage included those trays in question.—White v. Greenwood, 180 P. 45, 40 Cal.App. 113.—Ven & Pur 67.

Colo. 1932. Referees, in determining whether, under Public Domain Range Act, cattlemen or sheepmen had preferred right to use range, held not limited to consideration of grazing season of 1928. This was so since the use of the disjunctive word "or" in Laws 1929, p. 443, § 1, providing that the preferred right should be determined according to the use made of range during the last grazing season prior to passage of the act, whether such use was as a cattle "or" sheep range indicates that the Legislature had in mind a range that had been used exclusively for one or the other of such classes of livestock during the last grazing season, and such meaning of section 1 was conclusively shown by the fact that section 2 was devoted to the apportionment of any range "now" being used as a mixed sheep and cattle range, and the word "now" as thus used meaning March, 1929, when the act was approved and went into effect, and not the grazing season of 1928.—Barrow v. Wilcoxson, 14 P.2d 1095, 91 Colo. 278.

Del.Supr. 1945. The word "may", in testamentary provision directing trustee to transfer all stock "which I may own" in certain corporation to testator's nephew on death of testator's widow, indicated stock which testator might or could own at time of his death, as of which will spoke, in contradistinction to "now" or similar word meaning as of date of will.—Bird v. Wilmington Soc. of Fine Arts, 43 A.2d 476, 28 Del.Ch. 449.—Wills 466.

Del.Ch. 1919. In a will devising to one all that parcel of land, situate in S. county, "where I now reside," containing 45 acres, more or less, the word "now" is not a limitation, but an item of description, and does not of itself exclude from the devise after-acquired property, annexed to and enlarging the devised tract.—Sussex Trust Co. v. Polite, 106 A. 54, 12 Del.Ch. 64.—Wills 578(1).

Fla. 1951. The word "now" ordinarily means "at the present time" or "at the moment", and may refer to a condition existing at the time of passage

of an act, but, by its use, may come to mean "a time contemporaneous with something done" and have an ambulatory meaning in the sense that it denotes the moment when, from time to time, the act is read and applied.—Larson v. American Title & Ins. Co., 52 So.2d 816.—Statut 199.

Fla. 1951. Where statute authorizing city excise tax on premium receipts of insurance companies contained proviso that statute 'shall not be construed to require payment of an excise tax by an insurance company that does not "now" pay such tax,' action of legislature in adopting the compilation titled 'Florida Statutes, 1941,' which included the proviso intact, gave to the word "now" an ambulatory meaning and it should be read as 'now or hereafter' and denotes moment when, from time to time, the act is read and applied. F.S.A. §§ 16.19 et seq., 175.01 et seq., 175.05, 205.43.—Larson v. American Title & Ins. Co., 52 So.2d 816.—Statut 147.

Fla.App. 4 Dist. 1995. Provision of sunshine law pursuant to which governmental entity may meet in executive session with its attorney to discuss pending litigation to which entity is "presently" party did not preclude city from invoking provision due to fact that it was not nominal party in attorney fee litigation brought in mayor's name; "presently" under statute does not mean "now" as precise point in time, and is properly applied to time period from now into immediate future, i.e., a short while. West's F.S.A. § 286.011(8).—Brown v. City of Lauderdale, 654 So.2d 302.—Mun Corp 92.

Ga. 1925. Word "now" used in will refers to time when will went into effect.—Tate v. Tate, 128 S.E. 393, 160 Ga. 449.

Ga.App. 1923. If contract for sale of cultivators of varying seasonal value provided for delivery "now," delivery nearly a year after the order was given was as matter of law not made within reasonable time.—Beck & Gregg Hardware Co. v. Hall Hardware Co., 117 S.E. 271, 30 Ga.App. 224.—Sales 81(3).

Ga.App. 1923. If contract of sale provided for delivery "now," it would be construed as meaning without unreasonable delay or within a reasonable time.—Beck & Gregg Hardware Co. v. Hall Hardware Co., 117 S.E. 271, 30 Ga.App. 224.—Sales 81(3).

Ga.App. 1923. While dispute as to whether contract provided for delivery "now" or in "Nov." would ordinarily be a question for the jury, where the legal effect was the same in either case, the court was authorized to determine such effect in directing a verdict.—Beck & Gregg Hardware Co. v. Hall Hardware Co., 117 S.E. 271, 30 Ga.App. 224.—Sales 88.

Iowa 1980. Term "now" as used in jurisdictional provision of Uniform Child Custody Jurisdiction Act refers to time of filing of petition requesting modification. I.C.A. § 598A.14.—Pierce v. Pierce, 287 N.W.2d 879.—Child C 700.

Iowa 1923. Where the terms of a bond executed by a bank to secure repayment of county funds

deposited therein under Code, § 1457, expressly secured repayment of all funds "now or hereafter deposited" by the county treasurer though the sureties were liable for any funds on deposit when the bond was executed, they were not liable for any such deposits which, because of the insolvency of the bank, had been wholly lost to the county, the word "now" referring only to such funds as were then actually in the bank, and hence in an action by the county against the sureties it was error to sustain a demurrer to a defense on this ground.—*Greene County v. City Bank of Jefferson*, 195 N.W. 3, 196 Iowa 1164, amended 196 N.W. 94, 196 Iowa 1164.—Dep & Escr 37.

Iowa 1920. "Now" means at the present time.—*Walker v. Dwelle*, 175 N.W. 957, 187 Iowa 1384.

Iowa 1910. Under Code § 3271 (I.C.A. § 633.4), providing that "property to be subsequently acquired may be devised, when the intention is clear and explicit," a will giving to certain persons, "all my real estate which is" (describing it) "also including all other real estate now owned by me," devises real estate acquired by testator after execution of the will; "now" being referable to the time of testator's death.—*Luers v. Luers*, 124 N.W. 603, 145 Iowa 600, 139 Am.St.Rep. 453.—Wills 578(4).

Kan. 1929. The word "now," although ordinarily implying present time, may also be used in connection with a time referred to, or a time contemporaneous with something done, depending on the context; and as used in Laws 1927, c. 255, § 9, authorizing the reimbursement of taxpayers out of the road fund, but making reimbursement optional in any county where proceedings are now under way for construction of a state road, "now" refers to the effective date specified in the act rather than the day on which the act was approved.—*Thompson v. Board of Com'rs of Reno County*, 275 P. 205, 127 Kan. 863.

Kan. 1917. Title of Laws 1913, c. 124, § 1, Gen.St.1915, § 855, authorizing cities "now" owning waterworks to issue bonds for their extension, authorizes issuance of bonds by cities thereafter acquiring waterworks; the word "now" sometimes referring to a time contemporaneous with something done.—*State v. City of Lawrence*, 165 P. 826, 101 Kan. 225.—Statut 120(4).

Ky. 1944. Use of the word "now", in testamentary bequest to two sisters of all testatrix' United States bonds "amounting now to \$20,000 par value", indicated that phraseology following the words "United States bonds" was merely informative and not descriptive or definitive and not intended to limit bequest of bonds to \$20,000.—*McElroy v. Trigg*, 177 S.W.2d 867, 296 Ky. 543, 151 A.L.R. 966.—Wills 570.

Md. 1899. "Now," as used by a debtor on the presentation of an obligation, accompanied by demand for payment, stating that he could not pay it "now," as he had two members of his family "now" to support, being used twice, suggests the purpose of future payment when the disability now existing

may be removed.—*Beeler v. Clarke*, 44 A. 1038, 90 Md. 221, 78 Am.St.Rep. 439.

Mass. 1930. The beneficiary had in similar language made assignment of her interest in former policy on her husband's life issued for ten-year period, but now claims that the words "now or hereafter loaned" did not protect past loans. However, the assignee at the time of the second assignment was under conservatorship, and there was nothing to show that a present loan was in the minds of the parties and no money was lent at that time or after the date of assignment. The word "now" generally implies present time, but does not necessarily bear such implication, and its true meaning is determined from context.—*Worthen v. Burgess*, 173 N.E. 530, 273 Mass. 437.—Insurance 1991.

Mich. 1885. "Now," as used in a bond in which J. agreed to make, execute, and deliver to H. a good and sufficient deed of conveyance of such interest "as I 'now' have acquired of said H. of the following described lands," etc. means at the present time.—*Jeffrey v. Hursh*, 25 N.W. 176, 58 Mich. 246.

Minn. 1960. In statute providing that, for purpose of determining tax limitations "now" established by statute or by charter, certain property should be figured at stated percentages of full and true value thereof, quoted word was prospective in meaning and applied not only to tax limitations in effect when act was passed but to subsequent tax limitations in effect at time of making levy. M.S.A. § 273.13, subd. 7a.—*Governmental Research Bureau, Inc. v. St. Louis County*, 104 N.W.2d 411, 258 Minn. 350.—Counties 190.2; Mun Corp 956(2).

Mo. 1897. "Now" does not necessarily mean at the present time. For instance, where a statute provided that all instruments in writing now kept, etc., was approved on February 20th, it was nevertheless held that the word "now" referred to the time when the act regulating conveyances of real estate took effect in the subsequent October. In another case, in construing the provision of the bankrupt act of 1849 as to every deed or memorandum "now or hereafter" entered into, it was held that the provision did not apply to such instruments as were entered into and completed before the passing of the statute, but was held to have been used in the sense of "heretofore."—*City of St. Louis v. Dorr*, 41 S.W. 1094, 145 Mo. 466, 68 Am.St.Rep. 575, 42 L.R.A. 686, on rehearing 46 S.W. 976, 145 Mo. 466, 68 Am.St.Rep. 575, 42 L.R.A. 686.

Nev. 1940. Under statute providing for removal of officers for neglect or refusal to perform official acts in manner and form as "now" prescribed by law, complaint charging county clerk and treasurer with acts of omission, all of which involved acts required of such officer by repealed statutes or by statutes enacted after the removal statute, did not state cause of action. Comp.Laws, §§ 4860, 4861.—*Buckingham v. Fifth Judicial Dist. Court in and for Mineral County*, 102 P.2d 632, 60 Nev. 129.—Counties 67.

Nev. 1940. A statute, the substantive provisions of which provided for removal of public officers for neglect or refusal to perform official acts in manner and form "now" prescribed by law, was operative only with respect to acts prescribed by laws enacted and in force and effect at the time the removal statute was enacted, notwithstanding word "now" was not used in subsequent procedural provisions of the statute. Comp.Laws, §§ 4860, 4861.—Buckingham v. Fifth Judicial Dist. Court in and for Mineral County, 102 P.2d 632, 60 Nev. 129.—Offic 66.

N.J. 1963. Word "now" as used in statute providing that nothing in statute providing for certain optional plan of appointment of municipal officers should abolish office of any official or employee now protected by any tenure of office law means effective date of optional law and not date of adoption of optional law. N.J.S.A. 40:69A-207.—Loboda v. Clark Tp., 193 A.2d 97, 40 N.J. 424.—Mun Corp 126.

N.J.Sup. 1906. The use of the word "now," in a statute, often precludes the statute from being deemed general, as, for example, certain things confined to cities where a board of assessment and revision "now" exists, or confined to honorably discharged soldiers "now" in office, or confined to cities in which there are "now" by law three members of common council. P.L.1906, p. 192, providing that in all instances where excise commissioners are "now" by law appointed by the mayor or other governing body or any municipality shall be appointed by the court of common pleas in the county, is unconstitutional, because special.—Bumsted v. Henry, 64 A. 475, 74 N.J.L. 162, 45 Vroom 162, affirmed Decker v. Daudt, 67 A. 375, 74 N.J.L. 790, 45 Vroom 790.

N.J.Super.L. 1962. The word "now" as used in statute providing that nothing in statute providing for a certain optional plan of appointment of municipal officers shall abolish office of any official or employee now protected by any tenure of office law, meant any official or employee protected by tenure of office law on date optional law became effective, and not on date municipality approved such optional law. Const.1947, Art. XI; N.J.S.A. 11:1-1 et seq., 11:19-1 et seq., 40:69A-1 et seq., 207.—Loboda v. Clark Tp., 180 A.2d 721, 74 N.J.Super. 159, affirmed 193 A.2d 97, 40 N.J. 424.—Mun Corp 126.

N.J.Com.Pl. 1945. The constitutional clause withholding right of suffrage from person convicted of a crime which "now" excludes him from being a witness refers to time of adoption of constitution on September 2, 1844, and hence takes as a standard of reference the statute of 1799, providing that no person convicted of any of enumerated crimes, including conspiracy, shall be admitted as a witness unless first pardoned. Act June 7, 1799, Paterson's Laws, p. 401; N.J.S.A.Const. art. 2, par. 1.—Application of Marino, 42 A.2d 469, 23 N.J.Misc. 159.—Convicts 1; Elections 90.

N.Y.A.D. 2 Dept. 1912. Under General Construction Law, § 34, the term "now," in the constitutional provision relating to jurisdiction now exer-

cised by courts, relates to laws in force or to jurisdiction existing immediately before the taking effect of the Constitution.—Leach v. Auwell, 138 N.Y.S. 975, 154 A.D. 170.—Const Law 14.

N.Y.A.D. 4 Dept. 1908. 2 Rev. St. (1st Ed.) pt. 2, c. 6, tit. 1, § 5, provides that every will devising in express terms, or by intent, all of testator's real estate, shall be construed to pass all he owned at his death. Testatrix's will read: "I give \* \* \* to my husband all my real estate \* \* \* of which I am now possessed." She subsequently sold a farm which she then owned and purchased property of which she died seised. Held, that the word "now" in the will did not extend its meaning, and under the statute the property subsequently acquired by the testatrix went to her husband under the will.—Hodgkins v. Hodgkins, 108 N.Y.S. 173, 123 A.D. 110.—Wills 578(4).

N.Y.Sup. 1944. Under statute providing that salaries of attendants of County Court of Kings County are thereby equalized and fixed at same amount per annum as is "now" paid to attendants of Supreme Court of such county, the equalization of salaries called for is not to be given effect as of date of enactment and subsequent re-enactment. Judiciary Law, § 352; General Construction Law, §§ 34, 48.—Moskowitz v. LaGuardia, 48 N.Y.S.2d 174, 183 Misc. 33, affirmed 51 N.Y.S.2d 758, 268 A.D. 918, affirmed 62 N.E.2d 388, 294 N.Y. 830.—Courts 58.

N.Y.Ct.Cl. 1956. Under statute providing that any existing highway which is improved or reconstructed under provisions of statute shall continue to be maintained by the state or municipality "now" having jurisdiction over such existing highway, the word "now" signifies the moment the law became effective unless otherwise changed by law between such date and date of project agreement for construction of town line road. McK.Unconsol.Laws, § 7274.—Buffington v. State, 152 N.Y.S.2d 716, 2 Misc.2d 496.—High 105(1).

Okl. 1929. "Now," as used in law authorizing establishment and maintenance of public libraries and reading rooms in firstclass cities, relates to time contemporaneous with something done. Comp.St. 1921, § 9528, as amended by Laws 1927, c. 7, § 1; Const. art. 5, § 59.—Protest of Chicago, R.I. & P. Ry. Co., 279 P. 319, 137 Okla. 186, 1929 OK 263.—Statut 199.

Or. 1910. Tillamook City Charter, art. 4, § 2, subsec. 2, Sess.Laws 1893, pp. 551, 552, authorizes the city to collect road taxes from all property of the corporation equal to that "now" levied by law for road purposes to be expended on highways, streets, and alleys within the corporation, under the supervision of the common council, and exempts citizens and property from the same tax for county road purposes. Held, that the word "now" meant "at the present time," and limited the city's right to levy taxes for street purposes to the amount the county was authorized to levy for road taxes when the charter took effect, and this amount was not changed or increased by subsequent statutes, raising the county rate, either by the same or subsequent

Legislature.—Tillamook City v. County Court of Tillamook County, 107 P. 482, 56 Or. 112.—Mun Corp 956(2).

Or. 1887. The word "now," in its ordinary acceptation, means at this time, or at the present moment, or at a time contemporaneous with something done. It relates to actual existence of the fact at the time and place mentioned.—*Pike v. Kennedy*, 15 P. 637, 15 Or. 420.

Pa. 1939. "Now" may be employed in any of several senses, but to ascertain the sense in which testator used the word in devise of house and lot in which "I now reside," the word could not be lifted from its context, but was to be considered as part of the general description of the devise.—*In re Lusk's Estate*, 9 A.2d 363, 336 Pa. 465, 125 A.L.R. 787.—Wills 466.

Pa. 1939. "Now" within devise to wife of house and lot in which "I now reside," situate in the second ward, was intended to relate to the time when will became operative, so that where house in which testator resided when will was made was sold before death and one in which he resided in same ward at time of death was acquired after date of will, house in which testator resided at time of death passed to widow. 20 P.S. § 180.14.—*In re Lusk's Estate*, 9 A.2d 363, 336 Pa. 465, 125 A.L.R. 787.—Wills 578(1).

Pa. 1889. The word "now," in a will directing that a testator's business as now conducted shall be continued by his executor, must refer to the time of testator's death.—*Appeal of Allen*, 17 A. 453, 125 Pa. 544.

Pa. 1885. Where testatrix bequeathed to her legatee a certain number of shares of stock "now standing in my name on the books of the corporation," the word "now" referred to the time of the writing of the will, and was a bequest of the particular shares then standing on the books.—*Fidelity Trust Co.'s Appeal*, 1 A. 233, 108 Pa. 492, 16 W.N.C. 12.

S.C. 1908. The word "now," in the phrase "now being on the various tracts," implied present time, and the deed conveyed only the timber of the specified size at the time it was executed.—*Crawford v. Atlantic Coast Lumber Co.*, 60 S.E. 445, 79 S.C. 166.—Logs 3(10).

Tenn. 1896. "Now," as used in a will reciting that it was the testator's intention to give to each of certain children an equal portion, and that the children "now" reside in a certain place, relates to the date of the will.—*Jones v. Hunt*, 34 S.W. 693, 96 Tenn. 369.

Tex. 1915. Under Rev.St.1911, art. 3759, Vernon's Ann.Civ.St. art. 3810 providing that notice of sale under a deed of trust shall be given as "now" required in judicial sales, and Rev. St.1879, art. 2309, Vernon's Ann.Civ.St. art. 4203, Rules of Civil Procedure, rule 647, a trustee, who made out three notices of sale and posted one in the county building and mailed one to the sheriff to be posted at the courthouse and to a third person to be posted at another place more than 20 days before date of

sale, and he mailed a copy of the notice to the grantor in the deed of trust and his wife, and advertised the sale in a newspaper for three weeks complied with the statute; the word "now" meaning the law in force when the article was enacted.—*Roe v. Davis*, 172 S.W. 708, 106 Tex. 537.

Tex.Com.App. 1922. A deed granting to grantor's daughter and her children, "all now of Leon county in the state of Texas," in consideration of \$10 cash and "the natural affection which I bear my said daughter and children," certain property, for the daughter's sole use and benefit for her life, "and at her death to the issue of her body forever," conveyed a fixed interest vesting in the children living at the date of its execution, to take effect in possession on the termination of the life estate, and the interests of children dying before the death of the life tenant did not lapse in favor of surviving children, but descended to the deceased children's heirs; for a limitation to those children in existence at the date of the instrument was implied from the expression of "natural affection" and from the use of the word "now," which denotes present time and signifies separation or setting apart of an indicated date from that of any past or future date as a point of reference.—*Gibbs v. Barkley*, 242 S.W. 462.—Deeds 133(2).

Tex.Crim.App. 1938. Where fraternal benefit society obtained its charter in 1933, long after enactment of statute prohibiting solicitation of memberships in an unlicensed fraternal benefit society but exempting associations "now" doing business which provided death benefits not exceeding \$500, president of society could not avoid prosecution for soliciting memberships on ground that death benefits provided for in the constitution and by-laws did not exceed \$500, since use of word "now" in statute limited application of exemption to associations doing business at time statute was enacted. Vernon's Ann.P.C. art. 582; Vernon's Ann.Civ.St. art. 4857.—*Rail v. State*, 120 S.W.2d 252, 135 Tex.Crim. 418.—Insurance 1239(3).

Tex.Crim.App. 1937. In prosecution for the unlawful possession of intoxicating liquor in a dry area for the purpose of sale, search warrant and supporting affidavit which alleged that on certain premises the defendant on a designated day then and "now" kept intoxicating liquors for the purpose of sale were not inadmissible on ground that affidavit failed to show probable cause because not stating the time or place when intoxicating liquors were sold, the word "now" being construed to have reference to time of making affidavit.—*Cropper v. State*, 111 S.W.2d 709, 133 Tex.Crim. 391.—Int Liq 248.

Wis. 1949. Constitutional provision that Supreme Court shall consist of five justices to be elected as "now" provided, by use of word "now", refers to provisions of constitution and not to statutory regulations previously enacted, and does not prevent subsequent enactment of statutory provisions relating to election of justices of the Supreme Court. Const. art. 7, § 4.—*State ex rel. Frederick v. Zimmerman*, 37 N.W.2d 473, 254 Wis. 600.—Const Law 24.

Wis. 1949. Statute providing that if there are more than two candidates for office of justice of Supreme Court, April election shall be a primary election for such offices, and if one candidate does not receive more than 50 per cent of votes, election shall be held first Tuesday in May with names of two candidates who received most votes in April election, does not violate constitutional provision that Supreme Court shall consist of five justices to be elected as "now" provided, though statute was enacted after constitutional provision. Laws 1949, c. 15; Const. art. 7, § 4 (W.S.A.)—State ex rel. Frederick v. Zimmerman, 37 N.W.2d 473, 254 Wis. 600.—Elections 237; Judges 3.

#### NOW ALLOWED BY LAW

N.Y. 1940. The words "now allowed by law" as used in town law provision that fees of magistrate in criminal proceedings in which courts of special session have jurisdiction may be fixed by town board at sum not exceeding the amount "now allowed by law", refer to fees fixed by provision of Code of Criminal Procedure. Town Law, § 102, subd. 9; Code Cr.Proc. § 740-a.—Town of Putnam Valley v. Slutsky, 28 N.E.2d 860, 283 N.Y. 334, reargument denied 29 N.E.2d 665, 284 N.Y. 590.—J P 15.

#### NOW AND THEN

Ind.App. 2 Div. 1916. In a proceeding wherein a widow claimed under Burns' Ann.St.1914, § 3014, providing that if a husband leave a widow, one-third of his estate shall descend to her in fee simple free from all demands of creditors, and it was contended that she was deprived of any interest by section 3034, providing that if a wife shall have left her husband and "shall be living at the time of his death in adultery," she shall take no part of the estate, a special finding that, since a certain date "and up to and including" the date of the husband's death, she had been living "from time to time in the practice of adultery" was not sufficient to support a conclusion of law that she was "living at the time of his death in adultery" within section 3034; the phrase "from time to time" being synonymous with "occasionally," "at intervals," "now and then," and the finding being practically equivalent to a finding that between the dates named she occasionally lived in adultery.—Spade v. Hawkins, 110 N.E. 1010, 60 Ind.App. 388.

Mass. 1920. Where order blank of sellers read, "All orders accepted to be delivered to the best of our ability, but will under no circumstances hold ourselves liable for failure to deliver any portion of orders taken, sometimes caused by circumstances over which we have no control," "sometimes" meant "now and then," "occasionally," "if at any time," and sellers were under absolute obligation to make deliveries to best of ability at time specified, unless prevented by causes for which they were not responsible, so that contract was not void for lack of mutuality.—Bernstein v. W. B. Mfg. Co., 126 N.E. 796, 235 Mass. 425.

#### NOW ARE

Md. 1908. A lease provided that the premises be surrendered at the end of the term of two years "in the same condition as they now are." It covenanted that the "premises are now in good repair." When the lease was executed the premises were in very bad condition, and it was agreed that the property should be put in good condition before the lessee would take possession. The necessary improvements cost a considerable sum, of which the lessee paid a small part. Held, in an action against the lessee for not surrendering the premises in the same condition they were at the time of the rental, that the parties intended the premises to be surrendered at the end of the term in the same condition as they were at the beginning thereof, the words "now are" not referring to the condition of the premises at the time of making the lease.—Chesapeake Brewing Co. v. Goldberg, 69 A. 37, 107 Md. 485, 15 Am. Ann.Cas. 879.—Land & Ten 160(2).

#### NOW ATTACHES

Mass. 1893. The vessel instead of sailing to the west coast of South America from Tacoma, having gone to Sydney, and, after her arrival there, been chartered for a voyage to Manila, the policy was indorsed as follows: "Having deviated from Seattle & Tacoma to Sydney, N. S. W., this policy now attaches at & thence via Philippine Islands to port of advice and/or discharge in Atlantic United States & 15 days on vessel in port after arrival." Held, that the words "now attaches" did not make the policy attach at once to the Manila freight, while the inward freight was unloading.—Lincoln v. Boston Marine Ins. Co., 34 N.E. 456, 159 Mass. 337.—Insurance 2214.

#### NOW BEING LEGALLY DIVERTED

N.J.Sup. 1918. In Water Supply Act, the words "now being legally diverted" mean the amount diverted according to law in 1907, when the act went into effect, and do not extend to a quantity which corporation by contract may thereafter acquire to fulfill its contracts to supply water.—East Jersey Water Co. v. Board of Conservation & Development, 103 A. 853, 91 N.J.L. 448.—Waters 198.

#### NOW CONSTRUCTED

Ga. 1890. The words "now constructed," in Code, § 1689, providing that, where a railroad is intended to be built between two points where a railroad is now constructed, the general direction and location of such new railroad shall be at least 10 miles from the railroad already constructed, cannot be construed to mean now being constructed, or in the process of construction, but means completely constructed, and therefore the statute does not preclude two railroads in the process of construction from being placed nearer together than 10 miles.—Macon & A.R. Co. v. Macon & D.R. Co., 13 S.E. 157, 86 Ga. 83.

#### NOW DESIRE

Pa. 1947. The phrase "now desire", so far as it expresses intent to do anything, expresses a present

intent and not a future one to do that thing.—*Detwiler v. Capone*, 55 A.2d 380, 357 Pa. 495.

#### NOW DUE AND PAYABLE

Cal. 1904. The allegation of a counterclaim that plaintiff's indebtedness is "now due and payable," even treated as a statement of fact does not show that the counterclaim existed at the time of the commencement of the action, as required by Code Civ. Proc. § 438.—*Provident Mut. Building-Loan Ass'n v. Davis*, 76 P. 1034, 143 Cal. 253.—Plead 146.

#### NOW EXERCISED

Mich. 1944. Where life of chattel mortgage extended beyond life of mortgagor's liquor license and mortgagee indorsed mortgagor's note to obtain money to renew license, circumstances established that parties intended the words "now exercised", as used in provision for transfer to mortgagee upon default of liquor license now exercised, to refer to the then current license and renewals thereof.—*Roodvoets v. Anscher*, 13 N.W.2d 850, 308 Mich. 360.—Int Liq 103(3).

#### NOW EXISTING

Or. 1994. Claim of statutory fraud in the inducement of stock sale agreement, which was executed contemporaneously with release, was "now existing" at time that release agreement was executed, and thus, such claim by buyer against seller was released under release agreement releasing both parties from all claims, whether known or unknown, "now existing"; exclusion in release applied to claims that arose under listed agreements after execution of release agreement. ORS 59.127.—*Ristau v. Wescold, Inc.*, 868 P.2d 1331, 318 Or. 383.—Release 38.

#### NOW FIXED BY LAW

Ga.App. 1912. The effect of the act adopting the Code of 1910 was to re-enact into one statute all the provisions of that Code, and the phrase "now fixed by law," used in section 2788, comprehends all the law in the Code applicable to its provisions.—*Atkinson v. Swords*, 74 S.E. 1093, 11 Ga.App. 167.—Statut 146.

#### NOW FOR THEN

C.A.4 (Md.) 1993. "Nunc pro tunc" means literally "now for then"; it is a procedure whereby determination previously made, but for some reason improperly entered or expressed may be corrected and entered as of original time when it should have been, or when there has been omission to enter it at all.—*Maksymchuk v. Frank*, 987 F.2d 1072.—Fed Civ Proc 2625.

Bkrtcy.E.D.Va. 1992. "Nunc pro tunc" is Latin phrase literally meaning "now for then," and judgment entered nunc pro tunc is one given effect as of past date.—*In re Springfield Furniture, Inc.*, 145 B.R. 520.—Fed Civ Proc 2625.

Fla.App. 4 Dist. 1975. "Nunc pro tunc" means "now for then" and when applied to entry of illegal

order or judgment does not normally refer to a new or fresh decision, but relates to a ruling or action actually previously made or done but concerning which for some reason the record thereof is defective or omitted.—*Becker v. King*, 307 So.2d 855, certiorari denied 317 So.2d 76.—Judgm 273(3).

Fla.App. 5 Dist. 1982. "Nunc pro tunc" means "now for then" and when applied to entry of a legal order or judgment it normally refers, not to a new or de novo decision, but to the judicial act previously taken, concerning which the record is absent or defective, and the later record-making act constitutes but later evidence of the earlier effectual act.—*Briseno v. Perry*, 417 So.2d 813, petition for review denied 427 So.2d 736.—Crim Law 994(4).

Ga.App. 1961. "Nunc pro tunc" entry signifies "now for then" and is granted to answer purposes of justice.—*Hunt v. Williams*, 122 S.E.2d 149, 104 Ga.App. 442.—Courts 114.

Vt. 1979. Legal significance of "nunc pro tunc" or "now for then" is to set effective date of present order at particular and appropriate time in the past, on basis that correct entry was inadvertently or mistakenly departed from by the court involved.—*In re Parizo*, 404 A.2d 114, 137 Vt. 365.—Crim Law 996(1).

#### NOW HAVING

La. 1952. In lease provision requiring lessees introducing or "now having" electric lighting in leased premises to comply with all rules and regulations of Louisiana Fire Prevention Bureau, quoted phrase applied only to cases of lease renewals and referred only to electric fixtures, lighting and wiring previously introduced by tenant under a prior lease and made lease provision inapplicable to electric lighting and wiring that had not been installed by tenant.—*Dean v. Pisciotta*, 57 So.2d 591, 220 La. 725.—Land & Ten 124(3).

#### NOW IN CONNECTION WITH

Iowa 1920. A grant of use of gravel pit to repair dam now in connection with gristmill did not entitle grantee and his successors to use gravel for any dam which might be necessary for enjoyment of premises nor for reconstructing dam if it should be destroyed, the words "to repair" presupposing existence of structure, and the words "now in connection with" fixing the identity of such structure.—*Walker v. Dwelle*, 175 N.W. 957, 187 Iowa 1384.—Licens 51.

#### NOW IN FORCE

Ind. 1913. To construe the words "now in force" as used in Act March 4, 1911, Acts 1911, c. 118, § 5 (Burns' Ann.St. § 28-2905), providing that an increase in the license fee should not apply to licenses now in force, as not applying to a license granted, but not paid for and issued, held to violate the rule that words of a statute are to be construed in their plain and usual sense.—*McHale v. Board of Com'r's of Cass County*, 103 N.E. 321, 180 Ind. 390.—Int Liq 45.

Mich. 1961. Whether in a given statute the term "now in force" applies to the moment of adoption of the statute or to the moment of happening of a contemplated future event depends upon the total context, the circumstances surrounding the legislation, and what may be deduced from them as to the legislative intent.—People v. Reese, 109 N.W.2d 868, 363 Mich. 329.—Statut 51.

Mich. 1961. The statute providing that all laws "now in force" applicable to persons confined in state prisons shall apply to all persons who are or hereafter shall be confined in the house of correction or who have been transferred there, means "all laws now in force or hereinafter enacted" and hence defendant transferred from the state prison in 1953 to the Detroit House of Correction could be prosecuted for escape from that institution in 1954, notwithstanding defendant was transferred at a time when the house of correction was not specifically referred to in the Prison Break Statute. Comp.Laws 1948, §§ 750.193, 802.55.—People v. Reese, 109 N.W.2d 868, 363 Mich. 329.—Escape 4.

N.Y.A.D. 1 Dept. 1921. Where a will directed final distribution according to the laws of New York "now in force" regulating the distribution of personal property in case of intestacy, held, in view of other provisions, that testator desired distribution to be made under the state laws in force at the time the will was made, and not according to such laws as subsequently changed.—United States Trust Co. of New York v. Nathan, 187 N.Y.S. 649, 196 A.D. 126, affirmed 135 N.E. 894, 233 N.Y. 505.—Wills 481.

#### NOW IN USE

Wis. 1939. Where a cemetery was platted, and dedicated by the recording of the plat and approval thereof by town, and improvements were made and burial lots were sold, the cemetery was "now in use" within the exception in statutory amendment restricting the right, except as to those cemeteries "now in use," to enlarge cemeteries, notwithstanding at date amendment was enacted, there had not as yet been any interment in the cemetery. St.1931, § 157.06, as amended by Laws 1933, c. 246, § 1.—Town of Blooming Grove v. Roselawn Memorial Park Co., 286 N.W. 43, 231 Wis. 492.—Cem 3.

#### NOW LIVING

Ill. 1918. Under will making bequests to testator's orphan grandchildren, then giving remainder equally to his children "now living," with gift over of share of any child dying before testator leaving children, "and" gift over of share of any child who "shall die without child," "die without child" means before testator, so that his children surviving him take a fee simple.—Williamson v. Carnes, 120 N.E. 585, 284 Ill. 521.—Wills 545(3).

Me. 1921. Where a clause granting to a daughter's descendants "now living" "or hereafter born" is ambiguous, the rule limiting takers under such general clause to those in esse at testator's death is applicable.—Merrill v. Winchester, 113 A. 261, 120 Me. 203.—Wills 524(2).

Me. 1921. A will giving property to a daughter's children, grandchildren, and great-grandchildren "now living" or "hereafter born" will be construed to exclude children not in esse at testator's death for the reason that it is improbable, unless otherwise clearly expressed, that testator should desire to postpone the distribution of his estate for so long.—Merrill v. Winchester, 113 A. 261, 120 Me. 203.—Wills 524(2).

Me. 1921. Where testator in providing for a daughter's children devises "to each of her children, grandchildren and great-grandchildren now living," the words "now living" mean the time when the words were written, for the general rule that a will speaks from the date of testator's death may be overcome by the particular language of the clause in the light of the circumstances, and the words "or hereafter born" in the clause construed are used in contradistinction to "now living," and mean, those born after the making of the will; the word "born" being used in its broad sense to include both those actually born and those en ventre sa mere.—Merrill v. Winchester, 113 A. 261, 120 Me. 203.—Wills 524(3).

#### NOW LOADED

Wash. 1924. Telegram and letter agreeing to indorse trade acceptances given by another company for cars of crates, "now loaded," which order had directed seller to "ship at once," held not to guaranty payment for a car shipped three weeks later, though part of same order; "ship at once," meaning "with all reasonable haste consistent with fair business activity."—Grays Harbor Commercial Co. v. Yakima Valley Producers' Ass'n, 228 P. 600, 130 Wash. 567.—Guar 36(5).

#### NOW MEMBERS

Wash.App. Div. 2 2000. Police officers who were not eligible to participate in Volunteer Firemen's Relief and Pension Fund were not "now members" or "protected by" state or local pension plan, for purposes of statute prohibiting political subdivision from putting public employees under federal social security act if they are "now members or protected by" any state or local pension plan or system. Laws 1951, ch. 184, § 1.—Tumwater Police Officers Guild v. Employment Sec. Dept., 9 P.3d 225, 102 Wash.App. 317.—Mun Corp 187(2).

#### NOW OCCUPIED

U.S.Or. 1883. "Now occupied," as used in Act Cong. Aug. 14, 1848, 9 Stat. 323, entitled "An act to establish the territorial government of Oregon," section 1 declaring that the title to land not exceeding 640 acres "now occupied" as missionary stations among the Indians in the territory should be confirmed and established in the several religious societies to which the missionary stations respectively belong, means held in possession, held or kept for use, and does not include lands which were not occupied at the date of the act, but which had been voluntarily abandoned 11 months before, and the occupancy of which the society never resumed, either for missionary or any other purpose.—Mis-

sionary Soc. of M.E. Church v. Dalles City, 2 S.Ct. 672, 107 U.S. 336, 17 Otto 336, 27 L.Ed. 545.

#### NOW ON DEPOSIT IN DESIGNATED BANK ACCOUNTS

N.Y.Sur. 1957. In will bequeathing money "now on deposit in designated bank accounts" to named churches, quoted phrase referred to date of death, and the legacies were determined as of such date and not as of the time the will was executed.—*In re Corigliano's Estate*, 165 N.Y.S.2d 239, 9 Misc.2d 847.—Wills 578(1).

#### NOW OR HEREAFTER

Fla. 1948. Constitutional amendment authorizing legislature by special act to change boundaries of "any" justice of the peace district "now or hereafter" established, and to establish new or abolish any such district "now or hereafter" existing, authorized legislature to establish new or abolish districts, and change their boundaries by special act passed at any time while legislature was in session, including boundaries of districts, as constituted at date amendment was adopted or thereafter established by legislature, and including one or all, indiscriminately of total number. F.S.A. Const. art. 5, §§ 21, 23.—*Wilson v. Crews*, 34 So.2d 114, 160 Fla. 169.—J P 2.

Fla. 1948. Constitutional amendment authorizing legislature by special act to change boundaries of any justice district "now or hereafter" established and to establish new or abolish any district "now or hereafter" existing vested exclusive power in legislature to establish or abolish districts and change their boundaries, and divested county commissioners of all express power to divide county into districts, as well as implied power to establish, abolish or change boundaries, generally exercised by them prior to adoption of amendment. F.S.A. Const. art. 5, §§ 21, 23; F.S.A. §§ 87.01-87.13; Sp.Acts 1945, c. 23249.—*Wilson v. Crews*, 34 So.2d 114, 160 Fla. 169.—J P 2.

#### NOW OR HEREAFTER LOANED

Mass. 1930. Beneficiary's assignment of policy on her husband's life, for protection of assignee against loss of money "now or hereafter loaned," held to protect assignee from losses on loan previously made.—*Worthen v. Burgess*, 173 N.E. 530, 273 Mass. 437.—Insurance 1991.

Mass. 1930. The beneficiary had in similar language made assignment of her interest in former policy on her husband's life issued for ten-year period, but now claims that the words "now or hereafter loaned" did not protect past loans. However, the assignee at the time of the second assignment was under conservatorship, and there was nothing to show that a present loan was in the minds of the parties and no money was lent at that time or after the date of assignment. The word "now" generally implies present time, but does not necessarily bear such implication, and its true meaning is determined from context.—*Worthen v. Burgess*, 173 N.E. 530, 273 Mass. 437.—Insurance 1991.

#### NOW OWNED BY ME

Okl. 1942. Since a will is considered to be republished each day of its existence until revoked and rule respecting ambulatory wills applies in state, phrase "now owned by me" in will giving all of testator's interest in lands and personal property "now owned by me" to his brother, who died before testator's death, applied on date of testator's death, as well as on date of execution of will, so that such brother's descendants take all of testator's property, including realty acquired by him after date of will. 84 Okl.St.Ann. §§ 146, 156, 165.—*Jacobs v. Pinkston*, 121 P.2d 996, 190 Okla. 179, 1942 OK 19.—Wills 578(1).

#### NOW OWNED OR ACQUIRED

C.C.A.8 (Minn.) 1929. Railroad mortgage held not to cover after-acquired equipment; "appurtenances," "now owned or acquired." Railroad mortgage covering machinery and tools "now owned, or which may hereafter be owned or acquired," and rolling stock and equipment, implements, fuel, materials, and supplies "now owned or acquired by the mortgagor," held not to cover after-acquired equipment, since term "now owned or acquired" is not equivalent to "now owned or hereafter acquired," and rolling stock and equipment do not constitute "appurtenances" to railroad.—*Guaranty Trust Co. of New York v. Minneapolis & St. L.R. Co.*, 36 F.2d 747, certiorari denied 50 S.Ct. 407, 281 U.S. 756, 74 L.Ed. 1166.—R R 167.

#### NOW OWNED OR HEREAFTER ACQUIRED

C.C.A.8 (Minn.) 1929. Railroad mortgage held not to cover after-acquired equipment; "appurtenances," "now owned or acquired." Railroad mortgage covering machinery and tools "now owned, or which may hereafter be owned or acquired," and rolling stock and equipment, implements, fuel, materials, and supplies "now owned or acquired by the mortgagor," held not to cover after-acquired equipment, since term "now owned or acquired" is not equivalent to "now owned or hereafter acquired," and rolling stock and equipment do not constitute "appurtenances" to railroad.—*Guaranty Trust Co. of New York v. Minneapolis & St. L.R. Co.*, 36 F.2d 747, certiorari denied 50 S.Ct. 407, 281 U.S. 756, 74 L.Ed. 1166.—R R 167.

#### NOW PROVIDED BY LAW

Conn. 1897. "Now provided by law," within the meaning of Pub.Acts 1895, p. 648, c. 308, § 4, requiring that votes on the question of licensing the sale of liquors, cast as by the act provided, shall be counted and returned as now provided by law, has reference to the methods used prior to its enactment, and does not authorize the rejection of double or marked license ballots, as it does not refer to section 9 of the general election law, Pub. Acts 1895, p. 619, c. 267, providing for the rejection of double or marked ballots cast for candidates for office or for educational purposes.—*Fessenden v. Bossa*, 37 A. 977, 69 Conn. 335.

Ill. 1905. Priv.Laws 1857, p. 219, c. 11, divides the city of Joliet into school districts, provides for the election of school inspectors, and gives the city council power to levy taxes for school purposes. Laws 1897, p. 292, increases the power of the school inspectors giving them authority to employ teachers, and to fix the amount of their compensation, and to build or purchase buildings, etc., but provides that all moneys necessary for school purposes shall be raised as "now provided by law," and that they shall be held by the treasurer subject to the order of the school inspectors on warrants to be countersigned by the mayor and city clerk. Held, that the latter statute did not give the board of school inspectors authority to levy taxes by repealing the former statute by implication.—People ex rel. Board of School Inspectors of Joliet v. Mottinger, 74 N.E. 150, 215 Ill. 256.

Pa.Super. 1937. Statute providing that damages occasioned by construction of connecting road between two state highways shall be determined and paid in manner "now provided by law" in construction of state highways held to require that damages occasioned by construction of connecting road be determined and paid as provided by law at time of passage of statute, which therefor required payment by the county, rather than when statute is invoked which would require payment by the commonwealth. 36 P.S. §§ 171, 571, 572.—Petition of Easby, 189 A. 548, 124 Pa.Super. 578, opinion adopted 192 A. 646, 326 Pa. 511.

#### NO WRITTEN STATEMENT

Ala. 1998. Statement in acknowledgment form in employee handbook, signed by employee, that no written statement or agreement in handbook is binding, vitiated operative effect of arbitration provision contained in that employee handbook; plain meaning of the phrase "no written statement" included statement in handbook that employee would use binding, independent arbitration as final step in complaint process. Federal Arbitration Act, 9 U.S.C.A. §§ 1-16.—Ex parte Beasley, 712 So.2d 338.—Arbit 6.2.

#### NOW RIVER BANK

N.Y.Sup. 1939. Under restrictive covenant stipulating that building was to be located not less than 30 feet from the "now river bank", quoted words meant the edge of the upper bank of stream and did not mean the water's edge.—Moore v. Lyon, 22 N.Y.S.2d 114, 174 Misc. 1092, affirmed 22 N.Y.S.2d 208, 259 A.D. 1067.—Covenants 51(2).

N.Y.Sup. 1939. The construction within 15 feet from the edge of the upper bank of river of a building adjusted so that an automobile could be placed in it, but used as a summer house, was in violation of a restrictive covenant stipulating that premises should be used for private residence purposes only and that one "single dwelling" should be erected on the premises and should be located not less than 30 feet from the "now river bank".—Moore v. Lyon, 22 N.Y.S.2d 114, 174 Misc. 1092, affirmed 22 N.Y.S.2d 208, 259 A.D. 1067.—Covenants 103(2).

#### NOW SERVING

La. 1990. Provision of 1921 Constitution requiring judges to retire at the age of 75, but providing that any judge "now serving" who has served less than 20 years upon attaining age of 75 may remain in office until he or she has served for 20 years or reaches age 80 applies to all judges who took office under that language prior to January 1, 1975, when a new Constitution came into effect; phrase "now serving" did not limit its application to those who were serving in the year in which language was placed in the Constitution. LSA-Const.1921, Art. 7, § 8.—Williams v. Ragland, 567 So.2d 63, rehearing denied.—Judges 7.

#### NOW STANDING IN MY NAME

Md. 1878. According to well-settled rules of construction, in order to constitute a specific legacy, it is necessary for the testator to distinguish or identify the stock or thing given, by saying "stock now in my possession," or "now standing in my name," or some other equivalent expression, marking the corpus of the stock bequeathed, and showing the testator meant that that identical stock, and no other, should pass to the legatee. In case of a bequest general of stocks, or of a sum of money in stocks, without further explanation, and without more particularly referring to or marking the corpus of the identical stock, the fact that the testator possesses such stock at the time of the execution of the will is not sufficient to justify the court in declaring the legacy to be specific.—Dryden v. Owings, 49 Md. 356.

#### NOW TEACHING

Minn. 1948. The words "now teaching" in statute for licensing of teachers of barbering that any person now teaching may obtain license without examination referred not to time of enactment, but to time when statute took effect. M.S.A. § 154.065, subd. 7.—State ex rel. Krausmann v. Streeter, 33 N.W.2d 56, 226 Minn. 458, 4 A.L.R.2d 662.—Health 356.

#### NOXIOUS

C.C.A.8 (Mo.) 1934. Articles dangerous to health, covered by act requiring employers to provide for protection of employees from occupational diseases and furnished respirators to employees engaged in work productive of noxious or poisonous dusts, held not confined to those enumerated therein. V.A.M.S. § 292.310, declares antimony, arsenic, brass, copper, lead, mercury, phosphorus, zinc, their alloys or salts or any poisonous chemicals, minerals, acids, fumes, vapors, gases, or other substances, generated or used in harmful quantities or under harmful conditions, especially dangerous to employees' health, but section 292.300 provides generally that employer shall provide means for prevention of industrial or occupational diseases, and section 292.320, requires that respirators be furnished employees engaged in work productive of noxious or poisonous dusts; term "noxious" having been construed as covering dusts harmful or injuri-

ous to health or physical well-being.—St. Joseph Lead Co. v. Jones, 70 F.2d 475.

Cal.Super. 1955. The statute prohibiting the discharge of contaminants into the air is not unconstitutionally indefinite because of the use of the word "noxious" which must be understood as applying to fumes, gases and odors, as well as to "acids", the word that immediately follows it. West's Ann. Health & Safety Code §§ 24198–24341, 24208, 24242.—People v. Plywood Mfg's of Cal., 291 P.2d 587, 137 Cal.App.2d Supp. 859, appeal dismissed Union Oil Company of California v. People of the State of California, 76 S.Ct. 787, 351 U.S. 929, 100 L.Ed. 1458, rehearing denied 76 S.Ct. 1046, 351 U.S. 990, 100 L.Ed. 1503.—Crim Law 13.1(6).

N.Y.A.D. 2 Dept. 1917. The erection of buildings to be used as retail stores, with dwelling apartments above, does not violate a restrictive covenant, prohibiting establishment of distilleries, coal yards, stables, etc., or any business "dangerous, noxious, or offensive to the neighboring inhabitants"; the general clause being meant to prohibit other kinds of business which are dangerous, noxious, or offensive in the same manner as those specified, the word "noxious" suggesting that which causes or tends to cause injury, especially to health or morals.—Moubray v. G. & M. Improvement Co., 165 N.Y.S. 842, 178 A.D. 737.

### **NOXIOUS DUST**

Mo. 1932. In employee's suit for damages for tuberculosis allegedly contracted from inhalation of dust from sand blasting, defendant's instruction defining words, "noxious dust" within statute requiring employer to furnish respirator held properly refused as erroneous. V.A.M.S. §§ 292.120, 292.320, 292.390.—Dodd v. Independence Stove & Furnace Co., 51 S.W.2d 114, 330 Mo. 662.—Emp Liab 269.1.

### **NOXIOUS GAS**

C.C.A.2 (N.Y.) 1943. Air, filled with dust of powdered rock, is a "noxious gas", within New York Labor Law requiring employer to provide an air current sufficient to remove smoke and noxious gases and to insure safety of employees. Labor Law N.Y. § 417.—Stornelli v. U.S. Gypsum Co., 134 F.2d 461, certiorari denied 63 S.Ct. 1317, 319 U.S. 760, 87 L.Ed. 1712, rehearing denied 63 S.Ct. 1445, 320 U.S. 214, 87 L.Ed. 1851.—Emp Liab 30.

### **NOXIOUS OR DANGEROUS TRADE**

N.Y.Sup. 1947. The undertaking business was not a "noxious or dangerous trade", within restrictive covenant against use of lot for any slaughter house, smith shop, etc., or any other noxious or dangerous trade.—Jones v. Chapel Hill, 69 N.Y.S.2d 753, 189 Misc. 784, modified 77 N.Y.S.2d 867, 273 A.D. 510, motion denied 81 N.Y.S.2d 279, 274 A.D. 823.—Covenants 52.

### **NOXIOUS OR DESTRUCTIVE SUBSTANCE OR LIQUID**

Cal. 1878. West's Ann.Pen.Code, § 216, providing that every person who, with intent to kill, administers or causes or procures to be administered to another any poison or other "noxious or destructive substance or liquid," but by which death is not caused, shall be punished, does not mean merely such as might when administered be hurtful and injurious, but, like a poison, it must be capable of destroying life. It includes substances which act on the system mechanically so as to destroy life, as well as those which are capable of destroying life by their own inherent qualities. Pulverized glass or boiling water are included within "noxious or destructive substance or liquid," for when administered in sufficient quantities they will destroy life, but they are not poisonous.—People v. Van Deeler, 2 P.C.L.J. 24, 53 Cal. 147.

### **NOXIOUS OR OFFENSIVE**

N.Y.A.D. 1 Dept. 1901. The term "noxious or offensive," in a conveyance of property which contains a provision that the premises are not to be used for any trade or business which may be noxious or offensive to neighboring inhabitants, will not be construed to include a building thereon for use as a residence for nurses, without evidence justifying a conclusion that the building so used will be more noxious to neighboring inhabitants than a building used as a common residence for any other class of persons. "To be included within the general terms mentioned it must be found as a fact that it is the business which may be in any wise noxious or offensive to the neighboring inhabitants. The definition given to such a covenant by the Court of Appeals (Rowland v. Miller, 34 N.E. 765, 139 N.Y. 93, 22 L.R.A. 182) would seem to include the use to which the defendant intends to put these premises. In that case the court said: 'We cannot suppose that the parties had in mind any business which might be offensive to a person of supersensitive organization or to one of a peculiar or abnormal temperament, or to the small class of persons who are generally annoyed by sights, sounds, and objects not offensive to other people. They undoubtedly had in mind ordinary, normal people, and meant to prohibit trades and business which would be offensive to people in general, and thus render the neighborhood to such people undesirable as a place of residence.'”—Moller v. Presbyterian Hospital in City of New York, 72 N.Y.S. 483, 65 A.D. 134.

### **NOXIOUS OR OFFENSIVE BY REASON OF THE EMISSION OF ODOR, DUST, SMOKE, GAS OR NOISE**

N.J.Super.A.D. 1959. Properly construed, ordinance subsection prohibiting, in industrial zone, any trade or industry not specifically mentioned elsewhere "that is noxious or offensive by reason of emission of odor, dust, smoke, gas or noise" prohibited any other business like the specific businesses mentioned in preceding portions of section which was "noxious or offensive by reason of the emission of odor, dust, smoke, gas or noise"; and the automobile wrecking business, not being one of

**NUCLEAR INCIDENT**

those mentioned earlier or like any of those, was not prohibited by such subsection, even though there was some smoke and noise associated with dismantlement of wrecked vehicles.—*Mayer v. Board of Adjustment of Town of Montclair*, 152 A.2d 860, 56 N.J.Super. 296, certification granted 154 A.2d 673, 30 N.J. 601, reversed 160 A.2d 30, 32 N.J. 130.—Zoning 278.1.

**NOXIOUS POTION OR SUBSTANCE**

Tex.Crim.App. 1903. Pen.Code 1895, art. 647, Vernon's Ann.P.C. art. 1197, imposes a punishment on any one who shall mingle "any other noxious potion or substance with any drug, food or medicine, with intent to kill or injure any person." As the statute formerly stood, Pasch.Dig. art. 2198; Pen.Code 1858, art. 537, it read: "Any poison or other noxious potion," etc. *Held*, that the phrase, "noxious potion or substance" in the Penal Code means some character of poison.—*Runnels v. State*, 77 S.W. 458, 45 Tex.Crim. 446.—Environ Law 747.

**NOXIOUS PRODUCT**

Mo.App. 1958. Proof of one person's sensitivity to a substance is not proof that it is a "noxious product" as generally understood.—*Eddy v. Missouri Public Service Co.*, 309 S.W.2d 4.—Prod Liab 82.1.

**NOXIOUS THING**

Del.Super. 1969. An indictment charging that defendant with intent to procure miscarriage of a woman supposed by him to be pregnant "advised her to use \* \* \* an instrument or instruments to effect a miscarriage" was defective since an instrument is not a "noxious thing" proscribed by statute which refers only to advising use of "poison, drugs, medicine, or other noxious thing." 11 Del.C. § 301.—*State v. Riley*, 256 A.2d 273.—Abort 5.

**N. P**

Ga.App. 1908. The initials "N. P." will be recognized by the court as the usual and ordinary abbreviation for the official title of a notary public.—*Towler v. Carithers*, 61 S.E. 1132, 4 Ga.App. 517.—Evid 16.

**N.S.F**

Wash.App. Div. 3 1996. "N.S.F." stamp is authorized evidence of presentment and dishonor. West's RCWA 62A.3-510 (Repealed).—*Ford v. Hagel*, 920 P.2d 260, 83 Wash.App. 318, as am on denial of reconsideration, appeal after remand 92 Wash.App. 1061.—Banks 150.

**N. TO S. END OF W. AVENUE**

Ill. 1921. Judicial notice will be taken of meaning of "N." and "S." when applied to directions. The Supreme Court will take judicial notice that "N." and "S." when applied to directions are properly read north and south, and that "N. to S. end of W. avenue" means north and south end of W. avenue.—*Village of Bradley v. New York Cent. R. Co.*, 129 N.E. 744, 296 Ill. 383.—Evid 16.

Ill. 1921. The Supreme Court will take judicial notice that "N." and "S." when applied to directions are properly read north and south, and that "N. to S. end of W. avenue" means north and south end of W. avenue.—*Village of Bradley v. New York Cent. R. Co.*, 129 N.E. 744, 296 Ill. 383.—Evid 16.

**NUCLEAR FAMILY**

U.S.Ohio 1977. The constitutional protection of the sanctity of the family extended to family choice in case in which son and grandsons were living with grandmother, and is not confined within an arbitrary boundary drawn at the limits of the "nuclear family," consisting of a couple and its dependent children. (Per Mr. Justice Powell with three Justices concurring and one Justice concurring in the judgment.) U.S.C.A.Const. Amend. 14.—*Moore v. City of East Cleveland, Ohio*, 97 S.Ct. 1932, 431 U.S. 494, 52 L.Ed.2d 531.—Const Law 82(10).

**NUCLEAR INCIDENT**

C.A.5 (Tex.) 2000. Under the Price Anderson Act, term "nuclear incident" neither is limited to a single, catastrophic accident nor is contingent on whether the occurrence took place in a state which regulates its own uranium industry under Nuclear Regulatory Commission (NRC) guidelines or whether the facility is covered under the separate indemnification portions of the Act. Atomic Energy Act of 1954, §§ 11, 170(n)(2), as amended, 42 U.S.C.A. §§ 2014, 2210(n)(2).—*Acuna v. Brown & Root Inc.*, 200 F.3d 335, certiorari denied *Garcia v. Conoco, Inc.*, 120 S.Ct. 2658, 530 U.S. 1229, 147 L.Ed.2d 273, certiorari denied 120 S.Ct. 2658, 530 U.S. 1229, 147 L.Ed.2d 273.—Environ Law 494.

C.D.Ill. 1990. Accident at nuclear power plant, when worker was exposed to radioactive material while working inside reactor building, was not "extraordinary nuclear occurrence" but mere "nuclear incident," any claim in connection which would not fall within "waiver of defenses" provision of Price-Anderson Act. Atomic Energy Act of 1954, §§ 11(j, q), 170(n), as amended, 42 U.S.C.A. §§ 2014(j, q), 2210(n).—*O'Conner v. Commonwealth Edison Co.*, 748 F.Supp. 672, affirmed 13 F.3d 1090, certiorari denied 114 S.Ct. 2711, 512 U.S. 1222, 129 L.Ed.2d 838.—Electricity 16(1).

E.D.Mich. 1999. For purposes of bringing a public liability action (PLA) under the Atomic Energy Act, a "nuclear incident" can be any alleged personal harm or property damage from exposure to radiation at a commercial nuclear power plant. Atomic Energy Act of 1954, § 11(q), as amended, 42 U.S.C.A. § 2014(q).—*Lokos v. Detroit Edison*, 67 F.Supp.2d 740.—Electricity 16(1).

S.D.Ohio 1995. No "nuclear incident" occurred when government and university officials allegedly subjected cancer patients to radiation experiments under guise that they were receiving cancer treatment and, thus, patients failed to state claim against physicians under Price-Anderson Act, which confers federal jurisdiction over public liability actions arising from nuclear incidents; while physicians' alleged conduct might be reprehensible, operation of teletherapy unit was application of nuclear medi-

cine, and there was no unintended escape or release of nuclear energy. 42 U.S.C.A. §§ 2014, 2210(n)(2).—In re Cincinnati Radiation Litigation, 874 F.Supp. 796.—U.S. 77.

Mo.App. E.D. 1985. A “nuclear incident,” within meaning of Atomic Energy Act of 1954, § 1 et seq., as amended, 42 U.S.C.A. § 2011 et seq., does not necessarily have to occur within a short period of time, and steady exposure to radiation from an undetected leak of radioactive materials can constitute an incident within the meaning of the Act.—Bennett v. Mallinckrodt, Inc., 698 S.W.2d 854, 73 A.L.R.4th 553, certiorari denied 106 S.Ct. 2903, 476 U.S. 1176, 90 L.Ed.2d 989.—Neglig 305.

### **NUCLEUS OF DESCRIPTION**

Tex.App.—Corpus Christi 2000. Under “nucleus of description” theory, if enough appears in description of land in deed so that party familiar with locality can identify premises with reasonable certainty, it will be sufficient.—Siegert v. Seneca Resources Corp., 28 S.W.3d 680.—Deeds 111.

### **NUDE**

Mo.App. E.D. 1992. Defendant’s 14-year-old daughter whom he allowed to be photographed without her shirt was “nude” in photographs within meaning of word “nudity” in definition of prohibited sexual act under child abuse statute; definition of “nudity” used in obscenity statutes was not applicable to child abuse statutes. V.A.M.S. §§ 568.060, 568.060, subds. 1(2), 2, 573.010 et seq., 573.010(7).—State v. Foster, 838 S.W.2d 60, rehearing, transfer denied, and transfer denied, certiorari denied 113 S.Ct. 1607, 507 U.S. 994, 123 L.Ed.2d 169.—Infants 13.

### **NUDE PACT**

Ga. 1955. An executory contract founded on no consideration, either good or valuable, is “nude pact”, and cannot be enforced. Code, §§ 20-102, 20-301, 20-303, 20-304.—Georgia Cas. & Sur. Co. v. Hardrick, 88 S.E.2d 394, 211 Ga. 709.—Contracts 85.

La.App. 2 Cir. 1935. Contract between ice manufacturing corporation and prospective ice dealers, whereby dealers agreed for period of ten years to purchase ice from such corporation and from no other person or corporation in city, and corporation agreed to deliver ice daily to dealers at stated price, held not a “nude pact,” in view of privilege extended to dealers to purchase stock in corporation.—Oliver v. Home Service Ice Co., 161 So. 766.—Corp 458.

N.C. 1892. A “nude pact” is an agreement without consideration.—Wilmington & W.R. Co. v. Alsbrook, 14 S.E. 652, 110 N.C. 137, affirmed 13 S.Ct. 72, 146 U.S. 279, 36 L.Ed. 972.

### **NUDIST CAMP**

Cal.App. 2 Dist. 1991. There was no compelling interest to justify inclusion of private home within ordinance’s definition of “nudist camp,” and, thus, definition of nudist camp in county code violated

State Constitution; “nudist camp” meant any place in which three or more persons who were not all members of same family congregated or engaged in any activity while without clothing or covering or with partial clothing or covering, other than an occasional gathering in, or on the premises of a private home. U.S.C.A. Const. Amend. 1; West’s Ann.Cal. Const. Art. 1, § 1.—Elysium Institute, Inc. v. County of Los Angeles, 283 Cal.Rptr. 688, 232 Cal.App.3d 408, review denied, certiorari denied 112 S.Ct. 1180, 502 U.S. 1098, 117 L.Ed.2d 424.—Zoning 76.

### **NUDITY**

Del.Supr. 1979. For purposes of obscenity prosecution, “nudity” is not synonymous with lewd exhibition of the genitals. 11 Del.C. § 1364(2)(b).—Raymond Heartless, Inc. v. State, 401 A.2d 921.—Obscen 1.1.

Iowa 1996. “Nudity” within meaning of statute prohibiting sexual exploitation of minor includes exposure of breasts, buttocks or genitalia. I.C.A. § 728.1, subd. 6, par. g.—State v. Hunter, 550 N.W.2d 460, rehearing denied.—Infants 13.

Mo.App. E.D. 1992. Defendant’s 14-year-old daughter whom he allowed to be photographed without her shirt was “nude” in photographs within meaning of word “nudity” in definition of prohibited sexual act under child abuse statute; definition of “nudity” used in obscenity statutes was not applicable to child abuse statutes. V.A.M.S. §§ 568.060, 568.060, subds. 1(2), 2, 573.010 et seq., 573.010(7).—State v. Foster, 838 S.W.2d 60, rehearing, transfer denied, and transfer denied, certiorari denied 113 S.Ct. 1607, 507 U.S. 994, 123 L.Ed.2d 169.—Infants 13.

Mo.App. W.D. 1993. Defendant’s photograph of child, in which child’s excrement-smeared buttocks were visible, depicted “nudity” within meaning of child abuse statute, although child’s genitals were not visible. V.A.M.S. § 568.060, subd. 2.—State v. Salata, 859 S.W.2d 728, rehearing, transfer denied, and transfer denied.—Infants 13.

Mo.App. W.D. 1993. Amendment to statute prohibiting photographing of children engaged in prohibited sexual act, by adding “fetishism” to enumerated prohibited sexual acts, did not change substantive sense of “nudity” within meaning of statute. V.A.M.S. § 568.060, subd. 2.—State v. Salata, 859 S.W.2d 728, rehearing, transfer denied, and transfer denied.—Infants 13.

Neb. 1975. “Nudity” and “obscenity” are not synonymous and a nude performance does not become an obscene one unless, taken as a whole, it appeals predominantly to the prurient interest, a shameful interest in nudity or sex beyond customary limits, it describes in a patently offensive way sexual conduct specifically proscribed by state law, and, taken as a whole, it lacks serious artistic value as determined by average person applying contemporary community standards. R.S.Supp.1974, §§ 28-926.11 to 28-926.33.—Midtown Palace, Inc. v. City of Omaha, 229 N.W.2d 56, 193 Neb. 785.—Obscen 6.

N.J.Super.A.D. 2001. Ordinance prohibiting nudity on public beach was not vague as applied to partial nudity of topless female sunbather; wording of ordinance gave persons of ordinary intelligence fair notice of the nature of the prohibited conduct and common meaning of "nudity" did not require total nakedness, and ordinance banned indecent or lewd dress or indecent or unnecessary exposure as well as nudity.—*State v. Vogt*, 775 A.2d 551, 341 N.J.Super. 407, certification denied 785 A.2d 435, 170 N.J. 206.—Const Law 82(10); Obscen 2.5.

N.J.Super.A.D. 1999. Definition of "nudity" in section of lewdness statute designed to proscribe child pornography applies only to nudity on part of child. N.J.S.A. 2C:24-4, subd. b(1)(i).—*State v. Hackett*, 733 A.2d 554, 323 N.J.Super. 460, affirmed as modified 764 A.2d 421, 166 N.J. 66.—Obscen 2.5.

Tex.App.—Fort Worth 1989. City ordinance regulating sexually oriented businesses was not unconstitutionally "overbroad" in its definition of "nudity" as "less than completely and opaquely covered" human genitals, pubic region, or pubic hair, human buttock, or female breast or breasts below point immediately above top of areola; ordinance advanced public interest in ameliorating effect such businesses had on neighborhoods and was narrowly tailored in that it did not attempt to ban topless dancing but only to regulate such dancing within certain geographic areas, and there were alternative sites for such form of expression. U.S.C.A. Const. Amend. 1.—*Williams v. City of Fort Worth*, 782 S.W.2d 290, writ granted, and writ withdrawn, and writ denied.—Const Law 90.4(2); Obscen 2.5.

## NUDUM PACTUM

N.D.W.Va. 1942. A proof of claim for total and permanent disability benefits under life policy long abandoned and discarded by the parties concerned becomes "nudum pactum".—*Kendall v. Travelers Ins. Co.*, 45 F.Supp. 956.—Insurance 3142.

Ala. 1941. A release is a "contract" and must be supported by a lawful and valuable consideration and otherwise is "nudum pactum".—*National Life & Accident Ins. Co. v. Karasek*, 200 So. 873, 240 Ala. 660.

Ariz. 1943. Where agreement between Mexican agent for fishermen's co-operatives and Arizona truckers to engage in business of hauling fish to be obtained by agent made no provision for sharing of profits and losses and imposed on Arizona truckers no obligations in reciprocation for agent's services in obtaining fish, agreement was a "nudum pactum" and unenforceable.—*Estrella v. Suarez*, 134 P.2d 167, 60 Ariz. 187.—Contracts 10(1).

Cal. 1895. There is no question but that a writing which is a nudum pactum is not the subject of forgery; but a contract which a court will not enforce or even recognize, because it is against the policy of the law, cannot be termed a "nudum pactum".—*People v. James*, 42 P. 479, 110 Cal. 155.

Cal.App. 1 Dist. 1962. A "nudum pactum" is a voluntary promise, without any other consideration

than mere good will, or natural affection.—*People v. Searcy*, 18 Cal.Rptr. 779, 199 Cal.App.2d 740, 90 A.L.R.2d 814.—Contracts 85.

Fla. 1955. Contracts, which salesman had signed on behalf of company, but which customers had not signed, were "nudum pactum" and, therefore, only secondary evidence of terms of oral contract previously entered into between customer and salesman and of debt which customer would owe to the company upon completion of job called for by contract.—*Biber v. City of Miami*, 82 So.2d 747.—Contracts 35.

Ga. 1942. A gift in writing not based upon a good consideration is a "nudum pactum" and in absence of actual delivery of the property, remains ineffective. Code, §§ 48-101, 48-103.—*Cannon v. Williams*, 22 S.E.2d 838, 194 Ga. 808.—Gifts 19(1).

Ga.App. 1942. Although, when made, a promise may be "nudum pactum" because the promisee is not bound, the test of mutuality of contract is to be applied as of the time the contract is to be enforced and if the promisee has accomplished the contemplated object, the promise is valid.—*Perry v. Kimberly Jewelry Co.*, 23 S.E.2d 471, 68 Ga.App. 568.—Contracts 10(1).

Ga.App. 1942. Creditor's naked promise to extend the time of collection of a past-due debt would be "nudum pactum" and not binding on creditor.—*Lyle v. Mandeville Mills*, 22 S.E.2d 186, 68 Ga.App. 88.—Contracts 47.

Ga.App. 1940. A receipt marked in full for all claims arising under life policy, signed by beneficiary upon payment by insurance company of face value of policy, was a "nudum pactum" because of lack of consideration, and could not be pleaded as an "accord and satisfaction" in full, where policy contained double indemnity clause, and company admitted liability for face amount of policy. Code 1933, § 20-1204.—*Matthews v. Gulf Life Ins. Co.*, 12 S.E.2d 202, 64 Ga.App. 112.—Accord 7(1); Insurance 3384.

La. 1940. Contract employing plaintiff as comptroller of company for period of one year obligated plaintiff to serve for period of one year, and if plaintiff had left employment during such period without cause, he would not only have forfeited salary due him during remainder of period, but could, also, have been compelled to return to company all money that had been paid him under the contract, and hence contract was not a "nudum pactum". LSA-C.C. art. 2750.—*Hill v. American Co-op. Ass'n*, 197 So. 241, 195 La. 590.—Corp 308(3).

Neb. 1937. "Nudum pactum" is a voluntary promise, without any other consideration than mere good will, or natural affection, and such a promise is unenforceable.—*Grimes v. Baker*, 275 N.W. 860, 133 Neb. 517.—Contracts 47.

Neb. 1937. Reciprocal promises, as basis of a valid agreement, must ordinarily be obligatory upon parties, so that each may have an action thereon; otherwise such agreement is "nudum pac-

tum.”—*Grimes v. Baker*, 275 N.W. 860, 133 Neb. 517.—Contracts 56.

N.J.Sup. 1942. A landlord’s promise to make necessary repairs to leased dwelling house purchased by him, if tenant in possession thereof under month to month lease from prior owner would continue tenancy, was not “nudum pactum” for want of consideration on ground that defendant’s mere acquisition of property did not constitute new letting, as “consideration” for promise was continuance of tenancy.—*Watkins v. Feinberg*, 24 A.2d 198, 128 N.J.L. 79, affirmed 30 A.2d 27, 129 N.J.L. 386.—Land & Ten 152(2).

N.Y.Ct.Cl. 1943. In absence of express rescission of an old contract, a new promise made simply for additional compensation is a mere “nudum pactum”.—*Whale Oil Co. v. State*, 42 N.Y.S.2d 208, 180 Misc. 1067, affirmed 44 N.Y.S.2d 778, 266 A.D. 1043, appeal denied 47 N.Y.S.2d 275, 267 A.D. 841.—Contracts 237(1).

N.C. 1964. An agreement by which one party is subjected to trouble, loss or inconvenience is not a “nudum pactum”.—*Carolina Helicopter Corp. v. Cutter Realty Co.*, 139 S.E.2d 362, 263 N.C. 139.—Contracts 52.

Tenn.Ct.App. 1939. Where there was neither averment nor proof in tenant’s personal injury action against landlord that when landlord leased premises to tenant he covenanted that he would repair the premises, alleged subsequent promise of the landlord to repair, made without a consideration moving from tenant, was a mere “nudum pactum.”—*Talley v. Curtis*, 129 S.W.2d 1099, 23 Tenn.App. 181.—Land & Ten 152(2).

Wash. 1915. A contract, naked of any obligation or duty on one side, a “nudum pactum,” is not enforceable.—*Virtue v. Stanley*, 151 P. 270, 87 Wash. 167.

## NUGATORY

Ga. 1924. “Nugatory” means of no force; inoperative; ineffectual; invalid; futile; as, the law was “nugatory” because without a sanction. The word “nugatory,” as used in a decision stating that the error in opening a default and allowing the filing of a demurrer and answer at the second term, after the trial term of the case, rendered all subsequent proceedings “nugatory,” means the same as void.—*Avery & Co. v. Sorrell*, 121 S.E. 828, 157 Ga. 476, answer to certified question conformed to 122 S.E. 638, 32 Ga.App. 41.

## NUIRE

N.Y.Sup. 1926. “Nuisance” is derived from French word “nuire,” which means to injure, hurt, or harm. It is anything done to the hurt or annoyance of lands, tenements, or hereditaments of another. The injury also may be to person or property, to health, comfort, safety or morality.—*People v. Conti*, 216 N.Y.S. 442, 127 Misc. 244.

Ohio 1889. The term “nuisance,” derived from the French word “nuire,” to do hurt or annoy, is applied in the English law indiscriminately to in-

fringements upon the enjoyment of proprietary and personal rights (citing *Add. Torts*, 155, “Nuisance”); something noxious or offensive; anything not authorized by law which maketh hurt, inconvenience, or damage.—*Village of Cardington v. Fredricks’ Adm’r*, 21 N.E. 766, 46 Ohio St. 442, 21 W.L.B. 395.

## NUISANCE

C.A.D.C. 1995. Landowners could not maintain nuisance suit on basis of noise level that did not exist on their property, as “nuisance” is interference with interest in private use and enjoyment of land.—*Souders v. Washington Metropolitan Area Transit Authority*, 48 F.3d 546, 310 U.S.App.D.C. 370.—Nuis 44.

C.A.D.C. 1972. “Disorderly” conduct statute is not applicable for mere use of indecent or obscene words, but only if the language is, under contemporary community standards, so grossly offensive to members of the public who actually overhear it as to amount to a “nuisance”. D.C.C.E. §§ 22–1107, 22–1121.—*Von Sleichter v. U.S.*, 472 F.2d 1244, 153 U.S.App.D.C. 169, certiorari denied 93 S.Ct. 555, 409 U.S. 1063, 34 L.Ed.2d 517.—Disorderly C 1.

App.D.C. 1925. “Nuisance” defined. A “nuisance” is anything that works or causes injury, damage, hurt, inconvenience, annoyance, or discomfort to one in legitimate enjoyment of his reasonable rights of person or property, or that which annoys, vexes, irritates, or is offensive or troublesome, and may exist, not only in commission, but in omission.—*District of Columbia v. Totten*, 5 F.2d 374, 55 App.D.C. 312, 40 A.L.R. 1461, certiorari denied 46 S.Ct. 21, 269 U.S. 562, 70 L.Ed. 412.—Nuis 1.

App.D.C. 1925. “Nuisance” defined.—*District of Columbia v. Totten*, 5 F.2d 374, 55 App.D.C. 312, 40 A.L.R. 1461, certiorari denied 46 S.Ct. 21, 269 U.S. 562, 70 L.Ed. 412.—Nuis 1.

C.A.11 (Ala.) 1997. “Nuisance” under Alabama law involves idea of recurrence of acts causing injury. Ala.Code 1975, §§ 6-5-120, 6-5-121.—*Lucero v. Trosch*, 121 F.3d 591.—Nuis 4.

C.A.5 (Fla.) 1978. Under Florida law, a “nuisance” is anything which annoys or disturbs one in the free use, possession or enjoyment of his property, or which renders its ordinary use of occupation physically uncomfortable.—*Florida East Coast Properties, Inc. v. Metropolitan Dade County*, 572 F.2d 1108, certiorari denied 99 S.Ct. 253, 439 U.S. 894, 58 L.Ed.2d 240.—Nuis 1.

C.A.7 (Ill.) 1989. Any owner or rightful possessor of land, riparian or not, can complain about “nuisance,” that is, a condition which unreasonably interferes with his use and enjoyment of land.—*Okaw Drainage Dist. of Champaign and Douglas County, Ill. v. National Distillers and Chemical Corp.*, 882 F.2d 1241, rehearing denied, on remand 739 F.Supp. 459, vacated 956 F.2d 272, rehearing denied, appeal after remand 9 F.3d 1549, on remand 842 F.Supp. 1113, on subsequent appeal 96 F.3d 1049.—Nuis 44.

C.A.10 (Kan.) 1960. Rotating swing in public park was not a "nuisance" for which recovery could be allowed from Kansas municipality for injuries to rider.—Fowler v. City of Winfield, Kan., 286 F.2d 385.—Mun Corp 851.

C.A.5 (La.) 1963. "Nuisance" embraces mixed elements of law and fact.—Eastern Air Lines, Inc. v. American Cyanamid Co., 321 F.2d 683.—Nuis 1.

C.A.10 (N.M.) 1950. The term "nuisance" defies universal definition, but in legal contemplation it may fairly be said to be the unreasonable, unwarranted, or unlawful use of property, so as to cause injury, damages, hurt, inconvenience, annoyance, or discomfort to one in the legitimate enjoyment of his reasonable right of person or property.—Denney v. U.S., 185 F.2d 108.—Nuis 1.

C.A.9 (Or.) 1964. Under Oregon law, contamination of a cattle ranch by emanation of fluoride fumes and particles from an aluminum reduction plant operated by defendant was both a "trespass" and a "nuisance", although trespass aspect of the case was controlling in determining which statute of limitations was to be applied. ORS 12.080, 12.110.—Reynolds Metals Co. v. Martin, 337 F.2d 780.—Nuis 3(5); Tresp 10.

C.C.A.8 (Colo.) 1926. Maintaining place where customers habitually bring and consume their own liquor held 'keeping of liquor for commercial purposes,' and "nuisance" (National Prohibition Act, tit. 2, Secs. 3, 21 (Comp. St. Secs. 10138 1/2aa, 10138 1/2jj)). Under National Prohibition Act, tit. 2, Sec. 3 (Comp. St. Sec. 10138 1/2aa), maintaining for profit place were intoxicating liquor is habitually brought by others to be there possessed and consumed held to constitute 'keeping of liquor for commercial purposes,' and "nuisance," within section 21 (Comp. St. Sec. 10138 1/2jj), though proprietor does not own or sell liquor.—Notary v. U. S., 16 F.2d 434, 49 A.L.R. 1446.—Int Liq 143.

C.C.A.8 (Colo.) 1926. Maintaining place where customers habitually bring and consume their own liquor held "keeping of liquor for commercial purposes," and "nuisance" (National Prohibition Act, tit. 2, §§ 3, 21 [27 U.S.C.A. §§ 12, 33]).—Notary v. U. S., 16 F.2d 434, 49 A.L.R. 1446.—Int Liq 143.

C.C.A.5 (Fla.) 1927. Obstruction of navigable waters is "nuisance," and subject to abatement. An obstruction in navigable waters is a "nuisance," and may be abated in proper proceeding.—Sewell v. Arundel Corporation, 20 F.2d 503.—Nav Wat 19.

C.C.A.5 (Fla.) 1927. Obstruction of navigable waters is "nuisance," and subject to abatement.—Sewell v. Arundel Corporation, 20 F.2d 503.—Nav Wat 19.

C.C.A.8 (Neb.) 1936. Landlord is not liable for nuisance created on premises while in possession of tenant so long as he has no right of entry or power to abate. Term "nuisance," as used in reference to condition existing on leased premises, is used in its broadest sense of equivalence to a dangerous condition which may cause harm, inconvenience, or damage to another, or which, in consequence of its position or dangerous tendency, is calculated to

inflict injury upon an innocent person.—Lucas v. Brown, 82 F.2d 361.

C.C.A.3 (N.J.) 1938. Under New Jersey law, any unlawful obstruction of a highway is *prima facie* a "nuisance" and the party responsible for it is liable in damages to one injured thereby.—Delaware, L. & W.R. Co. v. Chiara, 95 F.2d 663, certiorari denied 59 S.Ct. 68, 305 U.S. 609, 83 L.Ed. 387.—Mun Corp 809(1), 819(1); Nuis 61.

C.C.A.2 (N.Y.) 1938. A sewer pipe line laid across a navigable channel in accordance with terms prescribed in an easement granted by the state and permit of the War Department would not be a "nuisance" or an "unlawful interference with navigation."—Sound Marine & Machine Corporation v. Westchester County, 100 F.2d 360, certiorari denied 59 S.Ct. 582, 306 U.S. 642, 83 L.Ed. 1042.—Nav Wat 19.

C.C.A.2 (N.Y.) 1925. Single sale of intoxicating liquors, standing by itself, does not constitute a "nuisance." Common nuisance, as defined in Volstead Act, tit. 2, Sec. 21 (Comp. St. Ann. Supp. 1923, Sec. 10138 1/2jj), implies a more or less continuous practice or habit of selling intoxicating liquor on the premises, and a single sale, standing by itself, does not constitute a "nuisance."—Schechter v. U.S., 7 F.2d 881, certiorari denied 46 S.Ct. 21, 269 U.S. 561, 70 L.Ed. 412.—Int Liq 143.

C.C.A.2 (N.Y.) 1925. Single sale of intoxicating liquors, standing by itself, does not constitute a "nuisance."—Schechter v. U.S., 7 F.2d 881, certiorari denied 46 S.Ct. 21, 269 U.S. 561, 70 L.Ed. 412.—Int Liq 143.

C.C.A.6 (Ohio) 1925. Transportation of whisky does not constitute "nuisance." Mere transportation of whisky does not constitute "nuisance," under National Prohibition Act, tit. 2, Section 21 (Comp. St. Ann. Supp. 1923, Sec. 10138 1/2jj).—Green v. U. S., 8 F.2d 140, 4 Ohio Law Abs. 254.—Int Liq 143.

C.C.A.6 (Ohio) 1925. Transportation of whisky does not constitute a "nuisance."—Green v. U. S., 8 F.2d 140, 4 Ohio Law Abs. 254.—Int Liq 143; Nuis 65.

C.C.A.10 (Okla.) 1933. Erection of modern gasoline station in residential district extending for three long blocks in town of 5,000 population held "nuisance" within Oklahoma laws, warranting injunction. Comp.St.Okl.1921, § 7870 (50 Okl.St. Ann. § 1).—Cities Service Oil Co. v. Roberts, 62 F.2d 579.—Autos 395; Zoning 776.

C.C.A.3 (Pa.) 1948. Contractors who supplied the material and built tank for storage of liquefied gas could not be held liable for death caused by explosion on theory of "nuisance" or "ultrahazardous activity", because gas liquefaction and storage enterprise was not under their control, though they supervised first filling of tank and were called upon from time to time for advice and service.—Moran v. Pittsburgh-Des Moines Steel Co., 166 F.2d 908, certiorari denied 68 S.Ct. 1516, 334 U.S. 846, 92 L.Ed. 1770.—Explos 8.

C.C.A.3 (Pa.) 1948. "Nuisance" has reference to type of interest invaded, and not to any particular type of conduct from which invasion results, and may be created by conduct which is intended to inflict harm, by negligence, or by an extra-hazardous activity.—*Moran v. Pittsburgh-Des Moines Steel Co.*, 166 F.2d 908, certiorari denied 68 S.Ct. 1516, 334 U.S. 846, 92 L.Ed. 1770.—Nuis 1.

C.C.A.5 (Tex.) 1945. A "nuisance" is anything that works injury, harm, or prejudice to an individual or the public.—*King v. Columbian Carbon Co.*, 152 F.2d 636.—Nuis 1, 59.

C.C.A.5 (Tex.) 1945. The terms "nuisance" and "negligence" are not synonymous, since liability for negligence is based on want of proper care, while one who creates or maintains certain types of nuisances may be liable for resulting injury regardless of the degree of care or skill exercised to avoid injury.—*King v. Columbian Carbon Co.*, 152 F.2d 636.—Nuis 7.

W.D.Ark. 2002. Under Arkansas law, "nuisance" is conduct by one landowner which unreasonably interferes with use and enjoyment of lands of another and includes conduct on property which disturbs peaceful, quiet, and undisturbed use and enjoyment of nearby property.—*Sewell v. Phillips Petroleum Co.*, 197 F.Supp.2d 1160.—Nuis 1.

D.Colo. 1954. A "nuisance" differs from a tort in that a "nuisance" implies a repetitious course of conduct in the operation of some business or facility.—*Smillie v. Continental Oil Co.*, 127 F.Supp. 508.—Nuis 1.

D.Colo. 1954. Complaint alleging that defendant, which dealt in petroleum products, removed certain underground metal tanks located closely adjacent to water wells of town, that such tanks were filled or partially filled with kerosene or other petroleum products, and that, in process of removing tanks, defendant permitted kerosene and other petroleum products to be released and spilled into the ground, so as to contaminate municipal water system of town, and that contaminated water damaged plaintiff in operation of dairy, failed to allege a cause of action based on "nuisance," theory, since there was no repetition or continuance of the alleged wrongful act.—*Smillie v. Continental Oil Co.*, 127 F.Supp. 508.—Waters 209.

D.Conn. 1938. A "nuisance" is something that injures or annoys another in the enjoyment of his legal rights.—*Gumbart v. Waterbury Club Holding Corp.*, 27 F.Supp. 228.—Nuis 1.

D.Conn. 1938. Innkeepers were not liable on theory of "nuisance," for injuries received by guest in fall while attempting to enter inn through open window under which there was drop of 25 feet to floor of unlighted gymnasium, in absence of showing of legal right of guest to enter by window, or that innkeepers knew or should have known that persons without invitation or license used window for entrance.—*Gumbart v. Waterbury Club Holding Corp.*, 27 F.Supp. 228.—Inn 10.1.

D.Idaho 1992. Tort of "trespass" applies to wrongful interference with the right of exclusive

possession of real property, while tort of private "nuisance" applies to wrongful interference with use and enjoyment of real property.—*Mock v. Potlatch Corp.*, 786 F.Supp. 1545.—Nuis 1; Tresp 10.

C.D.Ill. 1996. Under Illinois law, to constitute "nuisance," act, structure or device complained about must cause some injury, real and not fanciful, and must work some material annoyance, inconvenience or other injury to person or property of another.—*Sprague Farms, Inc. v. Providian Corp.*, 929 F.Supp. 1125.—Nuis 4.

N.D.Ill. 1929. Restaurant where patrons consumed liquor brought with them held subject to abatement as "nuisance," under National Prohibition Act (27 USCA). Restaurant where patrons consumed intoxicating liquor brought with them, and which supplied patrons with ginger ale and cracked ice therefor, and thereby tacitly consented to violations of National Prohibition Act (27 USCA) by patrons, held a "nuisance," within National Prohibition Act as being a public place where liquor is permitted to be kept for beverage purposes, and therefore subject to abatement.—U.S. v. Club Chez Pierre, 31 F.2d 220.—Int Liq 260.

N.D.Ill. 1929. Restaurant where patrons consumed liquor brought with them held subject to abatement as "nuisance," under National Prohibition Act, 27 U.S.C.A. §§ 1 et seq.—U.S. v. Club Chez Pierre, 31 F.2d 220.—Int Liq 260.

D.Kan. 1991. Under Kansas law, "nuisance" is annoyance which interferes with or obstructs reasonable and comfortable use and enjoyment of property of another.—*Women's Health Care Services, P.A. v. Operation Rescue-National*, 773 F.Supp. 258, reversed 24 F.3d 107, vacated 25 F.3d 1059.—Nuis 1.

W.D.Ky. 1948. A "nuisance" is that which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him, and when cause of the discomfort is continuous, courts of equity will restrain the nuisance.—*City of Louisville v. National Carbide Corp.*, 81 F.Supp. 177.—Nuis 62, 80.

D.Md. 1982. A "trespass" is invasion of one's interest in the exclusive possession of land as by entry upon it, while a "nuisance" is an interference with one's interest in the private use and enjoyment of the land which does not require interference with the possession.—*Nissan Motor Corp. in U.S.A. v. Maryland Shipbuilding and Drydock Co.*, 544 F.Supp. 1104, affirmed 742 F.2d 1449.—Nuis 1; Tres 1.

D.Mass. 1930. Mere discomfort in manufacturing community from atmosphere impregnated with disagreeable odors and impurities, without injury to life or health, does not constitute "nuisance" as matter of law.—*De Blois v. Bowers*, 44 F.2d 621.—Nuis 34.

D.Mass. 1930. Operation of steel galvanizing plant emitting obnoxious fumes and odors held to constitute "nuisance", where everything commercially practicable to control fumes was not done.—*De Blois v. Bowers*, 44 F.2d 621.—Nuis 3(3).

D.Mass. 1930. Operation of steel galvanizing plant emitting obnoxious fumes and odors held to constitute "nuisance", where everything commercially practicable to control fumes was not done. Evidence showed that gases and fumes emitted from galvanizing plant caused adjoining property owners physical discomfort and inconvenience to extent beyond what they ought reasonably be expected to endure. Evidence did not establish that defendants did everything commercially practicable to control fumes. Defendants made no satisfactory answer to property owners' suggestion that fumes could be turned into a tall chimney near galvanizing plant and discharged high in the air.—*De Blois v. Bowers*, 44 F.2d 621.—Nuis 3(3).

E.D.Mo. 1996. Under Missouri law, "nuisance" may be established based on defendant's conduct which is unreasonable as matter of law.—*Laidlaw Waste Systems, Inc. v. Mallinckrodt, Inc.*, 925 F.Supp. 624.—Nuis 1.

E.D.Mo. 1949. Booster station using gas engines on natural gas pipe line was not a "nuisance per se", and could become a "nuisance" only if it were not operated in a fair and reasonable way with regard to rights of nearby landowners in use and enjoyment of their home.—*Boller v. Texas Eastern Transmission Corp.*, 87 F.Supp. 603.—Nuis 3(5).

D.Nev. 1999. Under California law, use of stream which materially fouls and adulterates water, or deposit or discharge therein of any filthy or noxious substances that so far affect water as to impair its value for ordinary purposes of life, or anything that renders water less wholesome than when in its ordinary state, will constitute a "nuisance", which courts of equity will enjoin, and for which a lower riparian owner, injured thereby, is entitled to redress. West's Ann.Cal.Civ.Code § 3479.—*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 34 F.Supp.2d 1226, affirmed in part, reversed in part 216 F.3d 764, rehearing and rehearing denied 228 F.3d 998, certiorari granted in part 121 S.Ct. 2589, 533 U.S. 948, 150 L.Ed.2d 749, affirmed 122 S.Ct. 1465, 535 U.S. 302, 152 L.Ed.2d 517.—Waters 69, 75.

D.Nev. 1999. Under California law, fact that alpine lake with eutrophication problems might turn green and opaque, and be reduced to pale copy of its current self, was not "nuisance", as would be defense to landowners' regulatory takings claim arising from regional planning agency's actions in temporarily prohibiting most residential and all commercial construction on high hazard lands around lake until new regional plan was developed and temporarily suspending all permit approvals with respect to construction on high hazard lands until adoption of regional plan. U.S.C.A. Const.Amend. 5; West's Ann.Cal.Civ.Code § 3479.—*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 34 F.Supp.2d 1226, affirmed in part, reversed in part 216 F.3d 764, rehearing and rehearing denied 228 F.3d 998, certiorari granted in part 121 S.Ct. 2589, 533 U.S. 948, 150 L.Ed.2d 749, affirmed 122 S.Ct. 1465, 535 U.S. 302, 152 L.Ed.2d 517.—Em Dom 2(1.2).

E.D.N.Y. 1955. A localizer building and equipment duly authorized, installed and maintained by proper action of Civil Aeronautics Authority 175 feet from end of air field runway, did not constitute "nuisance" within New York General Municipal Law or otherwise as contended by airlines corporation in its action against United States for damage to plane striking building after overrunning runway. Civil Aeronautics Act of 1938, § 302 as amended 49 U.S.C.A. § 452; General Municipal Law of N.Y. §§ 355, 356.—*U.S. v. Eastern Air Lines*, 132 F.Supp. 787.—Nuis 3(1).

M.D.N.C. 1997. Under North Carolina law, while same act or omission may constitute negligence as well as give rise to cause of action for private nuisance per accidens, "nuisance" does not require negligence, but rather, nuisance is improper use of one's own property in way which injures land or other right of one's neighbor.—*Rudd v. Electrolux Corp.*, 982 F.Supp. 355.—Nuis 1.

M.D.N.C. 1997. Under North Carolina law, "nuisance" is any substantial nontrespassory invasion of another's interest in private use and enjoyment of land by any type of liability-forming conduct; invasion may be intentional or unintentional through conduct which is negligent, reckless, or ultrahazardous.—*Rudd v. Electrolux Corp.*, 982 F.Supp. 355.—Nuis 1, 2.

D.Or. 1994. Under Oregon law, in trespass and nuisance actions, liability is based on interference with possession of land; "trespass" is actionable invasion of possessor's interest in exclusive possession of land, and "nuisance" is actionable invasion of possessor's interest in use and enjoyment of land.—*Cereghino v. Boeing Co.*, 873 F.Supp. 398.—Nuis 1; Tresp 10.

D.Or. 1993. Under Oregon law, "nuisance" is an actionable invasion of possessor's interest in the use and enjoyment of land.—*Cereghino v. Boeing Co.*, 826 F.Supp. 1243.—Nuis 1.

D.Or. 1963. "Nuisance" is an offensive, annoying, unpleasant, or obnoxious thing or practice, a cause or source of annoyance, especially a continuing or repeated invasion or disturbance of another's right, or anything that works a hurt, inconvenience or damage.—*Renken v. Harvey Aluminum (Inc.)*, 226 F.Supp. 169.—Nuis 1.

E.D.Pa. 1984. Essence of a "nuisance" is interference with use and enjoyment of land.—*Philadelphia Elec. Co. v. Hercules, Inc.*, 587 F.Supp. 144, reversed 762 F.2d 303, certiorari denied 106 S.Ct. 384, 474 U.S. 980, 88 L.Ed.2d 337.—Nuis 1.

E.D.Pa. 1945. Discharging large quantities of mash from grain alcohol plant into navigable waters of river constituted private "nuisance," and, since resultant injury was foreseeable and preventable, nuisance was actionable and plant operator must respond in damages for cost of removing such mash from hold of partly submerged vessel and river channel.—*Maier v. Publicker Commercial Alcohol Co.*, 62 F.Supp. 161, affirmed 154 F.2d 1020.—Waters 74.

E.D.Pa. 1945. A "nuisance" is the unreasonable, unwarrantable, or unlawful use by a person of his own property which causes injury, damage, hurt, inconvenience, annoyance, or discomfort to one in the legitimate enjoyment of his reasonable rights of person or property.—*Maier v. Publicker Commercial Alcohol Co.*, 62 F.Supp. 161, affirmed 154 F.2d 1020.—Nuis 1.

E.D.Pa. 1942. An apartment occupied by a family of six which was a former store room covering a space of 20x20 without proper ventilation constituted a "nuisance" precluding enforcement by the office of Price Administration of the rental provisions of the Maximum Rent Regulation, Emergency Price Control Act of 1942, § 1 et seq. 50 U.S.C.A.Appendix § 901 et seq.—*Henderson v. Gandy*, 47 F.Supp. 381.—War 204.

E.D.Va. 1979. The term "nuisance" is incapable of exhaustive definition which will fit all cases, as it is very comprehensive and includes everything that endangers life or health, gives offense to senses, violates laws of decency, or obstructs reasonable and comfortable use of property.—*U.S. v. County Bd. of Arlington County*, 487 F.Supp. 137.—Nuis 1.

N.D.W.Va. 1957. A "nuisance" is that class of wrongs which arises from unreasonable, unwarranted or unlawful use of one's property which produces such material annoyance, inconvenience, discomfort or hurt that consequential damage is presumed.—*Gunther v. E. I. Du Pont De Nemours & Co.*, 157 F.Supp. 25, appeal dismissed 255 F.2d 710.—Nuis 1.

E.D.Wis. 1925. Roadhouse, where Intoxicating liquor consumed, held "nuisance," notwithstanding owners did not own, sell, or barter liquor. Roadhouse, where intoxicating liquor was consumed by patrons with owners' express consent and to their pecuniary profit, was "nuisance," within National Prohibition Act, tit. 2, Secs. 21, 22 (Comp. St. Ann. Supp. 1923, Sec. 10138 1/2jj, 10138 1/2k), in view of section 3 (Comp. St. Ann. Supp. 1923, Sec. 10138 1/2aa), regardless of whether owners owned, sold, or bartered such liquor; 'kept' not requiring personal custodianship or dominion by owners.—*U.S. v. Budar*, 9 F.2d 126.—Int Liq 260.

E.D.Wis. 1925. Roadhouse, where intoxicating liquor was consumed, held "nuisance," notwithstanding owners did not own, sell, or barter liquor. National Prohibition Act, tit. 2, §§ 3, 21, 22, 27 U.S.C.A. §§ 12, 33, 34.—*U.S. v. Budar*, 9 F.2d 126.—Int Liq 260.

D.Wyo. 1998. Under Wyoming law, "nuisance" is a wrong that arises from an unreasonable, unwarranted, or unlawful use by a person of his own property, and which works an obstruction or injury to the right of another.—*Wilson v. Amoco Corp.*, 33 F.Supp.2d 969.—Nuis 3(1).

Fed.Cl. 1997. Under California law, plume of contaminated groundwater underneath landowners' property, which was migrating toward community and threatening to contaminate groundwater basin, constituted "nuisance" that needed to be abated, thus falling within nuisance exception to regulatory

taking, even though contamination was caused by others; there was preexisting limitation on landowners' property rights for abatement of nuisance, and landowner was aware of problem. U.S.C.A. Const. Amend. 5; West's Ann.Cal.Civ.Code §§ 3479, 3480; West's Ann.Cal.Health & Safety Code § 25400; West's Ann.Cal.Water Code § 13050(m); Restatement (Second) of Torts § 839.—*Handler v. U.S.*, 38 Fed.Cl. 611, affirmed 175 F.3d 1374.—Em Dom 2(10); Waters 104.

Ala. 2001. Even a lawful and careful activity, when combined with culpable acts, constitutes a "nuisance" if the activity hurts, inconveniences, or damages the complaining party.—*Russell Corp. v. Sullivan*, 790 So.2d 940.—Nuis 5.

Ala. 1995. Activity that is lawful in nature and that is not "nuisance" in one locality may be or become nuisance when erected and maintained in certain other localities, depending on particular location of activity and way it is managed or operated. Code 1975, § 6-5-120.—*Parker v. Ashford*, 661 So.2d 213, rehearing denied.—Nuis 1.

Ala. 1995. In determining whether activity is or has become "nuisance," court must consider effect on ordinary reasonable person, i.e., person of ordinary sensibilities; it is not sufficient that it would be considered harmful or inconvenient by person of fastidious tastes or sensibilities. Code 1975, § 6-5-120.—*Parker v. Ashford*, 661 So.2d 213, rehearing denied.—Nuis 1.

Ala. 1979. Term "nuisance" refers to the interests invaded and to the damage or harm inflicted, not to any particular kind of act or omission which has led to the invasion.—*City of Birmingham v. City of Fairfield*, 375 So.2d 438, appeal after remand 396 So.2d 692.—Nuis 1.

Ala. 1967. Any establishment erected on premises of owner, though for purposes of trade or business lawful in itself, which, from situation, inherent qualities of business, or manner in which it is conducted, directly causes substantial injury to property of another, or produces material annoyance and inconvenience to the occupants of adjacent dwellings, rendering them physically uncomfortable, is "nuisance". Code 1940, Tit. 7, § 1081.—*Coleman v. Estes*, 201 So.2d 391, 281 Ala. 234.—Nuis 3(1).

Ala. 1957. Conduct of money lenders in deliberately, persistently, continuously and intentionally charging highly usurious rates of interest on short term small loans made to necessitous borrowers who were largely ignorant and not advised of their legal rights and who were not able to employ counsel, was violative of established public policy of state and, under the circumstances, constituted "public wrong" or "nuisance" subject to abatement by injunctive process. Code 1940, Tit. 9, §§ 60, 65.—*Larson v. State ex rel. Patterson*, 97 So.2d 776, 266 Ala. 589.—Nuis 65.

Ala. 1951. Where method of loading coal cars on team track caused dust as well as smoke from locomotives to be blown into homes in neighboring high class residential area, and unloading of metal

sand cars by beating on sides with heavy tools created loud and disturbing noises, and heating and distributing of contents of tar tank cars disturbed residents because of running motors, odors and fumes which permeated homes, and inconvenience was such as would affect an ordinary reasonable man, each of the various activities was a "nuisance". Code 1940, Tit. 7, § 1081.—McClung v. Louisville & N.R. Co., 51 So.2d 371, 255 Ala. 302.—Nuis 3(3); R R 222(2).

Ala. 1943. The blasting of rock on private premises, without reference to particular locality in which it is carried on, is not so intrinsically dangerous as to be ipso facto a "nuisance", but whether it is a nuisance is a "question of fact" depending upon surrounding circumstances.—Tennessee Coal, Iron & R. Co. v. Hartline, 11 So.2d 833, 244 Ala. 116.—Nuis 61, 76.

Ala. 1942. A city's trash dump is not an actionable "nuisance" unless its injurious condition is the result of neglect, carelessness, or unskillfulness of a city employee or officer. Code 1940, Tit. 37, § 502.—City of Bessemer v. Chambers, 8 So.2d 163, 242 Ala. 666.—Mun Corp 736.

Ala. 1941. A municipality has right to close or obstruct a street temporarily for purpose of repairing it, or making a public improvement therein, and may delegate its authority in such respect to one who has contracted with it to make the improvements or repairs, and the obstruction or closing of street does not constitute a "nuisance" so long as reasonable care is exercised in prosecuting the work, nor is it a damaging of abutting property for which the constitution requires compensation to be made, although access thereto is temporarily interfered with. Const.1901, § 235.—Thompson v. City of Mobile, 199 So. 862, 240 Ala. 523.—Em Dom 112; Mun Corp 394(5).

Ala. 1940. A tree between curb and sidewalk near corner was not "nuisance" casting on corner lot owner the duty of keeping roots of tree from growing under sidewalk and causing elevation in sidewalk.—City of Birmingham v. Wood, 197 So. 885, 240 Ala. 138.—Mun Corp 808(1).

Ala. 1940. The erection and maintenance along public roads of electric light poles by one authorized by the statute to do so is not a "nuisance," and hence one injured in the legitimate use of highway in consequence of location or maintenance of such pole must establish negligence in placing or maintaining pole in such close proximity to portion of highway set apart to public use as to be dangerous to members of public, and such negligence must be a proximate cause of injury. Code 1923, § 7197.—Birmingham Elec. Co. v. Lawson, 194 So. 659, 239 Ala. 236.—Electricity 16(1), 16(7).

Ala. 1938. The operation of a gasoline filling station in a semi-business district, without odor or disorder, but neatly and efficiently, in a city which had not been zoned into residential or business districts, would not be enjoined as a "nuisance" at the instance of an adjoining property owner, notwithstanding an alleged depreciation in value of her

property. Code 1923, § 9271.—Milton v. Maples, 179 So. 519, 235 Ala. 446.—Autos 395.

Ala. 1937. Anything that worketh hurt, inconvenience, or damage is a "nuisance."—City of Birmingham v. Hood-McPherson Realty Co., 172 So. 114, 233 Ala. 352, 108 A.L.R. 1140.

Ala. 1934. To constitute "nuisance," noise must be such as materially interferes with ordinary comfort of ordinary people, injury must be substantial, and trifling or occasional noises depending on ordinary use of property or in pursuance of ordinary trade or calling do not constitute nuisance. Code 1940, Tit. 7, § 1081.—Alabama Power Co. v. Stringfellow, 153 So. 629, 228 Ala. 422.—Nuis 3(3).

Ala. 1931. Profitable use of vacant property in residence district is not of itself "nuisance" to residents.—Drennen v. Mason, 133 So. 689, 222 Ala. 652.—Nuis 3(1).

Ala. 1931. Presence of small office on miniature golf course, storage of equipment, and collection of fees from players, possesses no elements of "nuisance" in fact.—Drennen v. Mason, 133 So. 689, 222 Ala. 652.—Nuis 3(9).

Ala. 1928. Any establishment erected on the premises of the owner, though for the purpose of trade or business lawful in itself, which, from the situation, the inherent qualities of the business, or the manner in which it is conducted, directly causes substantial injury to the property of another, or produces material annoyance and inconvenience to the occupants of adjacent dwellings, rendering them physically uncomfortable, is a "nuisance"; and smoke, offensive odors, noise or vibrations, when of such degree or extent as to materially interfere with the ordinary comfort of human existence, will constitute a nuisance.—Dixie Ice Cream Co. v. Blackwell, 116 So. 348, 217 Ala. 330, 58 A.L.R. 1223.

Ala. 1913. A smell disagreeable to ordinary persons, but not hurtful to health, is not such a physical annoyance as makes the use of the property producing it a "nuisance," unless the annoyance or discomfort caused thereby is of such a degree or extent as to materially interfere with the ordinary comfort of home existence.—Jones v. Adler, 62 So. 777, 183 Ala. 435.—Nuis 3(3).

Ala. 1911. In determining whether the maintenance of a planing mill, coalyard, and bins in a residence district in a city are a "nuisance," the effect on persons of ordinary sensibilities only, and not on persons of very delicate and fastidious tastes or sensibilities, should be considered.—First Avenue Coal & Lumber Co. v. Johnston, 54 So. 598, 171 Ala. 470, 32 L.R.A.N.S. 522.

Ala. 1909. Where defendant by blasting caused rock to fall into a stream where plaintiffs were to erect a pier for defendant, the injury was not a nuisance, since the term "nuisance" involves the idea of continuity or recurrence of the acts causing the injury, while a "tort," constituting an invasion of personal or contract right, expends its force in one act, though the injurious consequences may be of long duration.—McCalla v. Louisville & N.R. Co., 50 So. 971, 163 Ala. 107.—Nuis 3(6).

Ala.Civ.App. 1998. “Nuisance” consists of intentional, negligent, or unintentional conduct that works to hurt, inconvenience, or damage the complaining party. (Per Wright, R.A.J., with one Judge concurring, one Judge concurring specially, and three Judges concurring in the result.)—Persky v. Vaughn, 741 So.2d 414, rehearing denied, and certiorari denied.—Nuis 3(1).

Ala.App. 1924. Anything constructed on defendant's premises, which, of itself or by its intended use, directly injures neighbor in proper use and enjoyment of his property is a “nuisance.”—Union Cemetery Co. v. Harrison, 101 So. 517, 20 Ala.App. 291.—Nuis 4.

Ariz. 1939. The term “nuisance” is incapable of precise definition because the controlling facts are seldom alike and each case stands on its own footing and the term is so comprehensive that it has been applied to almost all wrongs which have interfered with rights of citizens whether in person, property or enjoyment of property or comfort.—Engle v. State, 90 P.2d 988, 53 Ariz. 458.—Nuis 59.

Ariz. 1938. A “nuisance” is such use of property or course of conduct as transgresses just restrictions imposed thereon by proximity of other persons or property in civilized communities, irrespective of actual trespass against others or malicious or actual criminal intent.—City of Phoenix v. Johnson, 75 P.2d 30, 51 Ariz. 115.—Nuis 1.

Ariz. 1938. A “nuisance” is wrong arising from owner's unreasonable, unwarranted, or unlawful use of property, working obstruction or injury to right of another or public, and producing such material annoyance, inconvenience, and discomfort that law will presume resulting damage.—City of Phoenix v. Johnson, 75 P.2d 30, 51 Ariz. 115.—Nuis 1, 59.

Ariz.App. Div. 2 2000. “Nuisance,” within meaning of a city's statutory authority to define and abate nuisances, means something that unreasonably interferes with another's enjoyment of his or her property and causes damage thereto. A.R.S. §§ 9–240, subd. B, par. 21(a), 9–276, subd. A, par. 16.—Home Builders Ass'n of Central Arizona v. City of Apache Junction, 11 P.3d 1032, 198 Ariz. 493, review denied.—Mun Corp 605.

Ariz.App. Div. 2 1988. “Nuisance” is condition which represents unreasonable interference with another person's use and enjoyment of his property and causes damage.—Graber v. City of Peoria, 753 P.2d 1209, 156 Ariz. 553.—Nuis 1.

Ariz.App. Div. 2 1975. “Nuisance” is that activity which arises from unreasonable, unwarranted or unlawful use by a person of his own property, working obstruction or injury to right of another, or to the public, and producing such material annoyance, inconvenience and discomfort that law will presume resulting damage.—State ex rel. Herman v. Cardon, 530 P.2d 1115, 23 Ariz.App. 82, opinion vacated 544 P.2d 657, 112 Ariz. 548.—Nuis 1, 59.

Ark. 1999. “Nuisance” is conduct by one landowner that unreasonably interferes with use and enjoyment of lands of another and includes conduct on property that disturbs the peaceful, quiet, and

undisturbed use and enjoyment of nearby property.—Goforth v. Smith, 991 S.W.2d 579, 338 Ark. 65.—Nuis 3(1).

Ark. 1999. To constitute a “nuisance,” intrusion must result in physical harm, as distinguished from unfounded fear of harm, which must be proven to be certain, substantial, and beyond speculation and conjecture.—Goforth v. Smith, 991 S.W.2d 579, 338 Ark. 65.—Nuis 4.

Ark. 1999. Proposed telecommunications tower on landowner's neighborhood property that already housed two other communications towers which had been in existence for 30 and ten years respectively was not a “nuisance,” in absence of showing of any certain, substantial harm that was beyond speculation or conjecture.—Goforth v. Smith, 991 S.W.2d 579, 338 Ark. 65.—Tel 461.5.

Ark. 1993. “Nuisance” is conduct by one landowner which unreasonably interferes with use and enjoyment of lands of another and includes conduct on property which disturbs peaceful, quiet, and undisturbed use and enjoyment of nearby property.—Southeast Arkansas Landfill, Inc. v. State, 858 S.W.2d 665, 313 Ark. 669.—Nuis 1.

Ark. 1991. Evidence supported finding that area surrounding proposed site for funeral home was mixed residential and commercial and, thus, chancellor was not required to determine that funeral business would constitute “nuisance”; commercial establishments were located in neighborhood years before plans to build funeral home in area were advanced.—Potter v. Bryan Funeral Home, 817 S.W.2d 882, 307 Ark. 142.—Nuis 3(7).

Ark. 1958. Anything that materially or substantially lessens or destroys the use and enjoyment of one's homestead constitutes a “nuisance”.—Flippin v. McCabe, 308 S.W.2d 824, 228 Ark. 495.—Nuis 3(1).

Ark. 1940. Whether a particular community shall be invaded by construction and operation of a filling station is a matter which, under state laws, may be regulated, notwithstanding station per se is not a “nuisance.” Pope's Dig. §§ 9543, 9589.—Van Hovenberg v. Holeman, 144 S.W.2d 718, 201 Ark. 370.—Autos 362.

Ark. 1933. Operation of ice plant in residential district held abatable “nuisance,” where it materially injured property and annoyed residents, regardless of how well plant was constructed or conducted.—Clay County Ice Co. v. Littlefield, 63 S.W.2d 530, 187 Ark. 911.—Nuis 3(5).

Ark. 1930. Where one does lawful act which, nevertheless being done in given place, necessarily tends to damage another's property, it constitutes “nuisance.” That is a nuisance which annoys and disturbs one in possession of one's property, rendering ordinary use or occupation physically uncomfortable.—Murphy v. Cupp, 31 S.W.2d 396, 182 Ark. 334.

Ark. 1928. That which disturbs one in possession of property, rendering its ordinary use physically uncomfortable, is “nuisance.”—Yaffe v. City

of Ft. Smith, 10 S.W.2d 886, 178 Ark. 406, 61 A.L.R. 1138.—Nuis 3(1).

Ark. 1928. Act lawful in itself, which tends to damage of another's property, is "nuisance."—Yaffe v. City of Ft. Smith, 10 S.W.2d 886, 178 Ark. 406, 61 A.L.R. 1138.—Nuis 5.

Ark. 1909. A "nuisance" may be both "public" and private in its character. In so far as it is public, the person who suffers a peculiar damage therefrom has a right of action. There are three things which one who sued on account of a public nuisance must show, in addition to the existence thereof, before he can recover: (1) A particular, or, more exactly speaking, a peculiar, injury to himself beyond that which is suffered by the rest of the public. (2) The injury to him must, according to some courts, be direct, and not merely consequential. (3) It must be of a substantial character, not fleeting or evanescent. One who has sustained damage peculiar to himself from a common nuisance has a cause of action against the person creating or maintaining it, although a like injury has been sustained by numerous other persons.—Czarnecki v. Bolen-Darnall Coal Co., 120 S.W. 376, 91 Ark. 58.

Ark. 1903. Where it was proven that the owner of a steam mill, to obtain water, made an excavation in a hollow leading down from a suburb of a nearby town, with the assent of most of the inhabitants of the neighborhood, that the filth from the nearby premises corrupted the water, so that it inconvenienced the neighborhood, and that the pond was of too recent origin to have as yet, injuriously affected the health of the community, instructions that whatever is openly injurious to public health and comfort, is a "nuisance," though not all the members of the community are affected thereby, that a "nuisance" must either be in a populous neighborhood, or so contiguous to a highway as to affect those passing thereon, that a "nuisance" was not necessarily detrimental to the public health, it being sufficient if its bad odors affected the public at large, and that, if the defendant maintained a "nuisance" by maintaining a pond wherein was drained a part of the filth of a nearby town, endangering the public health, and likely, in the nature of things, to generate disease, they should convict, were applicable to the evidence.—West v. State, 71 S.W. 483, 71 Ark. 144.

Ark. 1901. A "nuisance," in the ordinary sense in which the word is used, is anything that produces an annoyance—anything that disturbs one or is offensive, but in legal phraseology it is applied to that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or from his own improper, indecent, or unlawful personal conduct, working an obstruction of or injury to a right of another or of the public, and producing such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage.—*Ex parte Foote*, 65 S.W. 706, 70 Ark. 12, 91 Am.St. Rep. 63.

Cal. 1966. Where statute defining a "nuisance" as anything which is injurious to health or is inde-

cent or offensive to senses, or an obstruction to free use of property, so as to interfere with comfortable enjoyment of life or property, is the only statute applicable, considerable judicial discretion is allowed court in determining whether alleged danger is sufficiently serious to justify abatement. West's Ann.Civ.Code, § 3479.—*City of Bakersfield v. Miller*, 410 P.2d 393, 48 Cal.Rptr. 889, 64 Cal.2d 93, certiorari denied 86 S.Ct. 1890, 384 U.S. 988, 16 L.Ed.2d 1005.—Mun Corp 623(4).

Cal. 1952. Where defendants negligently constructed a fill on one defendant's property located on slope of canyon, so that mud washed down from that property during heavy rains onto property of plaintiff located at bottom of canyon, and evidence established that the fill constituted a threat of repetitions of such inundations and would, unless corrected, compel plaintiff to abandon her residence, the fill constituted a "nuisance." Civ.Code, § 3479.—*Spaulding v. Cameron*, 239 P.2d 625, 38 Cal.2d 265.—Nuis 3(1).

Cal. 1941. Compelling reasons of policy require that the responsibility for establishing those standards of public morality, the violation of which are to constitute public nuisance within equity jurisdiction should be left with the legislature, since "nuisance" is a term which does not have a fixed content, either at common law or at the present time.—*People v. Lim*, 118 P.2d 472, 18 Cal.2d 872.—Nuis 60.

Cal. 1931. Advertising case on outside of building with window opening at bottom and extending over sidewalk when opened held "nuisance". Civ. Code, § 3479.—*Montgomery v. Nelson*, 295 P. 1034, 211 Cal. 497.—Mun Corp 808(2).

Cal. 1930. Properly conducted sanitarium for insane held not to constitute "nuisance."—*Jones v. City of Los Angeles*, 295 P. 14, 211 Cal. 304.—Nuis 3(8).

Cal. 1927. Obstruction of street is "nuisance." An obstruction of a public street is "nuisance."—*Nagel v. Dorrington*, 262 P. 718, 202 Cal. 698.—Mun Corp 692.

Cal. 1927. Obstruction of street is "nuisance."—*Nagel v. Dorrington*, 262 P. 718, 202 Cal. 698.—Mun Corp 692.

Cal. 1920. OBSTRUCTION OF PUBLIC HIGHWAY "NUISANCE." Under Pol. Code, §§ 2731, 2737, 2739, Civ. Code, § 3479, and Pen. Code, §§ 370 and 372, an obstruction of a public highway is a nuisance, even though it may also be declared a nuisance by a municipal ordinance.—*Western States Gas & Elec. Co. v. Bayside Lumber Co.*, 187 P. 735, 182 Cal. 140.—Mun Corp 691.1.

Cal. 1907. Blasting, without reference to the particular locality in which it is carried on, is not so intrinsically dangerous as to be ipso facto a "nuisance," so that a blaster would be liable for the injury caused by it, whether or not he was guilty of any negligence in the manner in which the blasting was done.—*Houghton v. Loma Prieta Lumber Co.*, 93 P. 82, 152 Cal. 500.

Cal. 1907. West's Ann.Civ.Code, § 3479, declares anything which unlawfully obstructs the free passage or use of a public street a "nuisance." Section 3480 defines a "public nuisance" as one affecting an entire community or any considerable number of persons. Section 3493 provides that a private person may maintain an action for a "public nuisance" only if it is specially injurious to himself. In an action to enjoin the construction or operation of a railroad in the street in front of plaintiff's premises, the complaint alleged that the construction and operation of the railroad would greatly obstruct the use of plaintiff's premises and impair the easement of access thereto and egress therefrom, and would greatly hamper plaintiff in carrying on his business on the premises and lessen the value thereof. Held, that the allegations were merely statements of the plaintiff's opinion or conclusions as to the effect of defendant's proposed acts, and hence the complaint was demurrable as not showing a nuisance resulting in some special injury, within the meaning of West's Ann.Civ.Code, §§ 3479, 3480, 3493.—Brown v. Rea, 88 P. 713, 150 Cal. 171.

Cal.App. 1 Dist. 1968. Nothing which is done or maintained under express authority of a statute can be deemed a "nuisance." West's Ann.Civ.Code, § 3482.—Union City v. Southern Pac. Co., 67 Cal. Rptr. 816, 261 Cal.App.2d 277.—Nuis 6.

Cal.App. 1 Dist. 1961. Encroachment of building upon space above adjoining land, though not upon land itself, constituted "nuisance" abatable by mandatory injunction.—Pahl v. Ribero, 14 Cal. Rptr. 174, 193 Cal.App.2d 154.—Nuis 24.

Cal.App. 1 Dist. 1958. Complaint alleging that defendant created a fill on its property adjoining property of plaintiffs and, in so doing, caused surplus water to be diverted from its natural course onto plaintiffs' property, and mud and rock to obstruct existing drainage facilities, and mud and rock to flow on plaintiffs' properties to their damage, including deprivation of the use, comfort and enjoyment of portions of their property, clearly raised issue of "nuisance" as defined in statute. West's Ann.Civ.Code, § 3479.—Sturges v. Charles L. Harney, Inc., 331 P.2d 1072, 165 Cal.App.2d 306.—Nuis 48.

Cal.App. 1 Dist. 1958. Defendant's trees, which were blown down and covered a substantial area of plaintiff's land, and appreciably restricted its use for grazing purposes to which such land was normally devoted, constituted a "nuisance" and entitled plaintiff to abatement thereof, even though there was no showing that any act or conduct on the part of defendant caused the falling of the trees. West's Ann.Civ.Code, § 3479.—Mattos v. Mattos, 328 P.2d 269, 162 Cal.App.2d 41.—Nuis 19.

Cal.App. 1 Dist. 1943. In action by children against owners and occupiers of restaurant adjoining premises rented by owners to children's parents, for injuries sustained by children when bitten by rats, complaint alleging that owners allowed discarded food and vegetable matter to accumulate about restaurant premises so that rats were attract-

ed to and infested premises, despite requests to remedy conditions, was sufficient to state causes of action based on negligence and on maintenance of a "nuisance". Civ.Code §§ 1714, 3479, 3501; St.1939, p. 519, § 1803.—Coole v. Haskins, 135 P.2d 176, 57 Cal.App.2d 737.—Neglig 1523; Nuis 48.

Cal.App. 1 Dist. 1942. Every obstruction or depression, constructed or maintained by a property owner in the area between curb and property line, does not necessarily constitute a "nuisance". Civ. Code, § 3479.—Calder v. City and County of San Francisco, 123 P.2d 897, 50 Cal.App.2d 837.—Mun Corp 808(2), 808(3).

Cal.App. 1 Dist. 1942. The major factor in determining whether an obstruction or depression in area between the curb and property line constitutes a "nuisance" is the factor of reasonableness and the same factor is the major factor in determining negligence. Civ.Code, § 3479.—Calder v. City and County of San Francisco, 123 P.2d 897, 50 Cal. App.2d 837.—Mun Corp 808(2), 808(3).

Cal.App. 1 Dist. 1942. While a nuisance and liability for injuries occasioned thereby may exist without negligence, the torts of negligence and nuisance may be coexisting and practically inseparable, and a "nuisance", especially with respect to buildings or premises, presupposes negligence. Civ.Code, § 3479.—Calder v. City and County of San Francisco, 123 P.2d 897, 50 Cal.App.2d 837.—Neglig 1172; Nova 1; Nuis 7.

Cal.App. 1 Dist. 1933. Dance hall is not per se a "nuisance," and conducting thereof or of public dances therein is lawful business.—McPheeters v. McMahon, 21 P.2d 606, 131 Cal.App. 418.—Nuis 3(9).

Cal.App. 1 Dist. 1932. Temporary obstruction in course of authorized road work is not "nuisance," notwithstanding, through failure to provide protection for public, some one is injured. St.1919, p. 138; Pol.Code, § 2640 (repealed). See Streets and Highways Code, §§ 1070–1075).—Jones v. Hedges, 12 P.2d 111, 123 Cal.App. 742.—High 153.

Cal.App. 1 Dist. 1905. West's Ann.Code Civ. Proc. § 731, defines a "nuisance" as anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, and mere depreciation in value of surrounding property has no tendency to prove the cause of the depreciation a nuisance.—Meek v. De Latour, 83 P. 300, 2 Cal. App. 261.

Cal.App. 2 Dist. 1996. Liability for "Nuisance" arises where conduct which violates a duty owed to another also interferes with that party's free use and enjoyment of his property. West's Ann.Cal. Civ.Code § 3479.—Cutujian v. Benedict Hills Estates Assn., 49 Cal.Rptr.2d 166, 41 Cal.App.4th 1379, review denied.—Nuis 1.

Cal.App. 2 Dist. 1943. Anything is a "nuisance" which obstructs free use of property so as to interfere with its comfortable enjoyment. Civ.Code,

§ 3479.—Los Angeles Brick & Clay Products Co. v. City of Los Angeles, 141 P.2d 46, 60 Cal.App.2d 478.—Nuis 1.

Cal.App. 2 Dist. 1943. Unlawful sale of intoxicating liquor, of itself, without further facts, does not constitute a “nuisance” which may be abated by city attorney. West’s Ann.Civ.Code, §§ 3479, 3480; West’s Ann.Code Civ.Proc. § 731 (repealed 1905).—People v. Robin, 133 P.2d 436, 56 Cal.App.2d 885.—Int Liq 260.

Cal.App. 2 Dist. 1942. A photographer standing in the street to take a picture was not as a matter of law committing a “nuisance” in using the street so as to be barred from recovering for injuries sustained when struck by a bus. West’s Ann.Pen.Code, § 370.—Milton v. Los Angeles Motor Coach Co., 128 P.2d 178, 53 Cal.App.2d 566.—Autos 219.

Cal.App. 2 Dist. 1941. Where plaintiff’s property located at corner of street intersection was damaged by flood waters and it appeared that surface waters had collected near intersection before grading and paving of streets, the inadequacy of drains could not be considered a “nuisance” so as to subject city to civil action compelling abatement. Civ.Code, § 3482.—Womar v. City of Long Beach, 114 P.2d 704, 45 Cal.App.2d 643.—Mun Corp 846.

Cal.App. 2 Dist. 1940. Peacocks are not a “nuisance per se,” and hence complaint charging maintenance of peacocks on certain premises was insufficient to charge maintenance of a “nuisance” in absence of allegation of facts to support charge. West’s Ann.Pen.Code, § 373a.—Ex parte Cohn, 98 P.2d 769, 37 Cal.App.2d 39.—Ind & Inf 63.

Cal.App. 2 Dist. 1905. West’s Ann.Civ.Code, § 3479, defines a “nuisance” as anything which obstructs the free use of property or free passage or use of any street. Section 3493 provides that a private person may maintain an action for a public nuisance, if it is especially injurious to him. Held, that the owner of a lot abutting on a street has such an easement over it that he may maintain an action to abate structures erected in the street opposite his lot.—McLean v. Llewellyn Iron Works, 83 P. 1082, 2 Cal.App. 346, rehearing denied 83 P. 1085, 2 Cal.App. 346.

Cal.App. 2 Dist. 1905. A spike two inches high in a sidewalk is a “nuisance.”—Wile v. Los Angeles Ice & Cold Storage Co., 83 P. 271, 2 Cal.App. 190.

Cal.App. 3 Dist. 1959. Existence of freshly plowed or graded shoulder two to three inches below level of paved portion of state highway, though it could be found to be a dangerous condition requiring notice thereof or erection of warning signs, did not constitute a “nuisance” within exception to sovereign immunity doctrine under statute declaring anything which unlawfully obstructs free passage or use, in the ordinary manner, of any public highway to be a nuisance. West’s Ann.Civ.Code, § 3479.—Zeppi v. State, 345 P.2d 33, 174 Cal.App.2d 484.—High 192.

Cal.App. 3 Dist. 1959. Statute declaring to be a “nuisance” anything which is an obstruction to the free use of property or which unlawfully obstructs

the free passage or use in the customary manner of any highway means that it is the free passage or use in the customary manner of the highway which is prohibited and anything which does so is prohibited and where a Mosquito Abatement District by thick blanket of chemical fog made it impossible for a motorist to see or proceed safely down the highway a “nuisance” was created within the statute. West’s Ann.Civ.Code, §§ 3479, 3482.—Bright v. East Side Mosquito Abatement Dist., 335 P.2d 527, 168 Cal.App.2d 7.—Autos 264.

Cal.App. 3 Dist. 1946. Mere apprehension of injury from dangerous condition may constitute a “nuisance”, where it interferes with comfortable enjoyment of property.—McIvor v. Mercer-Fraser Co., 172 P.2d 758, 76 Cal.App.2d 247.—Nuis 4.

Cal.App. 3 Dist. 1937. An act which causes flood waters to overflow public highways so as to render the same impassable, or to cause injury thereto, authorizes the prosecution of an action by the state to abate such “nuisance.”—Averill v. Superior Court of Madera County, 73 P.2d 1247, 23 Cal.App.2d 621.—High 158.

Cal.App. 3 Dist. 1931. Fact of keeping place for sale of intoxicating liquor, rather than number of sales, characterizes place as “nuisance.”—People v. Bettencourt, 1 P.2d 494, 115 Cal.App. 387.—Int Liq 143.

Cal.App. 4 Dist. 2002. Real estate developer that sued avocado farmer for damage to developer’s land allegedly resulting from runoff of irrigation waters could not avoid application of statute immunizing certain agricultural activities from nuisance liability by labeling cause of action as a trespass claim; property damage allegedly sustained from irrigation water qualified as “nuisance” within literal language of statute. West’s Ann.Cal.Civ.Code §§ 3479, 3482.5.—Rancho Viejo LLC v. Tres Amigos Viejos LLC, 123 Cal.Rptr.2d 479, 100 Cal.App.4th 550.—Waters 262.

Cal.App. 4 Dist. 1994. Because operation of ice-cream trucks on city’s streets was specifically permitted by city ordinance, such permission could not give rise to “nuisance.” West’s Ann.Cal.Civ.Code § 3482; San Diego, Cal., Municipal Code § 54.0122, subds. (a, c).—Pekarek v. City of San Diego, 36 Cal.Rptr.2d 22, 30 Cal.App.4th 909, rehearing denied, and review denied.—Nuis 6.

Cal.App. 4 Dist. 1994. Interference need not directly damage land or prevent its use to constitute “nuisance.” West’s Ann.Cal.Civ.Code § 3479.—Koll-Irvine Center Property Owners Assn. v. County of Orange, 29 Cal.Rptr.2d 664, 24 Cal.App.4th 1036.—Nuis 1.

Cal.App. 4 Dist. 1948. Establishment and operation of an undertaking business in a purely residential section under circumstances causing a depressed feeling to the families in the immediate neighborhood, and depreciating the value of their property constitutes a “nuisance”.—Brown v. Arbuckle, 198 P.2d 550, 88 Cal.App.2d 258.—Nuis 3(7).

Cal.App. 4 Dist. 1942. Where the people showed that an alleged gambling game was being conducted at "Bridge" parlors but produced no evidence as to the type of people frequenting the parlors, or that there was disorder in the operation of the games, operation of the parlors was not restrainable as a "nuisance".—People v. Robbin, 128 P.2d 422, 53 Cal.App.2d 579.—Nuis 80.

Cal.App. 4 Dist. 1940. Members of "Jehovah's Witnesses" who were charged with conspiracy to disturb the peace did not commit a "nuisance" in a legal sense in going to homes in community in order to talk to householders who would admit the members and listen, especially where the calls were not repeated. Pen.Code, § 182.—People v. Nortum, 106 P.2d 433, 41 Cal.App.2d 284.—Nuis 61.

Cal.App. 4 Dist. 1931. Dust constitutes "nuisance" if causing perceptible injury to property, or so polluting air as to sensibly impair enjoyment thereof.—Centoni v. Ingalls, 298 P. 47, 113 Cal. App. 192.—Nuis 3(3).

Cal.App. 4 Dist. 1930. Condition of leased premises causing waters of creek to be thrown against bank along plaintiff's land and undermining it constituted "nuisance," for which landlord was liable.—Dennis v. City of Orange, 293 P. 865, 110 Cal.App. 16.—Land & Ten 170(1).

Colo. 1994. Land uses that cause pollution constitute "nuisance."—State, Dept. of Health v. The Mill, 887 P.2d 993, rehearing en banc denied, certiorari denied The Mill v. Colorado Dept. of Health, 115 S.Ct. 2612, 515 U.S. 1159, 132 L.Ed.2d 855.—Nuis 3(3).

Conn. 1992. To establish claim of "nuisance," plaintiff must prove that condition complained of has natural tendency to create danger and inflict injury on person or property, that danger created was continuing one, that use of land was unreasonable or unlawful, and that existence of nuisance was proximate cause of injuries and damages.—Tomasso Bros., Inc. v. October Twenty-Four, Inc., 602 A.2d 1011, 221 Conn. 194, on remand 1992 WL 219299, affirmed 646 A.2d 133, 230 Conn. 641.—Nuis 1, 4.

Conn. 1990. "Nuisance," whether public or private, describes inherently dangerous condition that has natural tendency to inflict injury upon persons or property.—Quinnnett v. Newman, 568 A.2d 786, 213 Conn. 343.—Nuis 1, 59.

Conn. 1968. Essential element of "nuisance" is a continuing inherent or natural tendency to create danger and inflict injury; and where use of land is involved to be a nuisance it must appear not only that condition by its very nature is likely to cause injury but also that use is unreasonable or unlawful.—Wood v. Town of Wilton, 240 A.2d 904, 156 Conn. 304.—Nuis 1, 3(1).

Conn. 1961. The essential element of "nuisance" is a continuing inherent or natural tendency to create danger and inflict injury.—Chazen v. City of New Britain, 170 A.2d 891, 148 Conn. 349.—Nuis 1.

Conn. 1958. A "nuisance" is that which works hurt, inconvenience or damage.—Nixon v. Gniazdowski, 138 A.2d 796, 145 Conn. 46.—Nuis 1.

Conn. 1950. In order to constitute a "nuisance," act or injury complained of must be substantial and tangible, and discomfort created thereby susceptible to the senses of ordinary people, and its actual effect must be judged by degree of discomfort and injury produced upon average person.—Jack v. Torrant, 71 A.2d 705, 136 Conn. 414.—Nuis 4.

Conn. 1949. The word "nuisance", in its proper use, involves as an essential element that it can be the natural tendency of the act or thing complained of to create danger and inflict injury upon person or property.—Laspino v. City of New Haven, 67 A.2d 557, 135 Conn. 603.—Nuis 1.

Conn. 1949. To constitute a "nuisance" in use of land, it must appear not only that a certain condition by its very nature is likely to cause injury, but also that use is unreasonable or unlawful.—Laspino v. City of New Haven, 67 A.2d 557, 135 Conn. 603.—Nuis 1.

Conn. 1949. Recovery could not be had from city for death of two boys who drowned when homemade boat capsized and sank in waterway of partially developed park of city, on ground that construction, maintenance, and supervision of waterway by city constituted a "nuisance", where it did not appear that use made by city of its property was unreasonable or unlawful, or that the condition complained of by its very nature was likely to cause injury.—Laspino v. City of New Haven, 67 A.2d 557, 135 Conn. 603.—Mun Corp 851.

Conn. 1948. Concrete traffic stanchion placed in intersection in city would not constitute a "nuisance" unless the stanchion by its very nature was likely to cause injury, and the use was unreasonable.—De Lahunta v. City of Waterbury, 59 A.2d 800, 134 Conn. 630, 7 A.L.R.2d 218.—Autos 264.

Conn. 1945. The maintenance by amusement resort owner of a pole carrying wires braced by guy wire which allegedly contained a strand of wire protruding about one quarter of an inch from the cut end of the cable did not constitute a public or private "nuisance".—Clark v. Pierce & Norton Co., 40 A.2d 752, 131 Conn. 499.—Nuis 3(9), 61.

Conn. 1942. To constitute a "nuisance" in the use of land, it must appear not only that a certain condition by its very nature is likely to cause injury, but also that the use is unreasonable or unlawful.—Beckwith v. Town of Stratford, 29 A.2d 775, 129 Conn. 506.—Nuis 3(1).

Conn. 1942. Evidence that street sweeper having only one light and dark in appearance was being operated on a foggy night in wrong lane of public highway at time of collision with automobile did not require that decision of fact be taken from the jury on ground of undisputed physical facts but sustained verdict for automobile passenger on issue whether use of sweeper produced a condition having a natural tendency to cause continuing danger and inflict injury, constituting a "nuisance" in fact.—Warren v. City of Bridgeport, 28 A.2d 1, 129

Conn. 355.—Autos 244(2.1), 244(33), 245(3), 245(38); Evid 588.

Conn. 1942. Whether the origin of the condition complained of was negligence, the determining element in deciding the right to recovery for "nuisance" is whether the natural tendency of the condition was to cause damage and inflict injury and whether this was its effect in a given case.—Warren v. City of Bridgeport, 28 A.2d 1, 129 Conn. 355.—Nuis 4.

Conn. 1942. The law of "nuisance" deals with a specific existing condition and the results following it, not, except as to contributory negligence, with circumstances out of which that condition arose, and with reference to the breach of duty by the person chargeable with creating or maintaining the condition, there is no occasion to submit to jury question of negligence out of which the condition grew, it being sufficient if plaintiff proves defendant was responsible for the nuisance regardless of negligence in its creation and maintenance.—Warren v. City of Bridgeport, 28 A.2d 1, 129 Conn. 355.—Nuis 54.

Conn. 1942. A nuisance not originating in negligence is characterized as an "absolute nuisance", the only practical distinction between such "nuisance" and one having had its origin in negligence being that contributory negligence is no defense to the former but may be to the latter.—Warren v. City of Bridgeport, 28 A.2d 1, 129 Conn. 355.—Nuis 1.

Conn. 1941. Where trolley pole on street car became disengaged from trolley wire and rope which was designed to hold it broke and pole flew up so that trolley wire was brought into contact with cable leading to traffic light, causing a short circuit as result of which trolley wire broke and fell on automobile in which plaintiff was sitting, town could not be held liable for fright and shock suffered by the plaintiff on ground that maintenance of wire near trolley cable was a "nuisance", since injuries were caused by an unusual combination of circumstances and conditions previously existing could not reasonably be found to be such as would have a natural tendency to produce injuries.—Orlo v. Connecticut Co., 21 A.2d 402, 128 Conn. 231.—Urb R 27.

Conn. 1940. Coasting on a public street is not a "nuisance" per se, and designation of places by a municipality where coasting is permitted does not necessarily and as a matter of law amount to licensing a "public nuisance". Gen.St.1930, § 460 (Rev. 1949, § 637).—Bagni v. City of Bristol, 14 A.2d 716, 127 Conn. 38.—Mun Corp 821(5).

Conn. 1940. That city permitted coasting upon one of its streets did not of itself as a matter of law render city liable to person injured by unknown coaster upon theory that city created a "nuisance". Gen.St.1930, § 460 (Rev.1949, § 637).—Bagni v. City of Bristol, 14 A.2d 716, 127 Conn. 38.—Mun Corp 821(5).

Conn. 1940. As respects city's liability for death of seven-year-old pedestrian struck by automobile

at crossing, city's designation of natural crosswalk across 47-foot heavily traveled street by extending yellow lines about 12 feet toward the center of the street from each curb was sufficient compliance with statute relating to crosswalks and did not constitute a "nuisance". Gen.St.1930, § 395.—James v. City of Waterbury, 12 A.2d 770, 126 Conn. 525.—Autos 258.

Conn. 1940. As respects liability of city for death of seven-year-old pedestrian struck by automobile at crossing, city's maintaining of a steady yellow light in each traffic standard at the crossing during the disrepair of the traffic light system did not increase the hazard to pedestrians and was not a "nuisance".—James v. City of Waterbury, 12 A.2d 770, 126 Conn. 525.—Autos 258.

Conn. 1940. Where a restricted area in public park was used for sliding and skiing and it was not shown that part of park where dangerous ledge existed was used for skiing and sliding or that municipality should have anticipated such use in that area which was not dangerous to persons in the lawful use of park for purpose to which it was devoted, rock ledge in park did not constitute a "nuisance" so as to impose liability on municipality for injuries sustained by person injured in a fall over ledge while skiing and sliding.—Balaas v. City of Hartford, 12 A.2d 765, 126 Conn. 510.—Mun Corp 851.

Conn. 1940. Railroad could not be held liable in "nuisance" for death by electrocution of state highway department engineer and injury to another when steel measuring tape fell over parapet of bridge which was constructed to take highway, not yet legally opened to the public, over railroad tracks, and tape came in contact with feed wire which furnished power for operation of railroad trains, since recovery on basis of private nuisance can be had only by one who is injured in relation to a right which he enjoys by reason of his ownership of an interest in land, and, as to public nuisance, engineers were not on bridge in exercise of rights as members of the general public.—Hassett v. Palmer, 12 A.2d 646, 126 Conn. 468.—Electricity 16(1).

Conn. 1940. In action by automobile passenger against town for injuries sustained when driver lost control of automobile on highway, trial court's conclusion that crushed stone upon highway, spread over space covering both wheel tracks and extending some 10 or 15 feet between crest of hill and protruding rock loosely and unevenly to depth of about 3½ inches, constituted a "nuisance" was warranted.—Bacon v. Town of Rocky Hill, 11 A.2d 399, 126 Conn. 402.—Autos 306(4).

Conn. 1939. If an act in its inherent nature is so hazardous as to make danger extreme and serious injury so probable as to be almost a certainty, it is a "nuisance" as a matter of law.—Jager v. First Nat. Bank, 7 A.2d 919, 125 Conn. 670.—Nuis 1.

Conn. 1939. A "nuisance" arises from the creation or maintenance of a condition having a natural tendency to cause danger and inflict injury or from the use of an intrinsically dangerous agency the necessary and obvious effect of which is to

cause harm.—*De Mare v. Guerin*, 5 A.2d 711, 125 Conn. 362.—Nuis 3(1).

Conn. 1939. An automobile is not in itself an intrinsically dangerous instrument, and for the operation of an automobile to constitute a "nuisance" a continuing condition of danger, as distinguished from momentary negligence in operation or a sudden and unexpected defect, must exist.—*De Mare v. Guerin*, 5 A.2d 711, 125 Conn. 362.—Autos 146.

Conn. 1939. In guest's action against city for injuries sustained in collision with a 1921 model automobile owned by city and operated by employee of the city, where collision resulted from the imperfect operation of the braking system, but evidence failed to show that the brakes were in a defective condition prior to the time of the accident or that the defect was not a sudden development, evidence was insufficient to take question of whether operation of the automobile constituted "nuisance" to the jury.—*De Mare v. Guerin*, 5 A.2d 711, 125 Conn. 362.—Autos 245(38).

Conn. 1937. Momentary negligent operation of fire truck which was being returned to firehouse after fire held not to render fire truck a "nuisance" so as to permit recovery by motorist who received injuries in collision with fire truck.—*Brock-Hall Dairy Co. v. City of New Haven*, 189 A. 182, 122 Conn. 321.—Autos 175(1).

Conn. 1932. Operator of unregistered automobile held not liable as creator of "nuisance" for injury he inflicts upon lawful user of highways. Gen.St.Supp.1931, § 275a (Rev.1949, § 2361).—*Gonchar v. Kelson*, 158 A. 545, 114 Conn. 262.—Autos 56.

Conn. 1927. City's pollution of stream by sewage disposal constitutes "nuisance."—*Donnelly Brick Co. v. City of New Britain*, 137 A. 745, 106 Conn. 167.—Mun Corp 838.

Conn. 1925. A single sale of liquor may establish a nuisance in violation of National Prohibition Act, tit. 2, § 21, 27 U.S.C.A. § 33, and unless circumstances show contrary should be held a "nuisance."—*U.S. v. Stevens*, 130 A. 249, 103 Conn. 48.

Conn. 1907. A grade crossing or the condition existing by reason of such an intersection of two highways is in the nature of a "nuisance," and can only lawfully exist under state authority.—*Cowles v. New York, N.H. & H.R. Co.*, 66 A. 1020, 80 Conn. 48.

Conn. 1897. Anything not warranted by law which annoys and disturbs one in the use of his property, rendering its ordinary use or occupation physically uncomfortable to him, is a "nuisance." If the annoyance is such as to materially interfere with the ordinary comfort of human existence, it is a nuisance; and, if the annoyance is one that is common to the public generally, then it is a public nuisance. The test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights. A public nuisance is one that injures the citizens generally who may be so circumstanced as to come within its influence. The pollution of a stream, therefore,

through the use of the same by a city for sewerage purposes, rendering the water unfit for domestic purposes and the watering of cattle, and causing the emission of noxious odors, is a public nuisance.—*Nolan v. City of New Britain*, 38 A. 703, 69 Conn. 668.

Del.Ch. 1963. Under statute relating to abatement of nuisance, word "nuisance" is the "place" where certain proscribed activities are carried on, and, therefore, phrase "maintaining a nuisance" is a term of art which purports to encompass all persons who may in any way contribute to fact that a particular "place" constitutes a "nuisance". 10 Del.C. §§ 7101, 7102.—State ex rel. Buckson v. Rossitto, 191 A.2d 642, 41 Del.Ch. 216.—Nuis 78.

Del.Ch. 1942. Extensive flying at low altitude, accompanied by excessive noise and occasioning unreasonable annoyance to occupants of the land below, and apprehension of danger on their part, constitutes an element of "nuisance" in that it interferes substantially with the enjoyment of the property by the occupants.—*Vanderslice v. Shawn*, 27 A.2d 87, 26 Del.Ch. 225.—Aviation 5; Nuis 4.

Del.Ch. 1942. Repeated low airplane flights to and from airport over complainant's houses and buildings and land used in connection therewith with noise of such intensity as to render the ordinary use or occupation of such homes and buildings physically uncomfortable were required to be enjoined as a "nuisance".—*Vanderslice v. Shawn*, 27 A.2d 87, 26 Del.Ch. 225.—Aviation 6; Nuis 4.

Del.Ch. 1942. In suit to enjoin operation of airport, evidence of flight over lands remote from the homes and buildings of plaintiffs failed to establish either a "nuisance" or "trespass" so as to warrant an injunction.—*Vanderslice v. Shawn*, 27 A.2d 87, 26 Del.Ch. 225.—Aviation 221; Nuis 33.

Del.Ch. 1937. Residence doorsteps, which protruded over sidewalk for nearly one-half its width, constituted not only a "purpresture" but also a "nuisance."—*Miller v. Town of Seaford*, 194 A. 37, 22 Del.Ch. 159.—Mun Corp 667.

Del.Ch. 1937. A building or other structure of like nature erected on a street which includes its sidewalk, without legislative sanction, is a "nuisance."—*Miller v. Town of Seaford*, 194 A. 37, 22 Del.Ch. 159.—Mun Corp 667.

Del.Ch. 1937. Residence doorsteps which plainly extended over clearly defined line of street and protruded over sidewalk for nearly one-half its width were subject to removal by city as a "nuisance". 29 Del.Laws, c. 153, §§ 16, 19.—*Miller v. Town of Seaford*, 194 A. 37, 22 Del.Ch. 159.—Mun Corp 667.

Del.Super. 1950. A "nuisance" is the existence of condition and as such must be distinguished from a mere act of negligence resulting in injury.—*Delaware Liquor Store v. Mayor and Council of Wilmington*, 75 A.2d 272, 45 Del. 461, 6 Terry 461.—Nuis 1.

Del.Super. 1950. Liability for damages caused by alleged negligence of operators of a city fire

engine on its return from a fire could not be imposed on the city on the theory of a "nuisance" where the city was engaged in performing a governmental function.—Delaware Liquor Store v. Mayor and Council of Wilmington, 75 A.2d 272, 45 Del. 461, 6 Terry 461.—Autos 187(2).

**Del.Super.** 1938. A sidewalk is primarily intended for public travel and in most cases a dangerous condition, defect, or obstruction therein, not caused by ordinary, reasonable, and usual use of the sidewalk as such, and which unnecessarily, materially, and unreasonably interferes with sidewalk's being used for purpose for which it was intended, is a "nuisance," and may make the person causing the dangerous condition liable in damages to a pedestrian injured thereby.—Massey v. Worth, 197 A. 673, 39 Del. 211, 9 W.W.Harr. 211.—High 200.

**Del.Super.** 1938. Generally, an individual who does any act which renders the use of a street hazardous, or less secure than it was left by the proper public authorities, by excavations made in the sidewalks, or by unsafe hatchways left therein, or by opening or leaving open areaways in the traveled way or by undermining the street or sidewalk, commits a "nuisance" and is liable to any person who is injured in consequence thereof while such person is himself exercising due care.—Massey v. Worth, 197 A. 673, 39 Del. 211, 9 W.W.Harr. 211.—Mun Corp 809(1).

**Del.Super.** 1923. A "nuisance" is anything from which results harm, inconvenience, or damage, or which materially interferes with the enjoyment of rights or property.—Cunningham v. Wilmington Ice Mfg. Co., 121 A. 654, 32 Del. 229, 2 W.W.Harr. 229.—Nuis 1.

**Del.Super.** 1915. A "nuisance" may be anything which essentially interferes with the enjoyment of life or property.—Murden v. Commissioners of Town of Lewes, 96 A. 506, 29 Del. 48, 6 Boyce 48, affirmed 108 A. 74, 30 Del. 428, 7 Boyce 428.—Nuis 1, 3(1).

**D.C.Mun.App.** 1953. The refusal of tenant whose possession depends upon Emergency Rent Act to permit landlord to enter premises at reasonable times to inspect and to make such repairs as are necessary to protect property from waste and deterioration would not constitute a "nuisance" but would be a violation of implied obligation of tenancy. D.C.Code 1951, § 45-1601 et seq.—Dunnington v. Thomas E. Jarrell Co., 96 A.2d 274.—Land & Ten 278.9(4); Nuis 3(1).

**D.C.Mun.App.** 1950. A "nuisance" is anything that works or causes injuries, damage, hurt, inconvenience, annoyance or discomfort to one in the legitimate enjoyment of his reasonable rights of personal property or that which renders an ordinary use and occupation by a person of his property, uncomfortable to him.—Reese v. Wells, 73 A.2d 899.—Nuis 1.

**D.C.Mun.App.** 1950. Alleged fact that tenant permitted a gas stove to remain lighted in a single instance and left the premises endangering the life and property of other occupants of the apartment

building was insufficient to establish a "nuisance" warranting eviction under the Rent Act. D.C.Code 1940, § 45-1605(b)(1), (b).—Reese v. Wells, 73 A.2d 899.—Land & Ten 278.9(4).

**D.C.Mun.App.** 1950. Some degree of permanence is an essential element of a "nuisance" and there must be a continuousness or recurrence of the things, facts, or acts which constitute the nuisance, deriving from the notion of unreasonable use and one act of misconduct though it causes discomfiture or inconvenience to others in the use and enjoyment of property, is not actionable as a nuisance.—Reese v. Wells, 73 A.2d 899.—Nuis 1.

**D.C.Mun.App.** 1948. Roomer's act in changing lock on door and refusing to provide proprietor of rooming house with a key, thereby preventing proprietor from compliance with regulations relative to inspection and repair and jeopardizing renewal of proprietor's rooming house license sufficiently constituted "disorderly conduct" or "nuisance" and the violation of obligation of her tenancy to the injury of the proprietor so as to entitle proprietor to possession.—Vaughn v. Neal, 60 A.2d 234.—Inn 9.

**D.C.Mun.App.** 1946. A "nuisance" is anything that works or causes injury, damage, hurt, inconvenience, annoyance, or discomfort to one in the legitimate enjoyment of his reasonable rights of person or property or which renders ordinary use and occupation by a person of his property uncomfortable to him.—Levy v. Bryce, 46 A.2d 765.—Nuis 1.

**Fla.** 1956. "Nuisance," in law, for the most part consists in so using one's property as to injure the land or some incorporeal right of one's neighbor.—Beckman v. Marshall, 85 So.2d 552.—Nuis 1.

**Fla.** 1954. Anything which annoys or disturbs one in free use, possession, or enjoyment of his property, or which renders its ordinary use or occupation physically uncomfortable is a "nuisance" and may be restrained.—Jones v. Trawick, 75 So.2d 785, 50 A.L.R.2d 1319.—Nuis 3(1), 19.

**Fla.** 1947. A lawful business may be abated as a "nuisance" if conducted in a way to corrupt public morals. F.S.A. § 64.11.—Federal Amusement Co. v. State ex rel. Tuppen, 32 So.2d 1, 159 Fla. 495.—Nuis 3(2), 19.

**Fla.** 1942. Evidence did not show that defendants' cafe was conducted as a "nuisance" justifying an injunction, on ground that gambling was permitted at a cafe under circumstances offending the good morals or manners of the community. F.S.A. § 823.05.—State ex rel. Farrior v. Roiz, 6 So.2d 835, 149 Fla. 630.—Nuis 84.

**Fla.** 1941. Anything which annoys or disturbs one in free use, possession or enjoyment of his property or renders its ordinary use or occupation physically uncomfortable may become a "nuisance" and be restrained.—Palm Corp. v. Walters, 4 So.2d 696, 148 Fla. 527.—Nuis 1, 19.

**Fla.** 1940. Anything which annoys or disturbs one in the free use, possession, or enjoyment of his property, or which renders its ordinary use or occu-

pation physically uncomfortable, is a "nuisance" and may be restrained.—*Knowles v. Central Allapattae Properties*, 198 So. 819, 145 Fla. 123.—Nuis 19.

Fla. 1940. Generally, anything which is detrimental to health or threatens danger to persons or property within a city may be retarded and dealt with by the municipal authorities as a "nuisance." F.S.A. § 167.05.—*Knowles v. Central Allapattae Properties*, 198 So. 819, 145 Fla. 123.—Mun Corp 605.

Fla. 1940. Under a general grant of power respecting "nuisances," a municipal corporation may declare a thing to be a "nuisance" which is one in fact, but without express charter power, generally, the city cannot declare by ordinance that to be a "nuisance" which is not so in fact.—*Knowles v. Central Allapattae Properties*, 198 So. 819, 145 Fla. 123.—Mun Corp 605.

Fla. 1940. The burial of carcasses of some 300 or 400 dogs and keeping of some 60 to 65 dogs on 3-acre tract within city constituted a "nuisance" which was properly enjoined on application of owners of property located in close proximity to 3-acre tract; but application to enjoin use of buildings on premises for housing and treatment of dogs by veterinarian would be denied, provided disturbing noise of dogs complained of was obviated by the order enjoining keeping of dogs on the tract. Acts 1931, c. 14658, § 14.—*Knowles v. Central Allapattae Properties*, 198 So. 819, 145 Fla. 123.—Nuis 19.

Fla. 1940. One who uses his property in a lawful and proper manner is not guilty of a "nuisance" merely because particular use which he chooses to make of it may cause inconvenience or annoyance to a neighbor, and nothing which is legal in its erection can be a "nuisance per se."—*City of Lakeland v. State ex rel. Harris*, 197 So. 470, 143 Fla. 761.—Nuis 5.

Fla. 1940. The turning of filth from a municipal sewage disposal plant into a canal near which dwellings were located constituted a "nuisance".—*City of Lakeland v. Douglass*, 197 So. 467, 143 Fla. 771.—Mun Corp 838.

Fla. 1940. An owner or occupant of property must use it in a way that will not be a nuisance to other owners and occupants in the same community, and anything which annoys or disturbs one in free use, possession or enjoyment of his property, or which renders its ordinary use or occupation physically uncomfortable, may become a "nuisance", and may be restrained.—*Mayflower Holding Co. v. Warrick*, 196 So. 428, 143 Fla. 125.—Nuis 3(1), 23(1).

Fla. 1940. Where gambling is permitted under such conditions and circumstances that it offends against the good morals or the finer sensibilities of the people of a community, the jurisdiction of equity may be invoked to abate it as a "nuisance," but not every place where gambling may be permitted may be abated as a "nuisance." F.S.A. § 823.05.—*Valdez v. State ex rel. Farrior*, 194 So. 388, 142 Fla. 123.—Nuis 79.

Fla. 1940. Where the keeper of a restaurant makes it a business to sell lottery tickets to the public and so conducts that part of his business that it is known to the public that such tickets can be purchased, and people who desire to engage in that enterprise frequent restaurant to purchase tickets and participate in lottery, he offends against the public, and under statute the jurisdiction of equity may be invoked to enjoin and abate the continuance of that enterprise at the particular location as a "nuisance." F.S.A. § 823.05.—*Valdez v. State ex rel. Farrior*, 194 So. 388, 142 Fla. 123.—Nuis 79, 80.

Fla. 1940. Under a general grant of power respecting "nuisances," a municipal corporation may declare a thing to be a "nuisance" which is one in fact, but without express charter power, generally, the city cannot declare by ordinance that to be a "nuisance" which is not so in fact.—*City of Miami Beach v. Texas Co.*, 194 So. 368, 141 Fla. 616, 128 A.L.R. 350.—Mun Corp 605.

Fla. 1940. Generally, anything which is detrimental to health or threatens danger to persons or property within a city may be retarded and dealt with by the municipal authorities as a "nuisance." F.S.A. § 167.05.—*City of Miami Beach v. Texas Co.*, 194 So. 368, 141 Fla. 616, 128 A.L.R. 350.—Mun Corp 605.

Fla. 1935. Anything which annoys or disturbs one in the free use, possession, or enjoyment of his property or which renders its ordinary use or occupation physically uncomfortable is a "nuisance" and may be restrained.—*Mercer v. Keynton*, 163 So. 411, 121 Fla. 87.—Nuis 19.

Fla.App. 3 Dist. 1979. Where noise from uninsulated and uncovered terrazzo corridor within lobby above apartment in condominium building was sufficient to annoy and disturb owners of apartment in the free use and enjoyment of apartment to extent it rendered its ordinary use physically uncomfortable, the noise constituted a "nuisance" so as to entitle owners to abatement thereof.—*Baum v. Coronado Condominium Ass'n, Inc.*, 376 So.2d 914.—Nuis 19.

Fla.App. 3 Dist. 1968. Landlord's alleged failure to provide adequate water heating facilities in apartment building in violation of minimum standards for rental housing as set by City Housing Code did not constitute a "nuisance" within statute authorizing the enjoining of nuisances and tenant was not entitled to injunction to permanently enjoin landlord from maintaining a rental business and collecting rents for tenant's apartment until nuisance was abated. F.S.A. § 823.05.—*Sawyer v. Robbins*, 213 So.2d 515.—Nuis 19.

Fla.App. 4 Dist. 1984. While fee splitting by dentists may be declared unethical and illegal, it is not a "nuisance" which would support an action for injunctive relief. West's F.S.A. §§ 466.001 et seq., 466.028, 466.028(1)(n).—*Cowan v. People ex rel. Florida Dental Ass'n, Inc.*, 463 So.2d 285.—Nuis 19.

Ga. 2002. To be liable for a "nuisance," a county must perform a continuous or regularly repetitive act, or create a continuous or regularly repeti-

tious condition that caused the harm.—*Morris v. Douglas County Board of Health*, 561 S.E.2d 393, 274 Ga. 898.—Counties 141.

Ga. 2002. Single act of negligence on the part of a county is insufficient to create a “nuisance” for which the county would be liable.—*Morris v. Douglas County Board of Health*, 561 S.E.2d 393, 274 Ga. 898.—Counties 141.

Ga. 1991. Relocation of railroad track within existing right-of-way did not constitute “nuisance” and, thus, abutting landowners had no right to recover in inverse condemnation; railroad operations were customary and proper use of right-of-way.—*MARTA v. Gomez*, 409 S.E.2d 35, 261 Ga. 617, on remand 414 S.E.2d 747, 202 Ga.App. 161.—Em Dom 266, 271.

Ga. 1978. Mayor and alderman did not create “nuisance” by failing to place traffic control signals on three-lane viaduct, which was State-aid road, where responsibility for placing traffic control signals on such viaduct was in the State and not the city. Code, § 68-1610(a, b), Laws 1953, Nov.-Dec. Sess., p. 556; § 95-604, Laws 1953, Nov.-Dec. Sess. p. 367; §§ 95-1738, 95-1741, Laws 1961, p. 469; § 69-302.—*Mayor & C. of Savannah v. Palmerio*, 249 S.E.2d 224, 242 Ga. 419.—Autos 279.

Ga. 1968. Anything that works hurt, inconvenience, or damage to another is a “nuisance.” Code, § 72-101.—*Town of Fort Oglethorpe v. Phillips*, 165 S.E.2d 141, 224 Ga. 834, 34 A.L.R.3d 1002.—Nuis 1.

Ga. 1964. “Nuisance” is anything that works hurt, inconvenience, or damage to another, and fact that act done may otherwise be lawful will not keep it from being a nuisance. Code, § 72-101.—*Dumus v. Renfroe*, 136 S.E.2d 753, 220 Ga. 33.—Nuis 1, 5.

Ga. 1958. A “nuisance” is a trespass.—*Bennett v. Bagwell & Stewart, Inc.*, 103 S.E.2d 561, 214 Ga. 115.—Nuis 1.

Ga. 1957. To constitute a “nuisance” it is not necessary that the noxious trade or business should endanger the health of the neighborhood, and it is sufficient if it produces that which is offensive to the senses, and renders the enjoyment of life and property uncomfortable. Code, §§ 72-101, 72-102, 72-104.—*Miller v. Coleman*, 97 S.E.2d 313, 213 Ga. 125.—Nuis 3(1).

Ga. 1955. Landlord’s complaint alleging that he operated retail store on ground floor of two-story building, and that he leased second floor to radio broadcasting company for radio broadcasting, and that company permitted its invitees and customers to meet in its studio and to dance and cavort three days a week in a noisy manner, so as to annoy landlord’s customers and employees failed to state a cause of action for the abatement by injunction of a “nuisance”.—*Gordon County Broadcasting Co. v. Chitwood*, 87 S.E.2d 78, 211 Ga. 544.—Nuis 32.

Ga. 1953. While “trespass” is a direct infringement of one’s right of property, the infringement in the case of a “nuisance” is result of act which is not wrongful in itself, but only because of the conse-

quences which flow from it.—*Rinzler v. Folsom*, 74 S.E.2d 661, 209 Ga. 549.—Nuis 1; Tresp 1.

Ga. 1946. That which the law authorized to be done, if done as authorized cannot be a “nuisance”. Code, § 72-204.—*Elder v. City of Winder*, 40 S.E.2d 659, 201 Ga. 511.—Nuis 6.

Ga. 1946. The lawful operation of properly licensed packaged liquor store is an authorized business in counties in which a majority of the voters have approved sale of liquor, and cannot be enjoined as a nuisance per se, since that which the law authorizes to be done, if done as the law authorizes, is not a “nuisance”. Ga.Code Ann. §§ 58-1002 to 58-1008.—*Collins v. Lanier*, 40 S.E.2d 424, 201 Ga. 527.—Int Liq 260.

Ga. 1945. A motion picture show is not per se a “nuisance”.—*Forehand v. Moody*, 36 S.E.2d 321, 200 Ga. 166.—Nuis 61.

Ga. 1942. City airport constructed and operated in proper manner under statutory authority is not a “nuisance”. Code, § 11-202.—*Delta Air Corp. v. Kersey*, 20 S.E.2d 245, 193 Ga. 862, 140 A.L.R. 1352.—Aviation 216; Mun Corp 851.

Ga. 1942. Aerial navigation over land of another owner at such height as not to interfere with the then existing reasonable use thereof by the owner does not constitute a “trespass” or a “nuisance” but repeated flight over the land of another at such a low height as to be dangerous to health or life of the landowner amounts to a “nuisance”, regardless of whether such low flights are necessary to use adjoining airport. Code, §§ 11-101, 85-201, 105-1409.—*Delta Air Corp. v. Kersey*, 20 S.E.2d 245, 193 Ga. 862, 140 A.L.R. 1352.—Aviation 5.

Ga. 1942. Where airport operated by city was so constructed that it could not be used without requiring such low flights over land as to be imminently dangerous to life and health of landowner and that of his family, the airport constituted a “nuisance”. Code, § 11-202.—*Delta Air Corp. v. Kersey*, 20 S.E.2d 245, 193 Ga. 862, 140 A.L.R. 1352.—Aviation 216; Mun Corp 851.

Ga. 1942. In suit by landowner against city and aviation companies to enjoin operation of city airport and for damages, allegations disclosing that airport was so constructed that it could not be used without requiring such low flight over owner’s property as to be imminently dangerous to life and health of property owner and that of his family were sufficient to show that the city and the defendant aviation companies were jointly and severally liable for maintaining the airport as a “nuisance”. Code, § 11-202.—*Delta Air Corp. v. Kersey*, 20 S.E.2d 245, 193 Ga. 862, 140 A.L.R. 1352.—Aviation 220; Mun Corp 857.

Ga. 1941. Where boundary line between adjoining lots became established by acquiescence of proprietors in a line resulting in encroachment upon one lot of two or three feet according to original plat of lots and owner of encroaching lot had acquired title by prescription to strip extending between established line and original platted line, the erection by owner of adjoining lot of a new

fence on platted line so as to obstruct driveway on encroaching lot amounted to an "ouster" of the strip of land cut off by new fence and a "continuing trespass" and "nuisance" flowing from continued obstruction of the driveway, subject to injunction.—*Lockwood v. Daniel*, 17 S.E.2d 542, 193 Ga. 122.—Inj 48, 51; Nuis 3(12), 19.

Ga. 1941. At common law, any contracting or narrowing of the highway is a "nuisance".—*South-eastern Pipe Line Co. v. Garrett ex rel. Le Sueur*, 16 S.E.2d 753, 192 Ga. 817.

Ga. 1941. In suit to enjoin the erection of a church by religious organization, the members of which were sometimes referred to as "Holy Rollers", in close proximity to residences of property owners in town, on ground that religious services would be too noisy and constitute a "nuisance", trial court did not err under evidence in refusing to grant an interlocutory injunction. Code 1933, § 72-101.—*Dorsett v. Nunis*, 13 S.E.2d 371, 191 Ga. 559.—Nuis 31.

Ga. 1940. The statutory definition of a "nuisance" was not intended to change the common-law definition thereof. Code 1933, § 72-101.—State ex rel. *Boykin v. Ball Inv. Co.*, 12 S.E.2d 574, 191 Ga. 382.—Nuis 61.

Ga. 1940. That which the law authorizes to be done, if done as the law authorizes, cannot be a "nuisance".—*Asphalt Products Co. v. Beard*, 7 S.E.2d 172, 189 Ga. 610.—Nuis 6.

Ga. 1939. The mere display and sale of tombstones and monuments on a lot in an exclusively residential section of city in such manner as to present a "grave-yard appearance" was not a "nuisance" and could not be enjoined by residents and owners of property in the vicinity on ground that it injuriously affected the value of their property and that the constant appearance of the spectacle would prey upon the minds and injuriously affect the health of the individuals. Code 1933, § 72-101.—*Grubbs v. Wooten*, 5 S.E.2d 874, 189 Ga. 390.—Nuis 3(1).

Ga. 1939. The granting of an interlocutory order prohibiting defendants from working on automobiles, trucks, and tires at their filling station between hours of 11 p. m. and 6 a. m., except on Saturday nights when hours are 12 to 6 a. m., was error, since defendants were engaged in a legitimate business, which was nonetheless lawful because conducted at night, and it did not amount to a "nuisance" merely because it caused some inconvenience and annoyance in neighborhood.—*Wilson v. Evans Hotel Co.*, 4 S.E.2d 155, 188 Ga. 498, 124 A.L.R. 373.—Autos 395.

Ga. 1939. The term "nuisance" is applied to such class of wrongs as arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, but one who uses his property or conducts his business in a lawful and proper manner does not create an "actionable nuisance," against which relief may be had, merely because the particular use or conduct which he chooses to make of it may cause some inconvenience or annoyance

in the neighborhood.—*Wilson v. Evans Hotel Co.*, 4 S.E.2d 155, 188 Ga. 498, 124 A.L.R. 373.—Nuis 5.

Ga. 1939. A person who lives in a city, town, or village must of necessity submit himself to the consequences and obligations of the occupations which may be carried on in his immediate neighborhood, which are necessary for trade and commerce, and also for the enjoyment of property and the benefit of the inhabitants of the place; and matters which, although in themselves annoying, are in the nature of ordinary incidents of city or village life, cannot be complained of as "nuisance."—*Wilson v. Evans Hotel Co.*, 4 S.E.2d 155, 188 Ga. 498, 124 A.L.R. 373.—Nuis 3(2).

Ga. 1938. The establishment and operation of an undertaking business in a section of a municipality essentially and distinctively devoted to residential purposes, so as to bring the residents into the close association with the moving and embalming of dead bodies, funerals, and harrowing incidents of death, is an enjoinal "nuisance."—*McGowan v. May*, 196 S.E. 705, 186 Ga. 79.—Nuis 3(7).

Ga. 1938. Where noise accompanies an otherwise lawful business or pursuit, whether such noise is a "nuisance" depends on nature of locality, on degree of intensity and disagreeableness of the sounds, on their times and frequency, and on their effect, not on peculiar and unusual individuals, but on ordinary, normal, reasonable persons of the locality. Code 1933, § 72-101.—*Warren Co. v. Dickson*, 195 S.E. 568, 185 Ga. 481.—Nuis 3(3).

Ga. 1938. That which the law authorizes to be done, if done as the law authorizes, cannot be a "nuisance."—*Warren Co. v. Dickson*, 195 S.E. 568, 185 Ga. 481.—Nuis 5.

Ga. 1937. Erection and maintenance of wooden building on public school ground to be used as basketball court and for other recreational exercises to be conducted by pupils within enclosure of building could not of itself be adjudged a "nuisance."—*Talmadge v. Harvey*, 190 S.E. 926, 184 Ga. 290.—Nuis 3(9).

Ga. 1937. Evidence held to justify judgment denying injunction against construction of wooden building on public school ground to be used as basketball court and for other recreational purposes on ground that construction and use of building would not constitute "nuisance" by injuring health and property of 75 year old woman whose residence was located opposite school ground.—*Talmadge v. Harvey*, 190 S.E. 926, 184 Ga. 290.—Nuis 33.

Ga. 1928. Anything that obstructs or impedes a private way is a "nuisance," and, under prior rulings of this court, a judgment requiring the removal of obstructions from a private way, without more, will include any gates across such private way, and bar their presence or use in the private way.—*Whiteside v. Croker*, 142 S.E. 139, 165 Ga. 765.

Ga. 1919. A "nuisance" is anything that worketh hurt, inconvenience, or damage to another; and the fact that the act done may otherwise be lawful does not keep it from being a nuisance.—*Holman*

v. Athens Empire Laundry Co., 100 S.E. 207, 149 Ga. 345, 6 A.L.R. 1564.

Ga. 1917. The operation of a cotton ginnery, so as to force the cotton seed into a seedhouse by "air suction," which method causes a great quantity of dust to be expelled through the cracks of the seedhouse and into the dwelling house of an adjacent proprietor, to his great discomfort and injury, is an invasion of the latter's property rights, and amounts to a "nuisance."—*Tate v. Mull*, 93 S.E. 212, 147 Ga. 195, 3 A.L.R. 310.

Ga. 1913. Under Civ.Code 1910, § 4457, a "nuisance" is "anything that worketh hurt, inconvenience, or damage, to another."—*Williams v. Southern Ry. Co.*, 79 S.E. 850, 140 Ga. 713.—Nuis 1.

Ga. 1913. "Nuisance" within statute defined.—*Williams v. Southern Ry. Co.*, 79 S.E. 850, 140 Ga. 713.—Nuis 3(1).

Ga. 1905. By Civ.Code 1895, § 3861, a "nuisance" is anything that worketh hurt, inconvenience, or damage, to another; and the fact that the act done may otherwise be lawful does not keep it from being a "nuisance." The inconvenience complained of must not be fanciful, or such as would affect only one of fastidious taste, but it must be such as would affect an ordinarily reasonable man. The employment, by the owner of a ginning plant, of machinery which separates dust and sand from cotton and expels the particles of dust and sand into the air in large volumes, causing the same to be blown into the dwelling house of an adjacent proprietor, to his great discomfort and injury, is an invasion of his property rights, for which an action for damages will lie.—*Ponder v. Quitman Ginnery*, 49 S.E. 746, 122 Ga. 29.

Ga.App. 2000. Record supported finding that unattended city-owned swimming pool that was closed for season was not "nuisance," and thus, city was entitled to sovereign immunity in action by parent of minor who drowned in pool; there was no evidence of prior occurrence of specific misfeasance in question, i.e., allowing fence to open and then allowing child into unattended pool, nor was there evidence that the act complained of was of any duration or that city failed to act within reasonable time after knowledge of defect or dangerous condition. O.C.G.A. § 36-33-1.—*Gooden v. City of Atlanta*, 531 S.E.2d 364, 242 Ga.App. 786.—Mun Corp 851.

Ga.App. 1993. One-time occurrence does not amount to "nuisance."—*City of Lawrenceville v. Macko*, 439 S.E.2d 95, 211 Ga.App. 312, on subsequent appeal 499 S.E.2d 707, 231 Ga.App. 671, reconsideration denied, and certiorari denied.—Nuis 1.

Ga.App. 1992. Water on state highway within county was not "nuisance" for which motorist, who was injured in automobile accident on highway, could maintain suit against county.—*Christian v. Monroe County*, 417 S.E.2d 37, 203 Ga.App. 342.—Autos 262.

Ga.App. 1990. Sewage in house after initial flooding as result of power company's metal rod

driven into sewer line was not "nuisance" maintained by county, unless county had duty to remove it.—*DeKalb County v. Orwig*, 395 S.E.2d 824, 196 Ga.App. 255, certiorari granted, affirmed in part, reversed in part 402 S.E.2d 513, 261 Ga. 137, on remand 406 S.E.2d 577, 199 Ga.App. 703, certiorari denied.—Counties 144.

Ga.App. 1988. Damage caused to private property as result of burst water main, which had been equipped by county with new "butterfly" valve during earlier road construction project, was result of single malfunction in operation of public works project, and was not result of "nuisance" arising from public project created and maintained for public purpose, such that State Constitution would mandate that just and adequate compensation be paid to property owner. O.C.G.A. § 36-1-4; Const. Art. 1, § 3, Par. 1.—*Desprint Services, Inc. v. DeKalb County*, 372 S.E.2d 488, 188 Ga.App. 218.—Em Dom 2(10).

Ga.App. 1987. Creek, which ran across apartment complex, which in the normal course of events and passage of time had cut its own channel, which neither began upon nor ended upon landlord's property, which was not shown to be different from other naturally formed land formations, which was not shown to be dangerous per se to any passerby, and which was not under control of landlord, was not "nuisance," in tenant's action against landlord for injuries sustained when tenant threw himself into creek in attempt to extinguish flames blinding his eyes.—*First Pacific Management Corp. v. O'Brien*, 361 S.E.2d 261, 184 Ga.App. 277.—Nuis 61.

Ga.App. 1985. Utilizing of state prison labor on county projects was not, by itself, a "nuisance" for which county could be held liable with regard to murder committed by state prisoner who escaped from road work detail in county; county could not be held liable for nuisance unless act complained of amounted to a taking for public purposes, and utilizing of state prisoners for county work was not by itself a nuisance but a beneficial act.—*West v. Chatham County*, 339 S.E.2d 390, 177 Ga.App. 417, certiorari denied.—Counties 141.

Ga.App. 1978. Municipality's operation and maintenance of playground equipment so designed as to be dangerous to life or health is a "nuisance" for which an action against a municipality may be maintained.—*Porter v. City of Gainesville*, 248 S.E.2d 501, 147 Ga.App. 274.—Mun Corp 851.

Ga.App. 1977. Knowledge of a dangerous situation created by a defect and failure to repair the defect within a reasonable time amounts to a "nuisance."—*Horton v. City of Macon*, 241 S.E.2d 311, 144 Ga.App. 380.—Nuis 1.

Ga.App. 1975. A "nuisance" is an indirect tort, while a trespass usually is a direct infringement of one's property rights.—*Jillson v. Barton*, 229 S.E.2d 476, 139 Ga.App. 767.—Nuis 1; Tresp 1.

Ga.App. 1968. Conduct of city employees in applying pressure to sewer line which caused flooding of residence constituted a negligent trespass but

not a "nuisance" despite resulting permanent damage.—Johnson v. City of Atlanta, 161 S.E.2d 399, 117 Ga.App. 586.—Mun Corp 736, 747(2).

Ga.App. 1961. "Nuisance" is incapable of any exact or comprehensive definition.—Cox v. De Jarrette, 123 S.E.2d 16, 104 Ga.App. 664.—Nuis 1.

Ga.App. 1961. Whole idea of "nuisance" is that of either a continuous or regularly repetitious act or condition which causes hurt, inconvenience or injury, and mere apprehension of future injury from nuisance which complainant anticipates may be maintained in future in operation of lawful business is not sufficient to authorize its abatement. Code, §§ 72-101, 72-104.—Southeastern Liquid Fertilizer Co. v. Chapman, 120 S.E.2d 651, 103 Ga.App. 773.—Nuis 3(1), 4.

Ga.App. 1954. That which the law authorizes to be done, if done as the law authorizes it to be done, cannot be a "nuisance", but it becomes a nuisance when conducted in an illegal manner to the hurt, inconvenience, or damage of another.—Ingram v. City of Acworth, 84 S.E.2d 99, 90 Ga.App. 719.—Nuis 6.

Ga.App. 1954. To constitute a "nuisance", it is not necessary that the noxious trade or business should endanger the health of the neighborhood, but it is sufficient if it produces that which is offensive to the senses and renders enjoyment of life and property uncomfortable. Code, § 72-101.—City of Macon v. Cannon, 79 S.E.2d 816, 89 Ga.App. 484.—Nuis 1.

Ga.App. 1954. An interference with the natural flow of surface water may also amount to a "nuisance" without the presence of the element of danger to health. Code, § 72-101.—City of Macon v. Cannon, 79 S.E.2d 816, 89 Ga.App. 484.—Waters 118.

Ga.App. 1954. If storm sewer was formerly adequate but became inadequate to carry surface water from an ordinary rainfall and overflowed onto plaintiff's property to city's knowledge, city's maintenance of such condition would constitute a "nuisance." Code, § 72-101.—City of Macon v. Cannon, 79 S.E.2d 816, 89 Ga.App. 484.—Mun Corp 832.

Ga.App. 1950. Where by reason of changed conditions, due to erection of buildings and paving of streets, a drainage system becomes inadequate to carry off augmented volume of water flowing through streets from ordinary rainfall, so that water overflows on adjoining property, and the situation is known to city, continued maintenance of situation by city constitutes a "nuisance" and for the damage resulting therefrom to adjacent property owners city may be liable. Code, §§ 69-301, 72-101.—Cannon v. City of Macon, 58 S.E.2d 563, 81 Ga.App. 310.—Mun Corp 830.

Ga.App. 1947. Obstruction of a public road is a "nuisance" authorizing any citizen especially injured by obstruction to proceed in his own name to have it abated. Code, §§ 72-201, 72-202, 72-401.—Henderson v. Ezzard, 44 S.E.2d 397, 75 Ga.App. 724.—High 158.

Ga.App. 1943. Statutory provision declaring place where intoxicating liquor is sold, kept or bartered in violation of law to be a nuisance, and authorizing its abatement by proper authorities contemplates some continuity of such violation of law, and does not mean that a single instance of sale, possession or barter constitutes a "nuisance" subject to abatement. Code, §§ 58-110, 72-401.—Foster v. Mayor and Council of City of Carrollton, 24 S.E.2d 143, 68 Ga.App. 796.—Int Liq 260.

Ga.App. 1943. Where officer finding whiskey on defendant's premises inquired if that was all defendant had, defendant's reply that he had let a named person have some did not establish guilt of selling intoxicating liquor constituting a "nuisance" subject to abatement under statute. Code, §§ 58-110, 72-401.—Foster v. Mayor and Council of City of Carrollton, 24 S.E.2d 143, 68 Ga.App. 796.—Int Liq 275.

Ga.App. 1943. Determination of mayor and council of city having population of less than 20,000 declaring operation of defendant's place of business to be a liquor "nuisance" under statute providing for abatement of liquor nuisance, was not sustained by evidence. Code, §§ 58-110, 72-401.—Foster v. Mayor and Council of City of Carrollton, 24 S.E.2d 143, 68 Ga.App. 796.—Int Liq 275.

Ga.App. 1943. The violation of a criminal statute does not necessarily constitute a "nuisance".—Foster v. Mayor and Council of City of Carrollton, 24 S.E.2d 143, 68 Ga.App. 796.—Nuis 65.

Ga.App. 1941. A petition, alleging that defendant city caused damage to plaintiff's land by paving street, elevating grade and raising curb, so that large amount of surface rain water was diverted onto such land, which was flooded because of inadequacy and cracking of storm sewer running through it, and that city was permanently enjoined from permitting resulting nuisance by superior court decree, which was not excepted to by city, stated cause of action for damages from maintenance of a "nuisance", as such decree was adjudication that such acts of city constituted a nuisance.—City of Atlanta v. Scott, 18 S.E.2d 76, 66 Ga.App. 257.—Mun Corp 845(2).

Ga.App. 1941. A business may be a "nuisance" either by reason of its location or by reason of improper or negligent manner in which it is conducted.—Asphalt Products Co. v. Marable, 16 S.E.2d 771, 65 Ga.App. 877.

Ga.App. 1940. Where damages to private property results from construction of highway, county is not responsible for "nuisance" as a tort-feasor but remedy against the county with voucher of highway department exists solely by virtue of constitutional provision against taking private property for public purposes without adequate compensation. Code 1933, § 2-301.—Habersham County v. Knight, 12 S.E.2d 129, 63 Ga.App. 720.—Em Dom 266.

Ga.App. 1940. Petition alleging that city laid or caused to be laid drain pipes on plaintiff's property without plaintiff's consent and that water flowing through drain pipes had cut and washed and contin-

ued to cut, wash away and destroy large portion of plaintiff's property, but not alleging that work done by city was performed in unskillful or improper manner or negligently maintained or that it was dangerous to health or life of plaintiff, did not state cause of action for creating or maintaining a "nuisance". Code 1933, §§ 69-308, 72-101; Laws 1901, pp. 477, 494, 495, §§ 1 et seq., 43, 44.—Lawrence v. City of La Grange, 11 S.E.2d 696, 63 Ga.App. 587.—Mun Corp 845(2).

Ga.App. 1939. That which the law authorizes to be done, if done as the law authorizes it to be done, cannot be a "nuisance." Code 1933, § 72-101.—Southland Coffee Co. v. City of Macon, 3 S.E.2d 739, 60 Ga.App. 253.—Nuis 6.

Ga.App. 1939. Under statute defining "nuisance" as anything working "hurt, inconvenience or damage to another," and providing that "the fact that the act done may otherwise be lawful does not keep it from being a nuisance," the act complained of must be unlawful, and a violation of some right, and where the act itself is legal, it becomes a "nuisance" only when conducted in an illegal manner to the hurt, inconvenience, or damage to another. Code 1933, § 72-101.—Southland Coffee Co. v. City of Macon, 3 S.E.2d 739, 60 Ga.App. 253.—Nuis 6.

Ga.App. 1939. In action for damages from flooding caused by dam across non-navigable stream, charge defining "nuisance" was unnecessary but giving of such charge was not error, where instructions properly limited recovery for loss of crops caused by backwater. Code 1933, §§ 72-101, 85-1306, 105-1406, 105-1407.—Groover v. Hightower, 1 S.E.2d 446, 59 Ga.App. 491.—App & E 1064.1(8); Trial 219.

Ga.App. 1939. A "nuisance" is an indirect tort, while a "trespass" usually is a direct infringement of one's property rights.—Groover v. Hightower, 1 S.E.2d 446, 59 Ga.App. 491.—Nuis 1; Tresp 1.

Ga.App. 1933. That which law authorizes, if done as law authorizes it to be done, cannot be "nuisance". Civ.Code 1910, § 4457.—Georgia Power Co. v. Moore, 170 S.E. 520, 47 Ga.App. 411.—Nuis 6.

Ga.App. 1932. Attorney's habitual drunkenness, resulting in repeated arrests and imprisonment, *held* "indecent behavior," constituting "nuisance" to court and bar, hence authorized disbarment under statute. Civ.Code 1910, § 4967(4).—Wood v. State, 165 S.E. 908, 45 Ga.App. 783.—Atty & C 38.

Ga.App. 1932. Maintenance of large oil tanks from which oil and grease flowed on to plaintiff's adjacent residential property and disagreeable and unhealthy fumes and gases emanated *held* a "nuisance."—Lancaster v. Monroe, 165 S.E. 302, 45 Ga.App. 496.—Nuis 3(3).

Hawai'i App. 1985. "Nuisance" is that which unlawfully annoys or does damage to another, anything that works hurt, inconvenience or damage, anything that annoys or disturbs one in free use, possession, or enjoyment of his property or which renders its ordinary use or physical occupation un-

comfortable, and anything wrongfully done or permitted, which injures or annoys another in enjoyment of his legal rights.—Marsland v. Pang, 701 P.2d 175, 5 Haw.App. 463, certiorari denied 744 P.2d 781, 67 Haw. 686.—Nuis 1.

Idaho 1997. Evidence was sufficient to establish that swimming lessons conducted by landowners in their backyard swimming pool were not "nuisance" prohibited by restrictive covenant; lessons did not create undue noise, were conducted in landowners' backyard, were during reasonable hours of day, parking was confined to landowners' frontage, and increased traffic was within capacity of subdivision's streets.—Gabriel v. Cazier, 938 P.2d 1209, 130 Idaho 171, rehearing denied.—Covenants 122.

Idaho 1960. Within meaning of statute providing that anything which unlawfully obstructs passage or use in customary manner of any street or highway is a nuisance, barricade at end of dead-end street, at river's edge, did not constitute a "nuisance" where there was no defect which obstructed free passage or use of street in customary manner. I.C. §§ 50-1141, 52-101.—Smith v. Sharp, 354 P.2d 172, 82 Idaho 420.—Mun Corp 776.

Idaho 1947. The test of a statutory "nuisance" based on illegal sale of liquor under statute, not prescribing number of violations or length of time violation must continue in order to constitute the offense, is not the number of sales made or the length of time liquor is left upon the premises, but whether the place is maintained for the keeping and sale of liquor in sense of the statute. Laws 1939, c. 222, §§ 1001, 1002.—State ex rel. Good v. Boyle, 186 P.2d 859, 67 Idaho 512.—Int Liq 260.

Idaho 1938. An incorporated club, which maintained a place wherein alcoholic liquors were sold and kept with intent to sell, constituted a "nuisance" within statute providing for abatement of building in which sale of liquor is carried on or continued or exists notwithstanding only two sales of liquor were made. Laws 1935, c. 103, §§ 1, 4, 57.—State v. Sawtooth Men's Club, 85 P.2d 695, 59 Idaho 616.—Int Liq 260.

Idaho 1938. The test of a statutory "nuisance," based on illegal sale of liquor under a statute not prescribing the number of violations or length of time violation must continue in order to constitute the offense, is not the number of sales made or the length of time liquor is kept upon the premises, but whether the place is maintained for the keeping and sale of liquor in the sense of the statute.—State v. Sawtooth Men's Club, 85 P.2d 695, 59 Idaho 616.—Int Liq 261.

Idaho 1924. If one has a right to the use of water for irrigation, and has conducted it through a nonnavigable stream to the point of intended use, an obstruction of such stream, which prevents the water being so conducted, is a "nuisance" within the meaning of C.S. § 6420.—Carey Lake Reservoir Co. v. Strunk, 227 P. 591, 39 Idaho 332.

Ill. 1992. Upstream landowners' levees constituted "nuisance" to downstream landowner by increasing washing, erosion, and scouring of land.—

Meyers v. Kissner, 171 Ill.Dec. 484, 594 N.E.2d 336, 149 Ill.2d 1, on remand 182 Ill.Dec. 704, 610 N.E.2d 128, 242 Ill.App.3d 136.—Waters 171(1).

Ill. 1966. A “nuisance” at common law is that which unlawfully annoys or does damage to another.—Belmar Drive-In Theatre Co. v. Illinois State Toll Highway Commission, 216 N.E.2d 788, 34 Ill.2d 544.—Nuis 1.

Ill. 1947. A “nuisance” at common law is that which unlawfully annoys or does damage to another.—City of Chicago v. Reuter Bros. Iron Works, 75 N.E.2d 355, 398 Ill. 202, 173 A.L.R. 266.—Nuis 1.

Ill. 1947. Test whether noise constitutes “nuisance” is whether rights of property, of health or of comfort are so injuriously affected by the noise that the sufferer is subjected to a loss which goes beyond the reasonable limit imposed upon him by the condition of living, or of holding property, in a particular locality in fact devoted to uses which involve the emission of noise although ordinary care is taken to confine it within reasonable bounds.—City of Chicago v. Reuter Bros. Iron Works, 75 N.E.2d 355, 398 Ill. 202, 173 A.L.R. 266.—Nuis 3(3).

Ill. 1944. Annoyance or detriment occasioned by industries of community to residents thereof is not test of “nuisance” subject to abatement.—City of Kankakee v. New York Cent. R. Co., 55 N.E.2d 87, 387 Ill. 109.—Nuis 62.

Ill. 1933. “Nuisance” is something which is offensive physically to the senses and by such offensiveness makes life uncomfortable.—Rosehill Cemetery Co. v. City of Chicago, 185 N.E. 170, 352 Ill. 11, 87 A.L.R. 742.—Nuis 1.

Ill. 1932. A permanent encroachment upon public street of municipality is “purpresture” and a “nuisance.”—People ex rel. Lapice v. Wolper, 183 N.E. 451, 350 Ill. 461.—Mun Corp 691.1.

Ill. 1915. Whatever is offensive physically to the senses, and by such offensiveness makes life uncomfortable, is a “nuisance.”—City of Chicago v. Atwood, 110 N.E. 127, 269 Ill. 624.

Ill. 1913. In determining what constitutes a “nuisance,” the questions of time, location, and surrounding circumstances must be considered, and what might be a nuisance in one locality because of the density of the population, the residential character of the neighborhood, or similar circumstances, may be entirely proper in another locality.—City of Pana v. Central Washed Coal Co., 102 N.E. 992, 48 L.R.A.N.S. 244, 260 Ill. 111.

Ill. 1905. The erection by a railroad company of switch tracks and a freight depot in a residence neighborhood directly across the street from complainant's residence and flat building, and the construction of an elevated driveway from the street to the tracks and depot, but in such a manner as not to cause the traffic to interfere with the use of complainant's property any more than any other constant use of the street would do, cannot be enjoined as a “nuisance”; there being no showing

that the depot was not necessary, or that it could have been as conveniently built elsewhere.—Walter v. Chicago & W.I.R. Co., 74 N.E. 461, 215 Ill. 456.

Ill.App. 1 Dist. 1962. A “nuisance” is something that is offensive, physically, to the senses and, by such offensiveness, makes life uncomfortable.—Bauman v. Piser Undertakers Co., 180 N.E.2d 705, 34 Ill.App.2d 145.—Nuis 1.

Ill.App. 1 Dist. 1949. Operation of a vocational school in one-family residential district did not create a “nuisance” as a matter of law.—Baur v. Ray Schools-Chicago, 85 N.E.2d 335, 337 Ill.App. 157.—Nuis 31.

Ill.App. 1 Dist. 1937. An ordinance providing that no premises used for any purpose whatever shall be used in the city if the use thereof shall be the occasion of any nuisance or dangerous or detrimental to health is sufficiently definite and not void as delegating unrestricted authority to municipal administrative officers, as contended by operator of barbecue stand alleged to be a nuisance under ordinance because of crashing of dishes and blowing of automobile horns for service during the night. Whatever is offensive, physically, to the senses, and by such offensiveness makes life uncomfortable, is a “nuisance.”—City of Chicago v. Wilkens, 11 N.E.2d 836, 293 Ill.App. 622.

Ill.App. 2 Dist. 1991. “Nuisance” at common law is something which unlawfully annoys or does damage to another.—City of Aurora v. Navar, 154 Ill.Dec. 757, 568 N.E.2d 978, 210 Ill.App.3d 126.—Nuis 1.

Ill.App. 2 Dist. 1971. Whatever is offensive physically to the senses and by such offensiveness makes life uncomfortable is a “nuisance”.—Schatz v. Abbott Laboratories, Inc., 269 N.E.2d 308, 131 Ill.App.2d 1091, reversed 281 N.E.2d 323, 51 Ill.2d 143.—Nuis 3(3).

Ill.App. 2 Dist. 1937. The term “nuisance” includes everything that endangers life or health, gives offense to senses, violates the laws of decency, or obstructs reasonable and comfortable use of property.—Hall v. Putney, 10 N.E.2d 204, 291 Ill.App. 508.—Nuis 1.

Ill.App. 2 Dist. 1937. The business of vending of nonintoxicating beverages confections, and sandwiches from a stand to which customers chiefly came in automobiles, was not a “nuisance” which would be suppressed at instance of neighboring homeowner, notwithstanding objectionable noises such as honking of horns, screeching of brakes, starting of engines and closing of automobile doors.—Hall v. Putney, 10 N.E.2d 204, 291 Ill.App. 508.—Nuis 3(3).

Ill.App. 4 Dist. 1985. Adjoining landowners' trees did not constitute a “nuisance” entitling landowners to injunctive relief, as landowners' complaint was silent as to when and how the trees gained life, and as there was no allegation that the trees constituted a danger or that they were negligently maintained.—Bandy v. Bosie, 87 Ill.Dec. 714, 477 N.E.2d 840, 132 Ill.App.3d 832.—Nuis 32.

Ill.App. 4 Dist. 1943. The term "nuisance" is applied to that class of wrongs which arise from unreasonable, unwarrantable or unlawful use by a person of his property so as to produce material annoyance, inconvenience, discomfort, or hurt from which the law will presume a consequent damage.—Gardner v. International Shoe Co., 49 N.E.2d 328, 319 Ill.App. 416, affirmed 54 N.E.2d 482, 386 Ill. 418.—Nuis 1.

Ind. 1974. Unit, which owners had been living in, which could be moved without use of regular house moving equipment and which had been placed on foundation, was a "mobile home" within town ordinance, which prohibited, as a "nuisance", the placing, locating or erecting of a mobile home within town except in approved trailer courts and which defined "mobile home" as "living quarters which may be moved \* \* \*" from one place to another without the use of regular house moving equipment," though wheels, axles and tongue had been removed from such unit.—Ott v. Johnson, 319 N.E.2d 622, 262 Ind. 548.—Nuis 61.

Ind. 1940. Where pit which was part of waterworks plant leased by town from municipal waterworks corporation, and in which gasoline engine was located, was covered with protective planks and was not dangerous to general public, and plaintiff went to plant by appointment to see its manager concerning employment, entered pit and ignited a match which caused explosion of gasoline fumes in the pit, the city and the corporation were not liable for injuries sustained by plaintiff on ground that the pit constituted a "nuisance".—Town of Kirklin v. Everman, 28 N.E.2d 73, 217 Ind. 683, on rehearing 29 N.E.2d 206, 217 Ind. 683.—Nuis 3(6), 62.

Ind. 1933. Use of city sidewalks for market purposes 3 days a week, while not a continuous obstruction, was such a permanent and habitual obstruction as to constitute a "nuisance".—House-Wives League v. City of Indianapolis, 185 N.E. 511, 204 Ind. 685.—Mun Corp 692.

Ind. 1907. An obstruction in a public highway constitutes a "nuisance".—State v. Southern Indiana Gas Co., 81 N.E. 1149, 169 Ind. 124, 13 Am. Ann.Cas. 908.

Ind. 1905. The accumulation of water and ice in a depression in a sidewalk, so as to obstruct the free and safe use of the sidewalk, by water being collected on a roof and cast on the sidewalk by a projecting conductor, constitutes a "nuisance," which it is the duty of the city to prevent or abate, negligent failure to perform which will make it liable to one injured thereby.—City of Muncie v. Hey, 74 N.E. 250, 164 Ind. 570.

Ind.App. 1999. "Nuisance" is defined as that activity which arises from unreasonable, unwarranted, or unlawful use by a person of his own property, working obstruction or injury to right of another, or to the public, and producing such material annoyance, inconvenience, and discomfort that law will presume resulting damage.—Travelers Indem. Co. v. Summit Corp. of America, 715 N.E.2d 926.—Nuis 3(1), 4.

Ind.App. 1995. In determining what constitutes "nuisance," relevant inquiry is whether thing complained of produces such condition as in judgment of reasonable persons is naturally productive of actual physical discomfort to persons of ordinary sensibility, tastes and habits. West's A.I.C. 34-1-52-1.—Lever Bros. Co. v. Langdoc, 655 N.E.2d 577.—Nuis 1.

Ind.App. 1 Div. 1970. Defendant's operation of mice-raising establishment which subjected owners of adjacent property to sight of maggots rolling through a fence and smell which brought tears to eyes of nearby residents constituted a "nuisance", as against defendant's contention that the "mousy" odor was but an occasional personal annoyance.—Cox v. Schlachter, 262 N.E.2d 550, 147 Ind. App. 530.—Nuis 3(10).

Ind.App. 1 Div. 1970. "Nuisance" is anything offensive to senses so as to intentionally interfere with comfortable enjoyment of life or property. Burns' Ann.St. § 2-505.—Davoust v. Mitchell, 257 N.E.2d 332, 146 Ind.App. 536.—Nuis 3(1).

Ind.App. 1943. Evidence disclosing that plaintiffs had placed on their properties water-flushed toilets which drained into a drain, that the substance flowing through the drain had a black and forbidding appearance, was polluted and filthy, and gave off offensive odor, established existence of a "nuisance" within nuisance statute. Burns' Ann.St. § 2-505.—Bearcreek Tp. of Jay County v. De Hoff, 49 N.E.2d 391, 113 Ind.App. 530.—Nuis 33.

Ind.App. 1939. To place and keep or leave continuously in a public highway anything which either impedes or endangers public travel is a "nuisance" and unlawful.—Indianapolis Water Co. v. Schoenemann, 20 N.E.2d 671, 107 Ind.App. 308.

Ind.App. 1918. In determining what constitutes a "nuisance," question is whether thing complained of produces such a condition as in the judgment of reasonable men is naturally productive of actual physical discomfort to persons of ordinary sensibility, tastes, and habits.—Meeks v. Wood, 118 N.E. 591, 66 Ind.App. 594.—Nuis 4.

Ind.App. 2 Div. 1910. Burns' Ann.St. 1908, § 291 (Burns' Ann.St. § 2-505), makes whatever obstructs the use of property so as to essentially interfere with its comfortable enjoyment a "nuisance," and the subject of an action. The complaint alleged that plaintiffs did a retail clothing and furnishing business on the first floor of a building, under a lease from one of the defendants, and that such defendant caused and permitted the upper story to be used by the other defendant as a roller skating rink, the noise from which prevented conversation in plaintiffs' store, and annoyed and drove away his customers, thereby causing loss of profits and injury to the business which could not be compensated for by damages, and that if such use is permitted to continue plaintiffs' business will be destroyed, and also alleged facts showing the character and extent of plaintiffs' business, their inability to procure another room, and prayed an injunction. Held, that the complaint showed that the business would be destroyed if the rink was contin-

ued, so that plaintiffs were entitled to the injunction; the injury not being susceptible of compensation in damages.—*Foor v. Edwards*, 90 N.E. 785, 45 Ind.App. 259.—Land & Ten 170(4).

Ind.App. 2 Div. 1910. Burns' Ann.St.1908, § 291 (Burns' Ann.St. § 2-505), makes whatever obstructs the use of property so as to essentially interfere with its comfortable enjoyment a "nuisance," and the subject of an action. The complaint alleged that plaintiffs did a retail clothing and furnishing business on the first floor of the building, under a lease from one of defendants, and that such defendant caused and permitted the upper story to be used by the other defendant as a roller skating rink, the noise from which prevented conversation in plaintiffs' store, and annoyed and drove away his customers, thereby causing loss of profits and injury to the business, which could not be compensated for by damages, and that, if such use is permitted to continue, plaintiffs' business will be destroyed, and also alleged facts showing the character and extent of plaintiffs' business, their inability to procure another room, and prayed an injunction. Held, that the complaint was not defective as alleging conclusions for failing to aver the names of plaintiffs' customers who were driven away by the noise; that being evidential.—*Foor v. Edwards*, 90 N.E. 785, 45 Ind.App. 259.—Inj 118(2).

Ind.App. 1908. Burns' Ann.St.1901, § 290, provides that whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action, thus following the common law, which defines a "nuisance" as anything which causes an injury to lands or houses and renders them useless or even uncomfortable for habitation, but the erection of a jail next to a residence is not the creation of a nuisance.—*Pritchett v. Board of Com'rs of Knox County*, 85 N.E. 32, 42 Ind.App. 3.

Ind.App. 2 Div. 1904. Burns' Ann.St.1901, § 290, defines "nuisance" as whatever is injurious to health or indecent or offensive to the senses or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of life or property.—*Russell v. State*, 69 N.E. 482, 32 Ind.App. 243.

Iowa 2000. If normal persons living in the community would regard the invasion in question as definitely offensive, seriously annoying or intolerable, then the invasion is significant enough to constitute a "nuisance."—*Perkins v. Madison County Livestock & Fair Ass'n*, 613 N.W.2d 264.—Nuis 4.

Iowa 1996. Hog confinement operation, which emitted odors offensive to neighboring landowners due to manure collection process involved, was a "nuisance," even though facility was lawful business; landowners enjoyed priority of possession, nature of locality before hog confinement operation was started was typical for rural Iowa, and odors complained of substantially interfered with landowners' right to utilize and enjoy their property free

of unreasonable interference. I.C.A. §§ 657.1, 657.2.—*Weinhold v. Wolff*, 555 N.W.2d 454, re-hearing denied.—Nuis 3(10).

Iowa 1992. "Nuisance" simply refers to hurt, annoyance, or inconvenience which results from cause of problem, but does not identify cause. I.C.A. §§ 657.1, 657.2.—*Guzman v. Des Moines Hotel Partners, Ltd. Partnership*, 489 N.W.2d 7.—Nuis 1.

Iowa 1987. Hog confinement operator's spreading of hog manure in immediate vicinity of adjoining landowners' homes constituted "nuisance."—*Valasek v. Baer*, 401 N.W.2d 33.—Nuis 3(10).

Iowa 1972. A fair test of whether operation of lawful trade or industry constitutes a "nuisance" is the reasonableness of conducting it in the manner, at the place and under the circumstances in question. I.C.A. §§ 657.1, 657.2, subd. 1.—*Patz v. Farmegg Products, Inc.*, 196 N.W.2d 557.—Nuis 3(1).

Iowa 1967. Noises may be of such a character and intensity as to so unreasonably interfere with the comfort and enjoyment of private property and thus constitute a "nuisance" and, in such cases, injury to health of complaining party need not be shown. I.C.A. §§ 657.1, 657.2, subd. 1.—*Bates v. Quality Ready-Mix Co.*, 154 N.W.2d 852, 261 Iowa 696.—Nuis 3(3).

Iowa 1963. A common law "nuisance" was created by dust raised by trucks hauling crushed rock from a quarry over a limestone and dirt surfaced three mile road along which 40 homes were located where the dust was irritating to the skin, nose and throat, made ordinary use of the homes and lawns impossible during dry weather, and was not merely a temporary situation.—*Shannon v. Missouri Val. Limestone Co.*, 122 N.W.2d 278, 255 Iowa 528.—Nuis 3(3).

Iowa 1960. Where operation of corn grinding machinery resulted in a loud irritating and annoying noise and interfered with adjoining property owners' use of their land in that such noise prevented proper rest, interfered with conversation, made it difficult to hear radio and television, and caused dust to come into adjoining property owners' house, such grinding operations constituted a "nuisance" which adjoining property owners were entitled to have abated. I.C.A. §§ 657.1, 657.2, subd. 1.—*Kellerhals v. Kallenberger*, 103 N.W.2d 691, 251 Iowa 974.—Nuis 19.

Iowa 1942. Noxious gases and odors which spread over plaintiff's land from city's sewage disposal plant on abutting land, constituted actionable "nuisance", which was not a "nuisance per se" but a "nuisance in fact" or "per accidens".—*Ryan v. City of Emmetsburg*, 4 N.W.2d 435, 232 Iowa 600.—Mun Corp 736.

Iowa 1942. An alleged invasion of plaintiff's land by noxious gases and odors from city's sewage disposal plant on abutting land was not a "trespass" but was a "nuisance".—*Ryan v. City of Emmets-*

burg, 4 N.W.2d 435, 232 Iowa 600.—Mun Corp 736, 737.

Iowa 1942. Unreasonable or unlawful use of property which unreasonably interferes with lawful use and enjoyment of other property is an actionable “nuisance”, and negligence is not an essential element of such an action, and the actor is generally liable for resulting injury to others notwithstanding his exercise of skill to avoid such injury.—Ryan v. City of Emmetsburg, 4 N.W.2d 435, 232 Iowa 600.—Nuis 1, 7.

Iowa 1942. The unreasonableness of conduct is determined largely by character and gravity of resulting injury rather than the injury threatened, and in determining whether conduct is “unreasonable” in a nuisance case, the test is not unreasonable risk or foreseeability as such terms are used in negligence cases, and if the conduct causes an unreasonable amount of harm, there may be a “nuisance”, even though it created no unreasonable risk of harm.—Ryan v. City of Emmetsburg, 4 N.W.2d 435, 232 Iowa 600.—Nuis 7.

Iowa 1942. The business of soliciting orders for goods, wares and merchandise at private residences is not a “nuisance,” but a lawful business, in which solicitor has a valuable property right.—City of Osceola v. Blair, 2 N.W.2d 83, 231 Iowa 770.—Nuis 61.

Iowa 1942. The business of junk dealer, because of its nature, may be declared a “nuisance” by a town under statutory provisions. Code 1939, §§ 5714, 5739, 5743, 5744, 12395, 12396.—Town of Grundy Center v. Marion, 1 N.W.2d 677, 231 Iowa 425.—Mun Corp 616.

Iowa 1942. The violation of town ordinance prohibiting the maintenance of a junk yard within 300 feet of any building used for business or residential purposes constituted a “nuisance”, and town was entitled to injunction to restrain junk yard owner from engaging in business of junk dealer in violation of ordinance and to a mandatory injunction requiring such owner to remove the junk to some place within town which was 300 feet or more from any buildings used for business or residential purposes. Code 1939, §§ 5714, 5739, 5743, 5744, 12395, 12396.—Town of Grundy Center v. Marion, 1 N.W.2d 677, 231 Iowa 425.—Nuis 65, 80.

Iowa 1941. A defect in leased premises existing at time of execution of lease is a “nuisance” which landlord must abate, and both landlord and tenant are liable for damages resulting from the nuisance.—Casey v. Valley Sav. Bank, 300 N.W. 733, 231 Iowa 19.—Land & Ten 170(1).

Iowa 1941. A city was not liable for destruction by fire of airplane in privately leased hangar of municipal airport, which fire was caused by sparks and hot electrodes falling through false ceiling above which city's employee was making repairs on tower upon which beacon light was maintained on theory that repair of tower was a “nuisance”. Code 1939, § 5903.01 et seq., and §§ 5903.02, 5903.11; § 6329, subd. 19; §§ 12395, 12396.—Abbott v. City of Des Moines, 298 N.W. 649, 230

Iowa 494, 138 A.L.R. 120.—Aviation 241; Mun Corp 851.

Iowa 1939. Injunction would not lie to restrain use of a public playground on ground that use of playground for athletic contests and playing of kittenball at night resulted in injury to plaintiff's property and was “nuisance”.—Casteel v. Town of Afton, 287 N.W. 245, 227 Iowa 61.—Nuis 3(9).

Iowa 1932. When noises are such as to unreasonably interfere with comfort and enjoyment of private property, they are a “nuisance,” and injury to health need not be shown.—Higgins v. Decorah Produce Co., 242 N.W. 109, 214 Iowa 276, 81 A.L.R. 1199.—Nuis 3(3).

Iowa 1932. Wholesale poultry and produce plant where fowls are fattened, slaughtered, and prepared for market is not “nuisance” per se.—Higgins v. Decorah Produce Co., 242 N.W. 109, 214 Iowa 276, 81 A.L.R. 1199.—Nuis 3(10).

Iowa 1932. Code 1927, § 2519, I.C.A. § 147.83, did not violate I.C.A. Const. art. 5, § 6, since practice of medicine without a license is a “nuisance” within Code 1927, § 12395, I.C.A. § 657.1, which equity may enjoin without regard to I.C.A. Const. art. 5, § 6.—State v. Howard, 241 N.W. 682, 214 Iowa 60.

Iowa 1927. Stretching wires across street held to constitute “nuisance,” which may be enjoined (Code 1924, §§ 5945, 12395, 12396).—Incorporated Town of Ackley v. Central States Electric Co., 214 N.W. 879, 204 Iowa 1246, 54 A.L.R. 474.—Mun Corp 692.

Iowa 1927. Depressions in sidewalk held not to constitute “nuisance.”—Atkinson v. Sheriff Motor Co., 212 N.W. 484, 203 Iowa 195.—Mun Corp 768(3).

Iowa 1927. Obstruction to alley is “nuisance” within statute.—Dugan v. Zurmuehlen, 211 N.W. 986, 203 Iowa 1114.—Mun Corp 692.

Iowa 1924. The essential element of a “nuisance” is the injury to one's neighbor, and involves an invasion of the legal rights of persons sustaining peculiar relations to the property or thing in question, or threatening or impending danger to the public.—State v. Jacob Decker & Sons, 196 N.W. 600, 197 Iowa 41.

Iowa 1919. Scales maintained by a private party in the street of an incorporated town, whereby water is dammed up, so as to create an obstruction, constitutes a “nuisance” within Code, § 753, empowering cities and incorporated towns to care for and control their streets, and keep them free from obstructions and nuisances.—Incorporated Town of Polk City, Polk County, v. Gemricher, 170 N.W. 378, 185 Iowa 278.—Mun Corp 693.

Iowa 1916. In view of Code, § 5078 (I.C.A. § 657.2), the obstruction of streets by the parking of automobiles is a “nuisance.”—Pugh v. City of Des Moines, 156 N.W. 892, 176 Iowa 593, L.R.A. 1917F, 345.—Autos 12.

Iowa 1915. Code Supp.1913, § 2382, I.C.A. §§ 125.2 to 125.4, 125.7, denounces and prohibits aiding and disposing of intoxicating liquors ordered or kept in violation of law, and section 2384, I.C.A. §§ 125.9, 125.10, declares that whoever erects, establishes, or continues, or uses any building or place for any of the purposes prohibited, is guilty of a "nuisance." Held that, as the statute made offenses relating to intoxicating liquors nuisances only when carried on in or in connection with buildings or places, the crime of aiding in delivering intoxicants is not a nuisance.—*Hathaway v. Benton*, 154 N.W. 474, 172 Iowa 299.

Iowa 1913. Where a city maintained a hitching rack in the street along plaintiff's property, the rack itself did not constitute a nuisance per se but the city's act in permitting unusual accumulations of offal from which offensive odors arose constituted a "nuisance." Code, § 753, requires cities to keep the streets open and free from nuisances, and section 5078 declares that obstructions of streets shall constitute a nuisance. Held that, since the power to maintain and control streets in cities is delegated to the city councils thereof, the construction and maintenance of hitching posts in the streets at the instance of the council of a city did not constitute a "nuisance."—*Smith v. City of Jefferson*, 142 N.W. 220, 161 Iowa 245, 45 L.R.A.N.S. 792, Am. Ann. Cas. 1916A,97.

Iowa 1908. Noises resulting from the operation of a manufacturing plant, to constitute a "nuisance," must be unreasonable and of such a character as to be of actual physical discomfort to persons of ordinary sensibilities.—*McGill v. Pintsch Compressing Co.*, 118 N.W. 786, 140 Iowa 429, 20 L.R.A.N.S. 466.

Iowa 1904. One may not create a "nuisance" and justify himself in a continuation thereof upon the ground that his establishment is a source of benefit and profit to the community, and, as applied to a water course, a nuisance is created when the use of stream by the first user is unreasonable in character, and such as to produce a condition actually destructive of physical comfort or health, or a tangible, visible injury to property. A riparian proprietor operating a creamery, who deposits refuse therefrom in a stream to such an extent as to produce a condition destructive of physical comfort or health, or to create a tangible, visible injury to property rights of the lower riparian proprietor, is guilty of an act constituting a nuisance.—*Bowman v. Humphrey*, 100 N.W. 854, 124 Iowa 744.

Kan. 1973. A nuisance is an annoyance, and any use of property by one which gives offense to or endangers the life or health, violates the laws of decency, unreasonably pollutes the air with foul, noxious odors or smoke, or obstructs the reasonable and comfortable use and enjoyment of the property of another may be said to be a "nuisance."—*Vickridge First & Second Addition Homeowners Ass'n, Inc. v. Catholic Diocese of Wichita*, 510 P.2d 1296, 212 Kan. 348.—Nuis 3(1), 3(3).

Kan. 1973. A "nuisance" is an annoyance, and any use of property which gives offense to or endangers life or health violates the laws of decency, unreasonably pollutes the air, or obstructs the reasonable and comfortable use and enjoyment of the property of another may be said to be a nuisance.—*Culwell v. Abbott Const. Co., Inc.*, 506 P.2d 1191, 211 Kan. 359.—Nuis 3(1), 3(3).

Kan. 1970. "Nuisance" means annoyance, and any use of property by its owner which gives offense to or endangers life or health, violates laws of decency, or obstructs reasonable and comfortable use of property of another may be said to be a nuisance.—*Baldwin v. City of Overland Park*, 468 P.2d 168, 205 Kan. 1.—Nuis 1.

Kan. 1969. Generally, "nuisance" is something which interferes with rights of persons, whether in person, property, or enjoyment of property or comfort, which annoys or causes trouble or vexation, which is offensive or noxious, or which works harm, inconvenience or damage.—*Delight Wholesale Co. v. City of Overland Park*, 453 P.2d 82, 203 Kan. 99.—Nuis 1.

Kan. 1961. "Nuisance" may be defined generally as something which interferes with rights of others, whether in person, property or enjoyment of property or comfort, or that which is offensive or noxious or which annoys or vexes.—*Wilburn v. Boeing Airplane Co.*, 366 P.2d 246, 188 Kan. 722.—Nuis 1.

Kan. 1954. "Nuisance" means annoyance.—*Steifer v. City of Kansas City*, 267 P.2d 474, 175 Kan. 794.—Nuis 1.

Kan. 1954. Any use of property by one so as to give offense to or endanger life or health, to violate laws of decency, unreasonably to pollute the air with foul, noxious, offensive odors or smoke, or to obstruct reasonable and comfortable use and enjoyment of property of another, is a "nuisance."—*Steifer v. City of Kansas City*, 267 P.2d 474, 175 Kan. 794.—Nuis 3(1), 3(3).

Kan. 1951. A "nuisance", generally, is something interfering with citizens' rights, whether in person, property, enjoyment thereof, or comfort, an annoyance, and in broadest sense, that which annoys or causes trouble or vexation, is offensive or noxious, or works hurt, inconvenience or damage.—*Hofstetter v. George M. Myers, Inc.*, 228 P.2d 522, 170 Kan. 564, 24 A.L.R.2d 188.—Nuis 1.

Kan. 1951. Generally, dust substantially interfering with comfortable enjoyment of adjacent premises constitutes a "nuisance," if sufficient to cause perceptible injury to persons or property.—*Hofstetter v. George M. Myers, Inc.*, 228 P.2d 522, 170 Kan. 564, 24 A.L.R.2d 188.—Nuis 3(3).

Kan. 1941. In action against city and others for death of plaintiff's son who sustained fatal injuries when diving into swimming pool, petition alleged that diving tower was 10 feet above water, that water was 9½ feet deep, and that water going through two outlets at 660 gallons per minute created a suction which deprived diver of benefit of natural buoyancy of water and caused his body to

go through water more swiftly than it otherwise would have gone and to strike pool floor so hard that he broke his neck, was insufficient to show that city was maintaining a "nuisance".—Shoemaker v. City of Parsons, 118 P.2d 508, 154 Kan. 387.—Mun Corp 857.

Kan. 1940. A place where intoxicating liquor law is habitually violated or where business of gambling is carried on is a "nuisance" and may be suppressed, enjoined or abated as such. Gen.St. 1935, 21-915 et seq., 21-2118, 21-2130 et seq.—State ex rel. Harley v. Cline, 100 P.2d 637, 151 Kan. 764.—Int Liq 260; Nuis 65, 79, 80.

Kan. 1940. Where use of premises for violations of intoxicating liquor law and for gambling was enjoined as a "nuisance," the injunction was an "incumbrance running with the land" and parties who subsequently violated the injunction were punishable for "contempt" regardless of whether they had actual knowledge of existence of injunction. Gen.St.1935, 21-915 et seq., 21-2118, 21-2130 et seq.—State ex rel. Harley v. Cline, 100 P.2d 637, 151 Kan. 764.—Int Liq 279; Nuis 86.

Kan. 1937. That loan company charging usurious interest did not conduct its business in as offensive a manner as might have been done did not prevent its open and persistent violation of usury statutes from constituting a "nuisance," which state was authorized to enjoin. Gen.St.1935, 41-101 et seq.—State ex rel. Beck v. Basham, 70 P.2d 24, 146 Kan. 181.—Nuis 65.

Kan. 1937. That loan company charging usurious interest did not conduct its business in as offensive a manner as might have been done did not prevent its open and persistent violation of usury statutes from constituting a "nuisance," which state was authorized to enjoin. Gen.St.1935, 41-101 et seq. The repeated, continuous, and persistent violations of the statutes are what makes them "nuisances."—State ex rel. Beck v. Basham, 70 P.2d 24, 146 Kan. 181.

Kan. 1936. "Nuisance" means annoyance, and any use of property by owner, which gives offense to or endangers life or health, violates laws of decency, or obstructs reasonable and comfortable use of another's property, is a "nuisance."—Jeakins v. City of El Dorado, 53 P.2d 798, 143 Kan. 206.—Nuis 3(1).

Kan. 1935. Noise and vibration caused by switching of cars to grain elevator in district where like businesses are conducted *held* not a "nuisance."—McMullen v. Jennings, 41 P.2d 753, 141 Kan. 420.—Nuis 3(3).

Kan. 1931. Swimming pool constructed and equipped in modern manner, though attractive to children, *held* not "nuisance."—Swan v. Riverside Bathing Beach Co., 294 P. 902, 132 Kan. 61.—Neglig 1177.

Kan. 1928. Marble slab made part of sidewalk by tenant *held* not "obstruction" or "nuisance" rendering abutting property owners liable to one falling on slippery sidewalk.—Spear v. City of Sterling, 267 P. 979, 126 Kan. 314.—Mun Corp 808(2).

Kan. 1917. If owner of refinery permits large quantities of oil and poisonous refuse to escape and flow over and upon neighboring land causing material injury, the use of refinery will be deemed to be unreasonable and to constitute a "nuisance."—Helms v. Eastern Kansas Oil Co., 169 P. 208, 102 Kan. 164, L.R.A. 1918C,227.—Nuis 3(5).

Kan. 1915. The characteristic of a "nuisance" is that it must or will injure that portion of the public who may be compelled to come in contact with it. The term is applied to that class of wrongs arising from the unreasonable, unwarranted or unlawful use by a person of his own property producing such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage. Unless prejudice or damage threaten or result as a necessary consequence of the act, there is no nuisance. While a nuisance may result from negligence, negligence is not involved in nuisance actions, either as essential to the cause of action, or as a ground of defense.—Bailey v. Kelly, 145 P. 556, 93 Kan. 723, L.R.A. 1916D,1220.—Nuis 1.

Kan. 1905. An authorized business properly conducted at an authorized place is not a "nuisance," for whatever is lawful cannot be wrongful; and the owner of a railroad thus authorized and operated is not liable in damages to one whose residence is permeated by smoke, cinders, and gas emitted from the engines to such an extent as to be injurious to the health and comfort of the inhabitants.—Atchison, T. & S.F. Ry. Co. v. Armstrong, 80 P. 978, 71 Kan. 366, 1 L.R.A.N.S. 113, 114 Am.St. Rep. 474.

Kan. 1895. The term "nuisance," at common law, included both gambling and lotteries.—In re Smith, 39 P. 707, 54 Kan. 702.

Kan.App. 1993. "Nuisance" is annoyance, and any use of property by one which gives offense to or endangers life or health, violates laws of decency, unreasonably pollutes air with foul, noxious odors or smoke, or obstructs reasonable and comfortable use and enjoyment of property of another may be said to be a nuisance.—Finlay v. Finlay, 856 P.2d 183, 18 Kan.App.2d 479, review denied.—Nuis 1.

Kan.App. 1981. "Nuisance" is an annoyance, and any use of property by one which gives offense to or endangers the life or health, violates the laws of decency, unreasonably pollutes the air with foul, noxious odors or smoke, or obstructs the reasonable and comfortable use and enjoyment of the property of another may be said to be a nuisance.—Sandifer Motors, Inc. v. City of Roeland Park, 628 P.2d 239, 6 Kan.App.2d 308, review denied.—Nuis 3(1), 3(3).

Ky. 1966. Even when business is lawful in itself and is being operated with due care, use of property that is otherwise reasonable may be rendered unreasonable by gravity of its effect upon use and enjoyment of other property and therefore it can be a "nuisance."—Valley Poultry Farms, Inc. v. Preece, 406 S.W.2d 413.—Nuis 5.

Ky. 1959. Coal mines themselves did not constitute "permanent nuisances" in sense of an expen-

sive permanent structure, but method of operation of mines, so that coal slack, copperas, and other deleterious substances were discharged from companies' property into river and deposited on farm causing damage to its productivity and fertility did constitute "nuisance".—West Ky. Coal Co. v. Rudd, 328 S.W.2d 156.—Nuis 3(5).

Ky. 1958. Normal, prudent, authorized operation of railroad over properly constructed and maintained crossing is not a "nuisance" within meaning of statute giving fourth-class cities power to abate a nuisance. KRS 86.150, 277.060(1) (h), (2).—City of Harrodsburg v. Southern Ry. Co., 313 S.W.2d 864.—Mun Corp 623(1).

Ky. 1950. When proposed business is not unlawful, the essential elements of a "nuisance" are the unreasonable use of property causing material annoyance, inconvenience, or discomfort.—City of Somerset v. Sears, 233 S.W.2d 530, 313 Ky. 784.—Nuis 5.

Ky. 1950. A drive-in theatre which was proposed to be erected in residential subdivision of city, which was to have "in-the-car" loud speakers and concession stand and rest rooms, and which was to accommodate a maximum of 400 automobiles, was not a "nuisance", and its construction and operation could not be enjoined in suit by owners of residences in the neighborhood.—City of Somerset v. Sears, 233 S.W.2d 530, 313 Ky. 784.—Nuis 3(9), 19.

Ky. 1949. Owner of lot in town who maintained a fence on portion of street in which he kept hogs under such conditions as to pollute the atmosphere of owners of lots across street, was guilty of maintaining a "nuisance" which would be enjoined.—Rudd v. Kittinger, 217 S.W.2d 651, 309 Ky. 315.—Nuis 3(10).

Ky. 1948. Evidence that property owner pleaded guilty to having liquor unlawfully in his possession on premises and was sentenced to jail and fined, and that witness had bought whisky from him on several occasions, and that his general reputation for illicit trade was bad, justified forfeiture of property as a "nuisance." KRS 242.310, 242.320.—Beavin v. Com. ex rel. Whitworth, 215 S.W.2d 119, 308 Ky. 522.—Int Liq 250.

Ky. 1948. Where Diesel engines used by corporation to generate electricity caused houses in the neighborhood to vibrate and interfered with the comfortable enjoyment of the houses, and commercial electricity was available to corporation to operate its business, there was a "nuisance" which would be enjoined.—Sam Warren & Son Stone Co. v. Gruesser, 209 S.W.2d 817, 307 Ky. 98.—Nuis 19.

Ky. 1947. The maintenance of a place where bookmaking or pool selling is carried on is a "nuisance" even though it is conducted without noise or boisterous conduct, and regardless of the fact that races are run at different points. KRS 436.440.—Goose v. Com. ex rel. Dummit, 205 S.W.2d 326, 305 Ky. 644.—Nuis 61.

Ky. 1946. A "nuisance" is either a "nuisance per se" which is not permitted under any condi-

tions, or a "nuisance per accidens", which will not be enjoined until proved an offensive thing.—Board of Ed. of Louisville v. Klein, 197 S.W.2d 427, 303 Ky. 234.—Nuis 19.

Ky. 1943. A "nuisance" is anything which annoys or disturbs the free use of one's property or which renders its ordinary use or physical occupation uncomfortable.—Adams v. Hamilton Carhartt Overall Co., 169 S.W.2d 294, 293 Ky. 443.—Nuis 1.

Ky. 1943. The barking of a few dogs to such an extent as to make the ordinary occupation of one's property physically uncomfortable constitutes a "nuisance".—Adams v. Hamilton Carhartt Overall Co., 169 S.W.2d 294, 293 Ky. 443.—Nuis 3(10).

Ky. 1943. Evidence supported finding that three dogs kept on defendant's premises barked during the night and in early morning hours to such an extent as to create a "nuisance" justifying injunctive relief.—Adams v. Hamilton Carhartt Overall Co., 169 S.W.2d 294, 293 Ky. 443.—Nuis 33.

Ky. 1943. Evidence that odors and sounds arising from a hog farm did not constitute a "nuisance" authorized denial of injunctive relief, where plaintiffs had moved into the neighborhood with opportunity to acquire knowledge of the farm and plaintiffs had taken no action for many years, and defendant operated the farm with a full recognition of the required sanitary regulations.—Hall v. Budde, 169 S.W.2d 33, 293 Ky. 436, 167 A.L.R. 1361.—Nuis 33.

Ky. 1942. A Louisville ordinance providing for installation of parking meters, and making reasonable provision for proper loading zones for the purpose of conducting business was not invalid on ground that it authorized a "nuisance" or an "unreasonable obstruction" interfering with use of sidewalks or streets by abutting owners. Ky.St. §§ 2742-2825, 2783.—City of Louisville v. Louisville Auto. Club, 160 S.W.2d 663, 290 Ky. 241.—Autos 7.

Ky. 1941. In determining whether commercial and industrial activities constitute "nuisance" as being so offensive to senses that they render enjoyment of life and property uncomfortable, the locality and surroundings are important.—Kentucky & West Virginia Power Co. v. Anderson, 156 S.W.2d 857, 288 Ky. 501.—Nuis 3(1).

Ky. 1941. Whether noise constitutes "nuisance" depends, not on its intensity or volume, but on whether it is of such character as to produce actual physical discomfort and annoyance to persons of ordinary sensibilities, thereby rendering adjacent property less comfortable and valuable, in which case noise is substantial and unreasonable in degree.—Kentucky & West Virginia Power Co. v. Anderson, 156 S.W.2d 857, 288 Ky. 501.—Nuis 3(3).

Ky. 1941. In action for damages to property by operation of electric substation on adjoining lot, testimony of some witnesses that they were not annoyed by humming of electric transformers is not conclusive as to nonexistence of "nuisance" because of noise created thereby, as the test is effect of such

humming on ordinary person who is neither sensitive nor immune to annoyance caused thereby.—Kentucky & West Virginia Power Co. v. Anderson, 156 S.W.2d 857, 288 Ky. 501.—Nuis 3(3).

Ky. 1941. The intolerable, steady monotony of ceaseless humming sound, caused by transformers in electric substation and loud enough to interfere with ordinary conversation in dwelling house on adjoining lot, constitutes actionable “nuisance”, though such noise is harmonious, slight and trivial in itself.—Kentucky & West Virginia Power Co. v. Anderson, 156 S.W.2d 857, 288 Ky. 501.—Nuis 3(3).

Ky. 1941. The creation of trifling annoyance and inconvenience does not constitute actionable “nuisance”.—Kentucky & West Virginia Power Co. v. Anderson, 156 S.W.2d 857, 288 Ky. 501.—Nuis 4.

Ky. 1941. One who knowingly harbors a vicious dog is liable to person injured irrespective of negligence, liability being based on theory that knowingly harboring constitutes a “nuisance”.—Turner v. Shropshire, 147 S.W.2d 388, 285 Ky. 256.—Anim 68.

Ky. 1940. The description of buildings predominating in an area which is characterized as a “slum area” by Federal Housing Act and the ordinances and contracts between city and municipal housing commission relating to slum clearance projects was substantially that which had always been the description of a “nuisance” within the power of a municipality to abate. Ky.St. §§ 2741x-1 et seq., 3058-1, 3058-26, 3095; United States Housing Act of 1937, §§ 10, 11, 42 U.S.C.A. §§ 1410, 1411.—Douthitt v. City of Covington, 144 S.W.2d 1025, 284 Ky. 382.—Health 377; Mun Corp 244(1).

Ky. 1939. A “nuisance” differs from those cases which fall within the doctrine which imposes absolute duty on one who maintains deleterious substances on his property to prevent their escape in that, by doctrine of “nuisance,” the damage must be a continuing one rather than an isolated invasion of the plaintiff’s interests.—Rogers v. Bond Bros., 130 S.W.2d 22, 279 Ky. 239.—Nuis 4.

Ky. 1938. Evidence showing reputation of place as being used for purposes of lewdness, assignation, and prostitution, corroborated by only one incident testified to by a deputy sheriff and driver, held not to justify an injunction on the ground that place was used for lewdness, assignation, or prostitution and was a “nuisance.” Ky.St. §§ 3941m-1 et seq., 3941m-3.—Cheek v. Com. ex rel. Harrington, 112 S.W.2d 681, 271 Ky. 464.—Nuis 84.

Ky. 1936. “Nuisance” is something which annoys or disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him.—Kentucky-Ohio Gas Co. v. Bowling, 95 S.W.2d 1, 264 Ky. 470.—Nuis 1.

Ky. 1932. Gasoline and oil service station is not “nuisance,” though it may be nuisance because of inappropriate location.—Standard Oil Co. v. City of Bowling Green, 50 S.W.2d 960, 244 Ky. 362, 86 A.L.R. 648.—Autos 395.

Ky. 1931. A lawful business conducted in proper manner and appropriate place is not “nuisance,” unless it causes substantial injuries or tends to offend public peace, health, or morals.—Com. v. Phoenix Amusement Co., 44 S.W.2d 830, 241 Ky. 678.—Nuis 64.

Ky. 1921. As a general rule, every unlawful use by a person of his own property in such a way as to cause material annoyance, discomfort, or hurt to other persons or the public generally, and every enjoyment by one of his own property which violates the rights of another in an essential degree, constitute a “nuisance.”—Petroleum Refining Co. v. Commonwealth, 232 S.W. 421, 192 Ky. 272.

Ky. 1917. A city cannot remove, abate, or destroy spur tracks of street railways under its right of exercising its police power, as a city only possesses such police power as may be expressly or by implication delegated to it by the Legislature through its charter, and then only on the ground that it is a nuisance, and the term “nuisance” is limited to such things as the common law or the statute declares to be a nuisance, and perhaps those things which in their nature may be nuisances, and a municipality cannot declare what shall constitute a nuisance.—City of Dayton v. South Covington & C. St. Ry. Co., 197 S.W. 670, 177 Ky. 202, Am. Ann. Cas. 1918E,229, L.R.A. 1918B,476.

Ky. 1913. The owner of property is liable for maintaining a “nuisance” to one injured thereby, if he throws upon his own premises decaying meats and vegetables or maintains cesspools from which offensive and unhealthful odors arise.—Cumberland Grocery Co. v. Baugh’s Adm’r, 152 S.W. 565, 151 Ky. 641, 43 L.R.A.N.S. 1037, Am. Ann. Cas. 1915A,130.

Ky. 1912. Under Ky.St. § 2885, providing that it shall be the duty of police officers in cities to remove all nuisances in the public streets, parks, and highways, it was the duty of a policeman, on obtaining knowledge of a dangerous cave-in in a street, to guard the same in order to prevent injury thereby, and hence the policeman’s knowledge thereof was notice to the city; the word “nuisance,” as there used, not being limited to a physical obstruction placed in a street, but including anything that “worketh hurt, inconvenience, or damage.”—City of Louisville v. Lenahan, 149 S.W. 932, 149 Ky. 537, Am. Ann. Cas. 1914B,164.

Ky. 1905. A private park in the residence part of a city, inclosed by a fence and rented to lodges and other bodies for holding entertainments by day and night, is, when permitted to be so conducted that it is a rendezvous for boisterous, dissolute, drunken people, who indulge in music, dancing, and obscenity until very late hours of the night, so as to disturb the sleep of neighboring residents, a “nuisance.”—Palestine Bldg. Ass’n v. Minor, 86 S.W. 695, 27 Ky.L.Rptr. 781.

Ky. 1947. A rendering plant, which due to its condition and method of operation emitted nauseous odors causing much discomfort to neighboring residents and unreasonably inconveniencing them in reasonable enjoyment of their property, consti-

tuted a “nuisance” which should be abated, and resident property owners in the vicinity were entitled to recover damages suffered by them up to time of such abatement. LSA-C.C. arts. 666-669.—*Borgnemouth Realty Co. v. Gulf Soap Corp.*, 31 So.2d 488, 212 La. 57.—Nuis 3(3), 35.

La. 1947. Evidence that railroad’s terminal facilities were so operated that dense smoke, cinders and fly ash were dispersed to injury of neighboring property owners established maintenance of “nuisance” and rendered railroad liable for resulting damages.—*Devoke v. Yazoo & M. V. R. Co.*, 30 So.2d 816, 211 La. 729.—R.R. 222(5).

La. 1944. Smoke, soot and noxious gases may constitute actionable “nuisance,” though produced and carried on by lawful business, where they result in material injury to neighboring property or interfere with its comfortable use and enjoyment by persons of ordinary sensibilities.—*McGee v. Yazoo & M. V. R. Co.*, 19 So.2d 21, 206 La. 121.—Nuis 5.

La. 1942. A restaurant which was located on lot which was within commercial district zone and which was more than 100 feet from plaintiff’s residence was not a “nuisance”, in view of testimony, uncontradicted except by plaintiff, that restaurant catered to a respectable class of patrons and that business was conducted in a very orderly way.—*State ex rel. Szodomka v. Gruber*, 10 So.2d 899, 201 La. 1068.—Nuis 3(1).

La. 1942. A municipal ordinance prohibiting opening of a driveway across a sidewalk within 150 feet from nearest property line of intersection of any two avenues was not a “zoning ordinance,” but merely a “traffic ordinance,” and defendants’ maintenance of driveways across sidewalks, within the forbidden distance, to afford access to parking space adjacent to their restaurant furnished no ground for having restaurant business declared a “nuisance”.—*State ex rel. Szodomka v. Gruber*, 10 So.2d 899, 201 La. 1068.—Mun Corp 669; Nuis 6.

La. 1939. A stack or vent line replacing flare for disposing of waste gases from gasoline plant in oil field, with result that health of adjoining property owner’s wife showed marked improvement, was not a “nuisance” which would be abated by permanent injunction restraining further operation of gasoline plant.—*Dodd v. Glen Rose Gasoline Co.*, 193 So. 349, 194 La. 1.—Nuis 3(3).

La. 1910. An obstruction is merely matter out of place and that which may be a stepping stone in a position where it is needed and may be used as such becomes an obstruction when occupying a place intended for other use, and where it is not needed and cannot be so used. Where a pavement has been laid, the asphalt surface of which lays smoothly down to the curb, a block of stone placed within the curb is an obstruction and becomes a “nuisance.”—*McCormack v. Robin*, 52 So. 779, 126 La. 594, 139 Am.St.Rep. 549.

La. 1910. A “nuisance” is anything which inconveniences, annoys, or produces inconvenience or damage. A “nuisance per se” is one which is always a nuisance in certain localities. A “nuisance

in fact” is one which becomes a nuisance by reason of circumstances and surroundings.—*City of New Orleans v. Lenfant*, 52 So. 575, 126 La. 455, 29 L.R.A.N.S. 642.—Nuis 1.

La.App. 2 Cir. 1996. While noise and dust do not necessarily constitute “nuisance,” in some instances they may be so, depending on particular circumstances. LSA-C.C. arts. 667-669.—*Barrett v. T.L. James & Co.*, 671 So.2d 1186, 28,170 (La.App. 2 Cir. 4/3/96), writ denied 674 So.2d 973, 1996-1124 (La. 6/7/96).—Nuis 3(3).

La.App. 2 Cir. 1996. Activities of contractor, particularly contractor’s operation of concrete recycling project in connection with highway reconstruction work, did not constitute “nuisance,” despite neighbors’ complaints of noise and concrete dust which allegedly damaged their homes and resulted in respiratory illnesses; operation was not continuous over seven-month period, crushing operations never occurred more than 17 days in one month, operation was not conducted late into night or commenced in early morning hours, no samples or photographs of allegedly damaged carpet or insulation were admitted into evidence, depositions of physicians failed to support claims that dust aggravated respiratory conditions, and videotape indicated that noise level in residences was such that normal conversation could be conducted. LSA-C.C. arts. 667-669.—*Barrett v. T.L. James & Co.*, 671 So.2d 1186, 28,170 (La.App. 2 Cir. 4/3/96), writ denied 674 So.2d 973, 1996-1124 (La. 6/7/96).—Nuis 3(3).

La.App. 2 Cir. 1994. Floodlighting consisting of four poles each approximately 22 feet tall positioned in corners of backyard, each pole topped by two lights which illuminated from dusk to dawn, was “nuisance” to neighborhood in violation of building restrictions and protective covenants of subdivision.—*Harrison v. Myers*, 639 So.2d 402, 25,902 (La.App. 2 Cir. 6/22/94).—Covenants 51(1).

La.App. 2 Cir. 1964. To constitute a “nuisance”, use of property must be of such character and to such an unreasonable degree as to produce actual discomfort and annoyance to ordinary sensibilities of normal person. LSA-C.C. arts. 666-669.—*Woods v. Turbeville*, 168 So.2d 915.—Nuis 1.

La.App. 2 Cir. 1959. Where lint, mote, burrs, trash, dirt, and dust were emitted from cotton gin, blown through discharge pipe and permitted to spread and drift on nearby farm and to sift through screens of residence on farm operation of cotton gin constituted a “nuisance”. LSA-C.C. arts. 666-669.—*Bankston v. Farmers Co-op. Gin of Winnsboro*, 116 So.2d 91.—Nuis 3(5).

La.App. 2 Cir. 1951. A trade or business lawful in itself becomes a “nuisance” when from the situation, its inherent qualities, or manner in which it is conducted, it causes material injury to property of another, interferes with his comfort and enjoyment, injures health of those living in vicinity, or interferes with their ordinary physical comfort, measured by habits and feelings of ordinary people, and life or health need not be endangered, it being sufficient if business produces that which is offen-

sive to senses, and which renders enjoyment of life and property uncomfortable.—Robertson v. Shipp, 50 So.2d 699.—Nuis 5.

La.App. 2 Cir. 1951. A “nuisance” is anything which inconveniences, annoys, or produces inconvenience or damage.—Robertson v. Shipp, 50 So.2d 699.—Nuis 1.

La.App. 2 Cir. 1951. The business of boarding, raising and training dogs in large numbers in a rural community is not per se a “nuisance”, but such business would be so classified if operated in a city, town or village.—Robertson v. Shipp, 50 So.2d 699.—Nuis 3(10).

La.App. 2 Cir. 1950. Excessive, unreasonable and disturbing noises, particularly during night hours, constitute “nuisance” to the abatement of which parties disturbed thereby are entitled, but noise is not necessarily a nuisance and will be held to be so only after thorough consideration of all surrounding facts such as character of locality and nature of noises and effect thereof on persons of ordinary sensibilities. L.S.A.-C.C. arts. 667-669.—Beauvais v. D. C. Hall Transport, 49 So.2d 44.—Nuis 3(3), 19.

La.App. 2 Cir. 1949. Excessive, unreasonable and disturbing noises, particularly during night hours, constitute a “nuisance” to the abatement of which parties disturbed thereby are entitled, but noise is not necessarily a nuisance and will be held to be so only after thorough consideration of all surrounding facts such as character of locality and nature of noises and effect thereof on persons of ordinary sensibilities. L.S.A.-C.C. arts. 667-669.—Hobson v. Walker, 41 So.2d 789.—Nuis 3(3).

La.App. 2 Cir. 1947. In order to consider a lawful business a “nuisance”, the injury caused thereby to complaining party must be real and not fanciful.—Kellogg v. Mertens, 30 So.2d 777.—Nuis 4.

La.App. 2 Cir. 1939. A “nuisance” is anything from which harm, inconvenience, or damage results, or which materially interferes with the enjoyment of rights or property.—Talbot v. Stiles, 189 So. 469.—Nuis 1.

La.App. 2 Cir. 1939. A veterinarian’s detention of dogs on his premises for observation and treatment constituted a “nuisance” as to adjoining residence owner, his wife, and tenants, who were disturbed by howling of the dogs, justifying abatement at instance of property owner.—Talbot v. Stiles, 189 So. 469.—Nuis 3(10), 19.

La.App. 2 Cir. 1935. Landowner required by cotton acreage reduction contract with Secretary of Agriculture to permit tenants to continue in occupancy, rent free, for specified time, unless tenant became nuisance or menace to landowner’s welfare, held precluded from ejecting tenant, since tenant, although not paying rent, did not thereby become “nuisance” or “menace”. L.S.A.-C.C. arts. 1890, 1902; Code Prac. art. 35.—Miller v. White, 163 So. 777.—Land & Ten 275.

La.App. 3 Cir. 1970. Four above-ground storage tanks on defendant’s property, used to store gaso-

line and diesel fuel in conjunction with defendant’s truck stop business, did not constitute a “nuisance,” though constructed within five feet of plaintiff’s property line and allegedly posed a danger of explosion, where, inter alia, plaintiff’s home was approximately 150 feet from the tanks, defendant’s premises were in a commercial area, and there was no showing that the trucks or their operators were noisy. L.S.A.-C.C. arts. 667-669.—Hilliard v. Shuff, 241 So.2d 56, writ issued 242 So.2d 577, 257 La. 454, reversed 256 So.2d 127, 260 La. 384, 50 A.L.R.3d 201, appeal after remand 280 So.2d 845, writ denied 282 So.2d 519, appeal after remand 285 So.2d 266, application denied 288 So.2d 356.—Nuis 3(6).

La.App. 4 Cir. 1971. The term “nuisance” is applicable to a thing of beauty, such as a vine, if it causes destructive botanical action, as well as a condition which is offensive to the senses, such as a nauseous odor.—Borenstein v. Joseph Fein Caterers, Inc., 255 So.2d 800.—Nuis 3(1), 3(3).

La.App.Orleans 1951. The operation of a commercial dog kennel in a residential neighborhood constituted a “nuisance” subject to injunction at suit of adjoining landowners.—Roche v. St. Roman, 51 So.2d 666.—Nuis 19.

Me. 1936. “Nuisance” is a violation of an absolute duty.—Foley v. H.F. Farnham Co., 188 A. 708, 135 Me. 29.—Nuis 1.

Me. 1936. “Nuisance” consists in a use of one’s own property in such a manner as to cause injury to the property, or other right, or interest of another.—Foley v. H.F. Farnham Co., 188 A. 708, 135 Me. 29.—Nuis 1.

Me. 1936. Maintenance on private property of a dangerous menace to public travel is a “nuisance”; and, when the danger is of such character as ought to awaken in a prudent owner a reasonable foresight of hurt to highway travelers, the duty to take care is undeniable.—Foley v. H.F. Farnham Co., 188 A. 708, 135 Me. 29.—Nuis 61.

Me. 1927. Obstruction in public way is “nuisance.” Rev.St. c. 23, § 5.—Yates v. Tiffiny, 136 A. 668, 126 Me. 128.—Mun Corp 692.

Me. 1909. Under Rev.St.1903, c. 22, § 1, a place of resort is a “nuisance” if used by a club either to sell intoxicating liquor to its members, or to distribute among them liquor owned in common, or to procure and dispense to its members liquor bought for and belonging to them individually.—State v. Kapicsky, 73 A. 830, 105 Me. 127, 23 L.R.A.N.S. 737.

Me. 1908. An obstruction placed within the limits of a public way is a “nuisance” at common law, as well as under Rev.St.1903, c. 22, § 5.—Smith v. Preston, 71 A. 653, 104 Me. 156.

Me. 1906. A thing is not a “nuisance” merely because a municipal ordinance declares it to be such, but the state may declare what shall be deemed a “nuisance.”—Inhabitants of Houlton v. Titcomb, 66 A. 733, 102 Me. 272, 10 L.R.A.N.S. 580, 120 Am.St.Rep. 492.

Md. 1958. A legitimate business may constitute a "nuisance" if improperly conducted.—Mayor and Council, Town of Bladensburg, Inc. v. Berg, 139 A.2d 703, 216 Md. 292, concurring opinion 140 A.2d 663, 216 Md. 292.—Nuis 5.

Md. 1954. Traditionally, a "nuisance" is a thing or condition which is on premises or adjacent thereto and which is offensive or harmful to those who are off premises.—Sherwood Bros. v. Eckard, 105 A.2d 207, 204 Md. 485.—Nuis 1.

Md. 1954. A "nuisance" exists because of violation of an absolute duty and does not rest upon degree of care used but rather on degree of danger existing with best of care, but "negligence" results from violation of relative duty for failure to use degree of care required under particular circumstances.—Sherwood Bros. v. Eckard, 105 A.2d 207, 204 Md. 485.—Neglig 230; Nuis 1.

Md. 1949. The projecting of blinding lights into homes adjacent to municipal stadium when stadium was used for playing night baseball was not a necessary concomitant of playing night baseball and would be enjoined as a "nuisance".—Green v. Garrett, 63 A.2d 326, 192 Md. 52.—Mun Corp 857.

Md. 1949. Use by patrons attending athletic events at municipal stadium of dirt field adjacent to stadium for parking their automobiles, thereby raising clouds of dust, would be enjoined until field was paved as constituting a "nuisance" to persons living in neighborhood of stadium.—Green v. Garrett, 63 A.2d 326, 192 Md. 52.—Mun Corp 857.

Md. 1948. Grass plot in center of street was not a "nuisance", but was obstruction to free flow of traffic which under adverse weather conditions might be dangerous to vehicles, as respects liability of city for damages from accident.—East Coast Freight Lines v. Mayor and City Council of Baltimore, 58 A.2d 290, 190 Md. 256, 2 A.L.R.2d 386.—Autos 264.

Md. 1946. An electric light pole is not of itself a "nuisance" although it may become one by reason of its location.—East Coast Freight Lines v. Consolidated Gas, Elec. Light & Power Co. of Baltimore, 50 A.2d 246, 187 Md. 385.—Electricity 16(1).

Md. 1944. "Nuisance" includes everything that endangers life or health, gives offense to the senses, violates the laws of decency, or obstructs the reasonable and comfortable use of property.—Hart v. Wagner, 40 A.2d 47, 184 Md. 40.—Nuis 1.

Md. 1939. A dredging company, which was dredging on federal government's property pursuant to contract, under federal supervision and control, in an authorized government enterprise, so that work was not a "nuisance," was not liable, under rule of liability without fault, to landowners, when mass of earth, which had been dredged from canal, and which was precipitated into pond, deprived plaintiffs of access to their land by rowboat and prevented operation of weir in letting water from pond into ravine on plaintiffs' land where carp were raised.—Toy v. Atlantic Gulf & Pacific Co., 4 A.2d 757, 176 Md. 197.—Nav Wat 26(3).

Md. 1939. In order to constitute a "nuisance" at law, wrongful act of defendant, or its agents or servants must be shown, since proof of damage, loss, or inconvenience suffered is not enough to maintain an action.—Toy v. Atlantic Gulf & Pacific Co., 4 A.2d 757, 176 Md. 197.—Nuis 1.

Md. 1939. A motion picture theater is not in itself a "nuisance" and would not become one merely by violation of an ordinance in its erection.—Cook v. Normac Corp., 4 A.2d 747, 176 Md. 394.—Nuis 65.

Md. 1939. Where owner moored raft at a place separated from end of street by stone wall and raft's presence and location near end of street did not impart danger to use of street or add to the natural danger of open water, mooring of raft did not create a "nuisance."—State, to Use of Alston v. Baltimore Fidelity Warehouse Co., 4 A.2d 739, 176 Md. 341.—Nuis 3(1).

Md. 1939. Where owner moored raft in public waters for use of its private purposes without giving notice or warning to children playing in street separated from water's edge by stone wall of danger of using raft, raft owner was not liable for drowning of child who reached raft by climbing over wall, on theory of attractive nuisance or as extending invitation for raft's occupation by child, since raft was not "nuisance" and "invitation" involves the existence of intent to induce others to act responsibly.—State, to Use of Alston v. Baltimore Fidelity Warehouse Co., 4 A.2d 739, 176 Md. 341.—Neglig 1177.

Md. 1938. The pollution of stream by municipal sewage disposal plant, rendering stream unfit for bathing and causing destruction of fish therein and making the stream unfit for the watering of horses and cattle of a riparian owner and causing noxious odors to arise from stream, was an actionable "nuisance." Acts 1927, c. 254; Acts 1933, Sp.Sess., c. 1.—Livezey v. Town of Bel Air, 199 A. 838, 174 Md. 568.—Mun Corp 838.

Md. 1934. Hauling and delivery of coal in sacks by truck was not a "nuisance" nor such inherently dangerous work that coal dealer would become liable for acts of truck operator who was independent contractor.—Hood v. Azrael, 175 A. 666, 167 Md. 641.—Autos 194(1).

Md. 1930. That through error or negligence of police officer revolver was placed within reach of intoxicated person held not to constitute such person a "nuisance," rendering city liable.—Wynkoop v. City of Hagerstown, 150 A. 447, 159 Md. 194.—Mun Corp 736.

Md. 1930. "Nuisance" necessarily involves idea of continuance, and term itself is not convertible with crime, and is distinguishable from trespass.—Wynkoop v. City of Hagerstown, 150 A. 447, 159 Md. 194.—Nuis 59.

Md. 1911. Noise alone, if it be of such a character as to be productive of actual physical discomfort and annoyance to a person of ordinary sensibility, may create a "nuisance," the subject of a remedy at

law or in equity.—*Longley v. McGeoch*, 80 A. 843, 115 Md. 182.

Md.App. 1977. A “nuisance” is defined as anything that works or causes injury, damage, hurt, inconvenience, annoyance, or discomfort to one in the legitimate enjoyment of his reasonable rights of property, or which renders ordinary use and occupation by a person of his property uncomfortable to him.—*Herilla v. Mayor and City Council of Baltimore*, 378 A.2d 162, 37 Md.App. 481.—Nuis 1.

Mass. 1949. Noise which constitutes an annoyance to a person of ordinary sensibility to sound, such as materially to interfere with ordinary comfort of life, and impair reasonable enjoyment of his habitation, is a “nuisance”.—*Malm v. Dubrey*, 88 N.E.2d 900, 325 Mass. 63.—Nuis 3(3).

Mass. 1949. Where truck freight terminal was located in manufacturing zone, but zoning by-law provided that no building should be used for any purpose offensive to neighborhood by emission of noise, and it appeared that employees at terminal worked all night loading and unloading and repairing trucks, making loud noises so as to interfere with sleep of persons in the area, there was a “nuisance” authorizing injunction enjoining operation of terminal between hours of twelve P.M. and six A.M. in such a manner as to cause noises to emanate therefrom so as to interfere with ability of other persons in area to sleep, even though night work was necessary for terminal’s business.—*Malm v. Dubrey*, 88 N.E.2d 900, 325 Mass. 63.—Nuis 3(5), 19.

Mass. 1949. An improperly registered automobile is a “trespasser” and a “nuisance” and the illegal quality of driving it permeates every movement of the operator and directly contributes as a cause of injury occurring from the driving of illegally registered automobile.—*Dean v. Leonard*, 83 N.E.2d 443, 323 Mass. 606.—Autos 56.

Mass. 1948. Where freight terminal was located in district zoned for business but was located on boundary near residential district, and employees at terminal worked all night loading and unloading trucks and sorting merchandise, making loud noises so as to interfere with sleep of persons in the area there was a “nuisance” and operation of terminal would be enjoined between 8 P.M. and 7 A.M.—*Weltshe v. Graf*, 82 N.E.2d 795, 323 Mass. 498.—Nuis 6, 19.

Mass. 1944. Where city engaged in laying sewer left materials there overnight and children using a beam upon a wooden horse for a seesaw permitted beam to fall and break leg of minor child, erection and use of seesaw upon way did not constitute “nuisance” for which city would be liable to injured child, since seesaw was not a permanent or continuing condition of highway.—*Caissie v. City of Cambridge*, 58 N.E.2d 169, 317 Mass. 346.—Mun Corp 736.

Mass. 1944. The fact that city did not have watchman at site of sewer improvement to prevent children from using city’s property in constructing a seesaw did not render presence of seesaw on street

a “nuisance” for which city would be liable to minor child injured by falling of beam used by children.—*Caissie v. City of Cambridge*, 58 N.E.2d 169, 317 Mass. 346.—Mun Corp 736.

Mass. 1942. Where declaration, in action by W.P.A. workman injured when electric drill came in contact with electric wires in a city street, did not allege that conduit containing wires was located in place other than that authorized by board of aldermen, but was based on failure of defendant electric company to exercise care in maintenance of wires below surface of street and to take precautions to prevent plaintiff from being injured, to give him due warning of existence of wires, and to insulate them properly, declaration failed to state concisely and with substantial certainty the substantive facts necessary to constitute cause of action for “nuisance”. G.L.(Ter.Ed.) c. 231, § 7, Second.—*Carroll v. Cambridge Elec. Light Co.*, 43 N.E.2d 340, 312 Mass. 89.—Mun Corp 742(4).

Mass. 1942. Where flights of airplanes from and to airport over adjoining land have not been such as to affect normal person’s health, habits or material comfort, decree enjoining airport operator from permitting such flights cannot rest on ground of “nuisance”.—*Burnham v. Beverly Airways*, 42 N.E.2d 575, 311 Mass. 628.—Aviation 219; Nuis 3(1).

Mass. 1942. Where the Boston Elevated Railway Company forfeited a particular location by breach of an implied condition of grant of location that it be used for the purpose for which it was granted, the structure on that location became a “nuisance” upon forfeiture, and the company could be required to abate the nuisance by removing the structure. St.1894, c. 548, § 6, as amended by St.1897, c. 500, §§ 2, 3; St.1939, c. 482, § 1.—*Boston Elevated Ry. Co. v. Com.*, 39 N.E.2d 87, 310 Mass. 528.—Mun Corp 693, 696.

Mass. 1941. The obstruction of a way does not constitute a “nuisance” if the obstruction is not for an unreasonable length of time, is reasonably necessary for the transaction of business, and does not unreasonably interfere with rights of the public.—*Jones v. Hayden*, 37 N.E.2d 243, 310 Mass. 90.—High 153.

Mass. 1941. A bank was not liable as for a “nuisance” for injuries sustained by plaintiff when her foot slipped on one of a number of metal letters imbedded in sidewalk in front of bank, which letters were placed in sidewalk in accordance with permit issued by Board of Street Commissioners of city, since letters constituted “signs on or over a public way” within meaning of statute under which municipal authorities are expressly empowered to issue permits for the placing and maintenance of signs and other structures on or over public ways, and did not constitute an illegal or unauthorized “obstruction”. Gen.Laws (Ter.Ed.) c. 85, § 8.—*Lynch v. First Nat. Bank of Boston*, 35 N.E.2d 488, 309 Mass. 458.—Mun Corp 808(8).

Mass. 1940. The statutes which impose liability on municipality for injuries sustained by reason of a “defect” in a public way, in breach of municipality’s

obligation to keep ways reasonably safe and convenient for travelers, do not give right of action based on existence of a "nuisance" as distinguished from a "defect." G.L.(Ter.Ed.) c. 84, §§ 1, 15.—Whalen v. Worcester Elec. Light Co., 29 N.E.2d 763, 307 Mass. 169.—Mun Corp 766.

Mass. 1940. The statutes which impose liability on municipality for injuries sustained by reason of a "defect" in a public way in breach of municipality's obligation to keep the way reasonably safe and convenient for travelers, and which impose limitations on the liability, and amount of recovery and impose conditions with respect to written notice and time within which actions must be brought, are intended to create an exclusive remedy, and the legislative intent cannot be thwarted by calling the "defect" a "nuisance", by failing to give the required notice, by bringing suit any time within six years or by seeking to recover damages in excess of those fixed by statute. G.L.(Ter.Ed.) c. 84, §§ 1, 15, 18-21; c. 229, § 1.—Whalen v. Worcester Elec. Light Co., 29 N.E.2d 763, 307 Mass. 169.—Mun Corp 766, 812(2), 813, 824.

Mass. 1939. Owners of tenement houses could not restrain as a "nuisance" the operation of a gasoline filling station on adjoining premises which had been licensed by proper public authority in absence of showing that noise and objectionable odor went beyond natural incidents of reasonable and careful conduct of gasoline filling station.—Czapski v. Sun Oil Co., 21 N.E.2d 230, 303 Mass. 186.—Autos 395.

Mass. 1939. An abandoned quarry which owner permitted city to use as a dump, and which became infested with cockroaches which spread over the adjoining land and into yards and houses in vicinity of dump, constituted a "nuisance."—Maynard v. Carey Const. Co., 19 N.E.2d 304, 302 Mass. 530.—Nuis 3(1).

Mass. 1939. The loan of an automobile and number plates by Connecticut dealer to office manager for his personal use violated Connecticut statutes, and when brought into Massachusetts automobile became a "trespasser" and "nuisance" under Massachusetts law, and manager was liable to a person exercising due care for injury proximately resulting from his operation. Gen.St.Conn.1930, § 1566(c); Gen.St.Supp.Conn.1935, § 553c(b, f); G.L., Ter.Ed., c. 90, § 9, and § 3, as amended by St.1933, c. 188.—Strogoff v. Motor Sales Co., 18 N.E.2d 1016, 302 Mass. 345.—Autos 56.

Mass. 1939. The lender of a tool or instrument with which another person may commit a trespass or create a nuisance does not become a "trespasser" or create a "nuisance," even though he knows that such use may possibly be made thereof, so long as lender does not himself intend or aid in that use.—Strogoff v. Motor Sales Co., 18 N.E.2d 1016, 302 Mass. 345.—Bailm 21.

Mass. 1938. The operation of an unregistered automobile on the highways of the commonwealth is unlawful and creates a "nuisance".—Geary v. Travelers Ins. Co., 15 N.E.2d 238, 300 Mass. 314.—Autos 56.

Mass. 1938. Where defendant had erected a passageway over the street while constructing a building as permitted by an ordinance temporarily blocking the passageway for the purpose of delivering materials for use in the building was not a "nuisance" so as to impose liability on defendant for injuries sustained by plaintiff when, during the short interval in attempting to go around the structure, she walked in the gutter and slipped on a natural accumulation of ice and broke her ankle.—Gaw v. Hew Const. Co., 15 N.E.2d 225, 300 Mass. 250.—Mun Corp 809(2).

Mass. 1937. Landowner has no right to collect water into definite channel by spout or otherwise and pour it upon public way, and if he does this, and, through operation of natural causes, water freezes, landowner is efficient cause in creation of "nuisance," and is liable for whatever damage ensues as probable consequence.—Bullard v. Mattoon, 8 N.E.2d 348, 297 Mass. 182.—Mun Corp 808(5).

Mass. 1933. Test whether noise constitutes "nuisance" is whether rights of property, health, or comfort are so injuriously affected that sufferer is subjected to loss beyond reasonable limit imposed by condition of living, or holding property, in particular locality devoted to uses involving emission of noise, though ordinary care is taken to confine it, or in vicinity of property of another acting reasonably with regard for rights of those affected by noise.—Tortorella v. H. Traiser & Co., 188 N.E. 254, 284 Mass. 497, 90 A.L.R. 1203.—Nuis 3(3).

Mass. 1932. Using spray pond in manufacturing ice cream in residential section held properly enjoined as "nuisance."—Shea v. National Ice Cream Co., 182 N.E. 303, 280 Mass. 206.—Nuis 3(5).

Mass. 1932. Manufacturing ice cream in populous residential district, causing noises early and late, water to be blown on residents in their homes, and causing flies, offensive odors, and destruction of vegetation, constituted "nuisance."—Shea v. National Ice Cream Co., 182 N.E. 303, 280 Mass. 206.—Nuis 3(5).

Mass. 1932. Awning across front of store and not maintained at height above sidewalk required by ordinance constituted "nuisance," irrespective of absence of permit.—Anderson v. Kopelman, 181 N.E. 239, 279 Mass. 140.—Mun Corp 808(7).

Mass. 1924. Unregistered motor vehicle is "nuisance" on highways, under St.1909, c. 534, § 9. Where owner of Ford touring car for temporary purposes removed body and put truck body on, without changing registration or license plate, vehicle became "nuisance" on highway, under St.1909, c. 534, and no recovery could be had for injury to it, or those riding in it, in collision.—Nichols v. Hoyley St. R. Co., 145 N.E. 33, 250 Mass. 88.

Mass. 1921. Under St.1909, c. 534, § 5, the use of an automobile without displaying conspicuously its register number on two plates furnished by the highway commission is prohibited, and such operation is a "nuisance," making the driver and assenting owner liable for all direct injury resulting from

their act, though not the result of negligence.—Evans v. Rice, 130 N.E. 672, 238 Mass. 318.

Mass. 1917. An unregistered automobile is a "nuisance," and its driver is a trespasser upon the public way and responsible for injuries to which the unlawful act contributed.—Fairbanks v. Kemp, 115 N.E. 240, 226 Mass. 75.

Mass. 1908. An owner, collecting surface water into a definite channel and pouring the same on a public highway where the water freezes, creates a "nuisance," and he is liable for the damages ensuing as a probable consequence.—Field v. Gowdy, 85 N.E. 884, 199 Mass. 568, 19 L.R.A.N.S. 236.

Mass. 1906. A person keeping bowling alleys under a license granted under Rev.Laws, c. 102, § 168, is not liable for maintaining a "nuisance," where the alleys are built in the manner such alleys are usually built, with pads and cushions to deaden the noise caused by the rolling of the balls, and where the alleys, as run, make no more noise than would be expected under similar circumstances.—Levin v. Goodwin, 77 N.E. 718, 191 Mass. 341, 114 Am.St.Rep. 616.

Mass. 1904. If legislative sanction is given to such acts that otherwise would be deemed a "nuisance" (as, for instance, by St.1894, p. 446, c. 399, licensing the storage of petroleum or any of its products), they cease to be such when properly exercised within the terms of the license which authorizes and permits them.—Com. v. Packard, 69 N.E. 1067, 185 Mass. 64.

Mass. 1895. The outflow of a private sewer on the land of another is not a nuisance within the meaning of Pub.St. c. 80, § 28, providing that land, not in a city, which is wet, rotten, spongy, or covered with stagnant water, shall be termed a "nuisance," so as to authorize the board of health to abate the same by construction of drains across the land.—Huse v. Amesbury Bd. of Health, 39 N.E. 1023, 163 Mass. 240.

Mich. 1978. An improperly designed or maintained manhole cover may constitute a "nuisance." (Per Fitzgerald, J., with two Justices concurring and two Justices concurring in the result.)—Rosario v. City of Lansing, 268 N.W.2d 230, 403 Mich. 124.—Mun Corp 736.

Mich. 1972. Word "nuisance" is so comprehensive that its existence must be determined from facts and circumstances of each case.—Ebel v. Board of County Road Com'rs of Saginaw County, 194 N.W.2d 365, 386 Mich. 598.—Nuis 1.

Mich. 1968. Gun club which was constructed in accordance with standards of National Rifle Association and was located in swampy area zoned agricultural and not residential was not a "nuisance" by reason of noise emanating therefrom.—Smith v. Western Wayne County Conservation Ass'n, 158 N.W.2d 463, 380 Mich. 526, 26 A.L.R.3d 647.—Nuis 3(6).

Mich. 1960. Where area in question on shore of Lake Huron was devoted exclusively or substantially so to full-time and summertime living in cottages

and homes situated in beautifully wooded sector at time when riparian proprietor, which was engaged in business of mining and transporting gypsum rock, constructed a large loading dock near center of the sector for purpose of loading gypsum rock on lake steamers, the dock was a "nuisance" which offended the personal and property rights of the owners of cottages and homes, and the "fait" being "accompli" and beyond judicial abatement, riparian proprietor subjected itself to payment of damages to such of the owners of cottages and homes as might be able to prove damages. Comp.Laws Supp. 1956, § 322.701 et seq. as amended by Pub.Acts 1958, No. 94; Submerged Lands Act, §§ 1-8, 43 U.S.C.A. §§ 1301-1315.—Obrecht v. National Gypsum Co., 105 N.W.2d 143, 361 Mich. 399.—Nuis 3(1), 42.

Mich. 1959. "Nuisance" comprehends interference with an owner's reasonable use and enjoyment of his property by means of smoke, noise, or vibration, obstruction of private easements and rights of support, interference with public rights, such as free passage along streams and highways, enjoyment of public parks and places of recreation, and, in addition, activities and structures prohibited as statutory nuisances.—Awad v. McColgan, 98 N.W.2d 571, 357 Mich. 386.—Nuis 1, 59.

Mich. 1959. Where awning on building fell down suddenly and injured pedestrian while workmen were attempting to remove the awning, no action by pedestrian for any "nuisance" existed against either landlord or tenant of building.—Galea v. Detroit Wabek Bank & Trust Co., 98 N.W.2d 503, 357 Mich. 333.—Land & Ten 170(1).

Mich. 1958. Maintenance by railroad of proposed freight switching yard in manufacturing zone in city was not a "nuisance."—Gray v. Grand Trunk Western R. Co., 91 N.W.2d 828, 354 Mich. 1.—Nuis 62.

Mich. 1957. Mere fact that certain activities may lessen value of other property in the locality does not constitute such activity a "nuisance".—Garfield Tp. v. Young, 82 N.W.2d 876, 348 Mich. 337.—Nuis 1, 59.

Mich. 1955. Where lease of realty to the state gave the state an easement over an 18 feet wide driveway located along leased premises, and defendants had a lease, which included the driveway, subject to rights of the state, and defendants proposed to erect a building five feet by eight feet on driveway, and building would not interfere with use of driveway, building was not a "nuisance" erection of which could be enjoined by plaintiff, whose customers used driveway, because no permit had been issued under city ordinance providing that no building shall encroach on public property unless a special permit shall have been authorized by the common council, since the building would not encroach on "public property".—Simms v. Berger, 70 N.W.2d 717, 342 Mich. 382.—Nuis 19.

Mich. 1951. One may construct on his property a building in which to carry on a lawful business, and mere fact that doing so may lessen value of other property in locality does not constitute erec-

tion of a "nuisance."—*Plassey v. S. Loewenstein & Son*, 48 N.W.2d 126, 330 Mich. 525.—Nuis 64.

Mich. 1944. The State Conservation Department's use of state-owned lake lots within residential subdivision as public fishing site does not constitute a "nuisance".—*Gableman v. Department of Conservation*, 15 N.W.2d 689, 309 Mich. 416.—Nuis 3(1).

Mich. 1943. Evidence established that the operation of a piggery on a large scale and the feeding of garbage on premises constituted a "nuisance", justifying issuance of injunction when the nuisance was in existence at time of trial and its temporary partial abatement was due to weather conditions only.—*Mitchell v. Hines*, 9 N.W.2d 547, 305 Mich. 296.—Nuis 33.

Mich. 1942. Operation of city dump would not be enjoined as "nuisance" on ground that it was attractive to school children, decreased their self-confidence and was bad for their morale.—*Smith v. City of Ann Arbor*, 6 N.W.2d 752, 303 Mich. 476.—Mun Corp 736.

Mich. 1942. Use of city dump would not be enjoined as a "nuisance" merely because of increased use of highways and traffic hazard conditions, or occasional leaving of rubbish along highway. Comp.Laws 1929, § 4085.—*Smith v. City of Ann Arbor*, 6 N.W.2d 752, 303 Mich. 476.—Mun Corp 736.

Mich. 1942. Smoke and odors from burning leaves and brush cannot generally be considered grounds for abating a "nuisance," but excessive smoke, especially if accompanied with odor of burning rags or offensive material, may warrant abatement.—*Smith v. City of Ann Arbor*, 6 N.W.2d 752, 303 Mich. 476.—Nuis 3(3).

Mich. 1941. In determining whether there is a nuisance, the question in all cases is whether the annoyance produced is such as materially to interfere with the ordinary comfort of human existence, though it is not necessary that the annoyance and discomfort should be so great as actually to drive the person complaining thereof from his dwelling, but if the alleged injury be a plain interference with ordinary comforts and enjoyment, there is a "nuisance", no matter how slight the damage, provided the inconvenience be actual and not fanciful.—*Northwest Home Owners Ass'n v. City of Detroit*, 299 N.W. 740, 298 Mich. 622.—Nuis 4.

Mich. 1941. In order to enjoin business as a "nuisance", it is not necessary to show danger from disease or unpleasantness of odors arising from maintenance of such a business.—*Kundinger v. Bagnasco*, 298 N.W. 386, 298 Mich. 15.—Nuis 33.

Mich. 1941. Where subdivision was strictly residential, except for one house which was used as florists' office after obtaining written consent of owners of all other houses in subdivision, intrusion of a funeral home therein would be restrained as a "nuisance".—*Kundinger v. Bagnasco*, 298 N.W. 386, 298 Mich. 15.—Nuis 3(7), 19.

Mich. 1938. Maintenance of dogs and dog pens by one of lot owners in platted area was not a "nuisance" where pens were cleaned every day and were not located in a congested city.—*Schurtz v. Wescott*, 282 N.W. 870, 286 Mich. 691.—Nuis 3(10).

Mich. 1938. A "nuisance" involves not only a defect but threatening or impending danger to the public, or, if a private nuisance, to the property rights or health of persons sustaining peculiar relations thereto.—*McDonell v. Brozo*, 280 N.W. 100, 285 Mich. 38.—Nuis 1, 59.

Mich. 1938. Conducting a race among school pupils on a public sidewalk was not a "nuisance" in a sense prohibited by ordinance, for which liability could be imposed on school officers for injuries sustained by pedestrian when deliberately run into by 14 year old pupil who was participating in race under authority of the officers.—*McDonell v. Brozo*, 280 N.W. 100, 285 Mich. 38.—Schools 62.

Mich. 1938. Where restaurant was located in an essentially residential district, and fighting and noisemaking occurred in restaurant late at night, disturbing sleep of nearby residents, operation of restaurant was enjoined as a "nuisance."—*Smith v. Nickoloff*, 277 N.W. 880, 283 Mich. 188.—Nuis 3(3).

Mich. 1930. Operation of motor oils storage plant on unrestricted property in nonresidential section, without emission of smoke and noxious odors, held not "nuisance."—*Krulikowski v. Tide Water Oil Sales Corp.*, 232 N.W. 223, 251 Mich. 684.—Nuis 3(2).

Mich. 1916. A railroad in a street permitted to be there by competent authority is not a "nuisance," though damages to abutting landowners were not ascertained and paid before putting it there.—*Plantenga v. Grand Rapids Terminal Ry. Co.*, 157 N.W. 425, 190 Mich. 661.—R R 113(12).

Mich. 1915. Garbage of itself is a "nuisance," and a municipality, in the exercise of its police power, may control the manner of its collection and disposition.—*Board of Health of City of Grand Rapids v. Vink*, 151 N.W. 672, 184 Mich. 688.

Mich.App. 1999. Hog producers did not have claim for "nuisance" against electric utility for damage caused to production by stray voltage as there was no continuing wrongful acts by utility, but rather continual harmful effects of completed, allegedly tortious act involving initial provision of electrical service; rather, claim sounded in negligence.—*Jackson County Hog Producers v. Consumers Power Co.*, 592 N.W.2d 112, 234 Mich.App. 72, appeal denied 610 N.W.2d 921, 461 Mich. 993, reconsideration denied Jackson Cty. Hog Producers, Inc. v. Consumers Power Co., 626 N.W.2d 411, 461 Mich. 993, appeal denied 610 N.W.2d 921, 461 Mich. 993, reconsideration denied 626 N.W.2d 411, 461 Mich. 993.—Electricity 16(1).

Mich.App. 1997. "Nuisance" is interference with plaintiff's use and enjoyment of his land.—*Traver Lakes Community Maintenance Ass'n v. Douglas Co.*, 568 N.W.2d 847, 224 Mich.App. 335,

appeal denied 587 N.W.2d 500, 459 Mich. 890.—Nuis 1.

Mich.App. 1993. Single alleged incident of lewdness, assignation or prostitution in defendants' vehicle was insufficient to demonstrate that vehicle was "nuisance" subject to abatement; circumstances did not permit reasonable inference that conduct was habitual, notwithstanding lengthy discussion of reputation and record of woman found in car with defendant husband, or testimony that husband had been seen on multiple occasions driving in area and talking to women. M.C.L.A. § 600.3801.—State ex rel. Wayne County Prosecuting Attorney v. Bennis, 504 N.W.2d 731, 200 Mich. App. 670, appeal granted People ex rel. O'Hair v. Bennis, 519 N.W.2d 159, 445 Mich. 862, reversed Michigan ex rel. Wayne County Prosecutor v. Bennis, 527 N.W.2d 483, 447 Mich. 719, certiorari granted 115 S.Ct. 2275, 515 U.S. 1121, 132 L.Ed.2d 279, affirmed 116 S.Ct. 994, 516 U.S. 442, 134 L.Ed.2d 68, rehearing denied 116 S.Ct. 1560, 517 U.S. 1163, 134 L.Ed.2d 661.—Nuis 65.

Mich.App. 1968. "Nuisance" is maintenance of condition on land such as deprives other landowners of right of enjoyment of their property and is not protected by state's immunity from tort liability.—Buckeye Union Fire Ins. Co. v. State, 164 N.W.2d 699, 13 Mich.App. 498, reversed 178 N.W.2d 476, 383 Mich. 630, appeal after remand 195 N.W.2d 915, 38 Mich.App. 155.—States 112.2(1).

Minn. 1972. The term "nuisance" denotes an infringement or interference with the free use of property or the comfortable enjoyment of life, and it necessarily follows that an unlawful denial of reasonable access to property may constitute a "nuisance". M.S.A. § 561.01.—Schmidt v. Village of Mapleview, 196 N.W.2d 626, 293 Minn. 106.—Nuis 1.

Minn. 1969. By planting a tree on their property so near to the boundary line that it soon grew across such line onto plaintiffs' adjoining property, pushing plaintiffs' fence out of line and raising ground level from base of tree to plaintiffs' sidewalk, defendants obstructed free use and enjoyment of plaintiffs' property, an encroachment constituting a "nuisance." M.S.A. § 561.01.—Holmberg v. Bergin, 172 N.W.2d 739, 285 Minn. 250.—Nuis 3(1).

Minn. 1960. "Nuisance" denotes wrongful invasion or infringement of a legal right or interest and comprehends not only such invasion of property but of personal rights and privileges and includes intentional harms and harms caused by negligence, recklessness, or ultrahazardous conduct.—Randall v. Village of Excelsior, 103 N.W.2d 131, 258 Minn. 81.—Nuis 1, 2, 7.

Minn. 1956. An uninvited initiatory call upon all, or a majority, of householders of an urban area, as preliminary to the subsequent establishment of a regular route service for the sale and delivery to customers of the daily necessities of life which are perishable or subject to spoiling within a reasonably short time such as bread and milk does not constitute a "nuisance" within the meaning of

an ordinance prohibiting peddlers and solicitors from making uninvited calls upon householders to sell merchandise. M.S.A. §§ 616.01(1), 645.16(3, 6).—Excelsior Baking Co. v. City of Northfield, 77 N.W.2d 188, 247 Minn. 387.—Hawk & P 3(7).

Minn. 1947. Evidence that tenant over long period permitted accumulation on premises of ashes, papers, rubbish, and garbage to such extent as to constitute a fire hazard and produce offensive odors, so that roaches and rats infested the property, sustained finding that a "nuisance" existed within meaning of statute so as to entitle purchasers of premises to obtain possession of the premises on ground that tenant was guilty under Price Administration regulations of committing or permitting a nuisance thereon. M.S.A. § 561.01.—Cohen v. Steinke, 26 N.W.2d 843, 223 Minn. 292.—Land & Ten 278.14(5); War 236.

Minn. 1943. Defendant's drainage of creamery and other waste upon plaintiff's land so that it submerged a part of his pasture, killed vegetation, and created noxious odors, constituted a "nuisance" within statutory definition thereof entitling plaintiff to an injunction and damages, unless defendant had acquired a right by prescription or implied grant to drain the waste from his creamery upon plaintiff's land. Minn.St.1941, § 561.01.—Herrmann v. Larsson, 7 N.W.2d 330, 214 Minn. 46.—Nuis 3(1), 3(3), 19, 42.

Minn. 1942. In an area zoned for industrial use, whether conditions incident to the operation of a particular industry constitute a "nuisance" that is, a substantial interference with the enjoyment of life of those residing in the district must be determined by whether that industry is being operated under conditions best calculated to remove or minimize the interference.—Jedneak v. Minneapolis General Elec. Co., 4 N.W.2d 326, 212 Minn. 226.—Nuis 7.

Minn. 1938. A trapdoor in floor of lavatory in restaurant in village was not a "nuisance," or so faulty in design or construction that owner of building, who let it to tenant under agreement that tenant was to keep it in proper repair and condition at his own cost, could be held liable for injuries sustained by customer at restaurant in fall through trapdoor, notwithstanding that trapdoor was only access to furnace in basement, where trapdoor was so constructed that if lifted after closing door of lavatory all danger from falling into trapdoor opening from restaurant was completely barred.—Lyman v. Hermann, 280 N.W. 862, 203 Minn. 225.—Land & Ten 170(1).

Minn. 1933. "Nuisance" does not rest on degree of care used but rather on danger, indecency, or offensiveness existing or resulting even with best of care. Minn.St.1927, § 9580.—Johnson v. City of Fairmont, 247 N.W. 572, 188 Minn. 451.—Nuis 7.

Minn. 1930. Defendant's maintenance of dam for purpose of maintaining water level and permitting use of rowboats in lake did not constitute "nuisance," preventing acquisition of prescriptive right. Gen.St.1923, § 9580 (M.S.A. § 561.01).—Pahl v. Long Meadow Gun Club, 233 N.W. 836, 182 Minn. 118.—Waters 164.

Minn. 1924. Noises alone may be of such character and volume as to constitute a "nuisance" abatable during the usual hours of sleep, even though even greater and more distracting noises during other hours of the day may not be such.—Roukovina v. Island Farm Creamery Co., 200 N.W. 350, 160 Minn. 335, 38 A.L.R. 1502.

Minn. 1920. Undertaking establishments and so-called funeral homes may properly be held a "nuisance" in districts of a city occupied exclusively for residences, and an ordinance prohibiting them therein is valid, provided the city has been granted the authority to restrict or prohibit nuisances.—City of St. Paul v. Kessler, 178 N.W. 171, 146 Minn. 124.

Miss. 1995. When owners of property repeatedly use premises to violate law, and where law enforcement is forced to repeatedly return to scene to curb illegal usage of property, property can be abated as "nuisance."—Bosarge v. State ex rel. Price, 666 So.2d 485.—Nuis 79.

Miss. 1962. A business, although in itself lawful, which impregnates atmosphere with disagreeable and offensive odors and stenches, may become a "nuisance" to those occupying property in vicinity, where such obnoxious smells result in material injury.—Alfred Jacobshagen Co. v. Dockery, 139 So.2d 632, 243 Miss. 511.—Nuis 3(3).

Miss. 1947. While it is the province of local court to define the term "nuisance" as used in federal Rent Control Act, the interpretation of Federal Rent Administrator is entitled to great weight. Federal Rent Control Act, 50 U.S.C.A.Appendix, § 901, et seq.—Young v. Weaver, 32 So.2d 202, 202 Miss. 291, 174 A.L.R. 983.—Land & Ten 278.9(4); Statut 219(6.1); War 228.

Miss. 1947. The term "nuisance" as used in provision of federal Rent Control Act authorizing eviction of a tenant for nuisance is by administrative interpretation a legal nuisance. Federal Rent Control Act, 50 U.S.C.A.Appendix, § 901 et seq.—Young v. Weaver, 32 So.2d 202, 202 Miss. 291, 174 A.L.R. 983.—Land & Ten 278.9(4); War 228.

Miss. 1947. A "nuisance" is a wrong arising from unreasonable, unwarrantable, or unlawful use by a person of his own property or from his own improper, indecent, or unlawful personal conduct working an obstruction or injury to a right of another or of the public and producing such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage.—Young v. Weaver, 32 So.2d 202, 202 Miss. 291, 174 A.L.R. 983.—Nuis 1, 59.

Miss. 1947. Tenant's refusal to admit carpenter at an early hour in the morning until family was properly dressed and the fact that some unfriendly feelings had developed between tenant's family and landlord's family did not constitute a "nuisance" justifying the eviction of tenant. Code 1942, §§ 946, 1060, 1073; Federal Rent Control Act, 50 U.S.C.A.Appendix, § 901 et seq.—Young v. Weaver, 32 So.2d 202, 202 Miss. 291, 174 A.L.R. 983.—Land & Ten 278.9(4); War 228.

Miss. 1942. The maintenance of an undertaking and embalming establishment in a residential section of city is unwarranted invasion of rights of persons residing in immediate vicinity thereof as substantially decreasing property values and destroying such persons' comfort and happiness and constitutes a "nuisance", against which they are entitled to injunction.—Smith v. Fairchild, 10 So.2d 172, 193 Miss. 536.—Nuis 3(7), 23(1).

Mo. 1990. "Nuisance," for purposes of surface water runoff claim is founded on unreasonable, unusual, or unnatural land use that substantially impairs right of owners of lower tenement to enjoy their property peacefully.—Hansen v. Gary Naugle Const. Co., 801 S.W.2d 71.—Waters 119(1).

Mo. 1948. "Nuisance" does not rest on degree of care used, but on degree of danger existing with best of care.—Hinds v. City of Hannibal, 212 S.W.2d 401.—Nuis 7.

Mo. 1948. Petition by one seeking to recover from city for injuries allegedly sustained when assaulted by policeman while he was in city jail sounded in tort and was barred under doctrine of governmental immunity for acts of public officers in exercise of governmental functions, and could not be sustained on theory that city, by continuing policeman in its employ with knowledge of his many felonious assaults upon various people, was guilty of maintaining a "nuisance".—Hinds v. City of Hannibal, 212 S.W.2d 401.—Mun Corp 747(3).

Mo. 1943. The noise or vibration, even from a lawful business, may be of such a character as to be of actual physical discomfort to persons of ordinary sensibilities living near it or so injuring property that it constitutes a "nuisance".—Crutcher v. Taystee Bread Co., 174 S.W.2d 801.—Nuis 3(3).

Mo. 1943. Evidence as to operation by bakery of its machinery and mechanical equipment, and particularly a large ventilating, fan, supported finding that machinery and equipment did not constitute a "nuisance", which would be enjoined upon application of owner of residence property adjoining bakery.—Crutcher v. Taystee Bread Co., 174 S.W.2d 801.—Nuis 33.

Mo. 1943. To constitute a "nuisance", there must be a degree of danger inherent in thing itself and violation of absolute duty to refrain from participating acts, while "negligence" is failure to exercise reasonable care, foresight and prudence, required under particular circumstances, in performance of such acts.—Brown v. City of Craig, 168 S.W.2d 1080, 350 Mo. 836.—Neglig 233; Nuis 1.

Mo. 1943. "Inherently dangerous," within rule that to constitute "nuisance", as distinguished from "negligence", there must be degree of danger inherent in thing itself, means danger inhering in instrumentality or condition itself at all times, so as to require special precautions to prevent injury, not danger arising from mere casual or collateral negligence of others with respect thereto under particular circumstances.—Brown v. City of Craig, 168 S.W.2d 1080, 350 Mo. 836.—Nuis 7.

Mo. 1943. In action against city for death of prisoner as result of burning of city jail, allegations of petition as to isolated location of jail, failure to provide means for prisoners to communicate with persons outside, lack of proper ventilation, absence of fire extinguishers, failure to provide jailer or attendant, etc., held insufficient as not pleading "nuisance," but "negligence" in performance of governmental function.—*Brown v. City of Craig*, 168 S.W.2d 1080, 350 Mo. 836.—Mun Corp 742(4).

Mo. 1941. There cannot be a "nuisance," "attractive" or otherwise, except from a condition maintained over an unreasonable period of time.—*State ex rel. W. E. Callahan Const. Co. v. Hughes*, 159 S.W.2d 251, 348 Mo. 1209.—Neglig 1172; Nuis 1.

Mo. 1941. The owner of a completed building adjoining a highway is liable to a person injured by the falling of any part thereof, although the premises are in possession and under exclusive control of a tenant, if building by reason of faulty construction or the use of unsuitable materials, or for any other reason was, when leased, in a dangerous condition, since such a condition constitutes a "nuisance", and it is not material that building was not constructed by owner or that tenant has obligated himself to repair.—*Kelly v. Laclede Real Estate & Inv. Co.*, 155 S.W.2d 90, 348 Mo. 407, 138 A.L.R. 1065.—Land & Ten 170(1).

Mo. 1940. A funeral home, located in purely residential neighborhood, constitutes a "nuisance".—*Clutter v. Blankenship*, 144 S.W.2d 119, 346 Mo. 961.—Nuis 3(7).

Mo. 1932. "Nuisance" does not rest on degree of care used, but on degree of danger existing with best of care.—*Pearson v. Kansas City*, 55 S.W.2d 485, 331 Mo. 885.—Nuis 7.

Mo. 1927. "Nuisance" is public one if it affects enjoyment and health of persons as part of public while passing to and from public place where people have right to go, and it is the public annoyance, and not number of people annoyed, that constitutes "public nuisance."—*State ex rel. Renfrow v. Service Cushion Tube Co.*, 291 S.W. 106, 316 Mo. 640.

Mo. 1918. A powder magazine, as to all property and residents in such proximity to it that they are subject to danger from its explosion, is a "nuisance," regardless of the question as to negligence in the manner of keeping it.—*Liggett v. Excelsior Powder Mfg. Co.*, 202 S.W. 372, 274 Mo. 115.

Mo.App. E.D. 2001. "Nuisance" is the unreasonable, unusual or unnatural use of one's property so that it substantially impairs the right of another to peacefully enjoy his or her property.—*Hanes v. Continental Grain Co.*, 58 S.W.3d 1, rehearing, transfer denied, and application dismissed.—Nuis 1.

Mo.App. E.D. 1990. "Nuisance" is unreasonable, unusual or unnatural use of one's property so that it substantially impairs right of another to peacefully enjoy his or her property.—*Snelling v. Land Clearance For Redevelopment Authority For the City of St. Louis*, 793 S.W.2d 232.—Nuis 1.

Mo.App. E.D. 1984. "Nuisance" signifies in law such use of property or such course of conduct as, irrespective of actual trespass against others or of malicious or actual criminal intent, transgresses just restrictions on use or conduct which proximity of other persons or property in civilized communities imposes on what would otherwise be rightful freedom.—*Grommet v. St. Louis County*, 680 S.W.2d 246.—Nuis 1.

Mo.App. S.D. 1995. "Nuisance" is unreasonable, unusual, or unnatural use of one's property so that it substantially impairs right of another to peacefully enjoy his property.—*Jordan v. Stallings*, 911 S.W.2d 653.—Nuis 1.

Mo.App. W.D. 2002. "Nuisance" is the unreasonable, unusual, or unnatural use of one's property so that it substantially impairs the right of another to peacefully enjoy his property.—*King v. City of Independence*, 64 S.W.3d 335.—Nuis 1.

Mo.App. W.D. 1995. Landowners' boat dock was private "nuisance," as it interfered with adjacent landowners' property rights under easement extending lakeward; dock was within adjacent landowners' property lines as extended lakeward and effectively closed off useful access to portions of adjacent landowners' lake area, and extended directly over area to which adjacent landowners had previously been granted permit to move their dock.—*Paul v. Jackson*, 910 S.W.2d 286, rehearing, transfer denied (49730), and transfer denied.—Nav Wat 43(1).

Mo.App. W.D. 1995. "Nuisance" is condition that arises from person's unreasonable, unwarranted, or unlawful use of his own property, causing obstruction or injury to public, and producing material annoyance, inconvenience, and discomfort.—*Jackson v. City of Blue Springs*, 904 S.W.2d 322, rehearing, transfer denied, and transfer denied.—Nuis 59.

Mo.App. W.D. 1993. "Nuisance" is unreasonable, unusual, or unnatural use of one's property so that it substantially impairs the right of another to peacefully enjoy his or her property.—*Stevinson v. Deffenbaugh Industries, Inc.*, 870 S.W.2d 851, rehearing, transfer denied, and transfer denied.—Nuis 1.

Mo.App. W.D. 1986. "Nuisance" is the unreasonable, unusual or unnatural use of one's property so that it substantially impairs right of another to peacefully enjoy his property.—*Davis v. J.C. Nichols Co.*, 714 S.W.2d 679, rehearing overruled 768 S.W.2d 81, appeal after remand 761 S.W.2d 735.—Nuis 3(1).

Mo.App. 1972. At common law, a "nuisance" is a wrong arising from an unreasonable or unlawful use of property to the discomfort, annoyance, inconvenience or damage of another, and usually comprehends continuous or recurrent acts.—*Meinecke v. Stallsworth*, 483 S.W.2d 633.—Nuis 3(1).

Mo.App. 1969. "Nuisance" is a condition, and not an act or failure to act of person responsible for condition and does not rest upon degree of care

used, but upon degree of danger existing with best of care.—White v. Smith, 440 S.W.2d 497.—Nuis 1.

Mo.App. 1968. Nuisance and negligence are two different kinds of torts; “negligence” is failure to use degree of care required under particular circumstances involved; whereas “nuisance” does not rest upon degree of care used but on degree of danger existing with best of care.—Titone v. Teis Const. Co., 426 S.W.2d 665.—Neglig 230; Nuis 7.

Mo.App. 1955. Statute giving board of aldermen of city of fourth class power to pass ordinances for the prevention of “nuisances”, does not empower city to declare a slaughterhouse a “nuisance” by its ordinance, since a slaughterhouse is not a “nuisance” per se. Section 79.370 RSMo 1949, V.A.M.S.—State ex rel. Jack Frost Abattoirs, Inc. v. Steinbach, 274 S.W.2d 588.—Mun Corp 605.

Mo.App. 1943. A thing is a “nuisance” when of itself it constitutes an unlawful annoyance or source of danger to others, and one who causes or maintains it is liable regardless of the care exercised by him.—Bollinger v. Mungle, 175 S.W.2d 912.—Nuis 1, 7.

Mo.App. 1942. The business of conducting a restaurant is not a “nuisance per se”, but only becomes a “nuisance” when conducted in such a manner as to become offensive to the health, morals, or comfort of those lawfully residing in close proximity to it, and in such a case it is always safer for the court to make its injunction only broad enough to prohibit a continuance of the business in such a manner or under such conditions as to annoy or be offensive, and thus leave the matter in such condition that the offending party may, if possible, remedy the defect.—State ex rel. Wallach v. Oehler, 159 S.W.2d 313.—Nuis 3(5), 37.

Mo.App. 1941. In action by adjoining landowner operating a filling station to enjoin business competitor from erecting a fence on defendant’s own property just inside the division line on ground that fence would seriously inconvenience customers of plaintiff who drove in and out at the south end of plaintiff’s premises, granting of injunction was error, since right to erect the fence was an “incident of ownership” and was not a “nuisance”, and was not prohibited by statute, ordinance or valid covenant.—Howe v. Standard Oil Co. of Ind., 150 S.W.2d 496.—Inj 34.

Mo.App. 1940. Where gases and fumes issuing from heating plant, over which landlord had exclusive control, injured health of tenant, landlord was guilty of an actionable wrong in the maintenance of a “nuisance,” irrespective whether landlord was negligent in operation of heating plant.—Lederer v. Carney, 142 S.W.2d 1085.—Land & Ten 170(2).

Mo.App. 1936. Evidence held to sustain judgment enjoining grocery company from maintaining automobile parking lot for its customers adjacent to property owner’s residence on ground parking lot created “nuisance” tending to destroy value of residence, endangering residents’ health, and detracting from enjoyment of residence as a home.—Rhodes

v. A. Moll Grocer Co., 95 S.W.2d 837, 231 Mo.App. 751.—Nuis 33.

Mo.App. 1935. That punitive damages were asked for and recovered in action for damages to property from spray pond operated in connection with electric light plant did not compel conclusion that action was not for “nuisance,” which is defined as anything that causes hurt, inconvenience, or damage to another. Mo.R.S.A. § 1511.—Vaughn v. Missouri Power & Light Co., 89 S.W.2d 699.—Nuis 41.

Mo.App. 1935. Where property owner’s petition against electric power company for damages caused by company’s spray pond substantially alleged a nuisance notwithstanding petition did not use word “nuisance.”—Vaughn v. Missouri Power & Light Co., 89 S.W.2d 699.—Plead 49.

Mo.App. 1935. Permanent encroachment on a public street for private use or obstruction of a public highway is a “nuisance”.—Boyle v. Neisner Bros., 87 S.W.2d 227, 230 Mo.App. 90.—Mun Corp 665.

Mo.App. 1927. A “nuisance” is public when it affects the rights to which every citizen is entitled, while a “private nuisance” is any unwarranted, unreasonable, or unlawful use by a person of his own property to the injury, annoyance, or detriment of the rights of some private individual, or group of individuals, not amounting to a trespass.—Lademan v. Lamb Const. Co., 297 S.W. 184.

Mo.App. 1916. Where the air is corrupted by noisome smells so as to substantially interfere with the ordinary comforts of human existence, or to materially diminish the value of another’s property, such smells constitute a “nuisance.”—Swanson v. Bradshaw, 187 S.W. 268.

Mo.App. 1909. An obstruction in a stream caused by filling it, and resulting in damages to property through water being set back, is a “nuisance.”—Hedrick v. City of St. Joseph, 122 S.W. 375, 138 Mo.App. 396.—Waters 171(1).

Mo.App. 1906. A saloon or tippling house was not a “nuisance” at common law if properly conducted, and therefore a conviction for maintaining a nuisance cannot be sustained by proof of the maintenance of an unlicensed tippling house, in the absence of proof that it was so conducted as to annoy, disturb, or scandalize the people in a community, by showing that drunkards, thieves, prostitutes, or other disorderly persons were permitted to resort there.—State v. Ingram, 94 S.W. 790, 118 Mo.App. 323.

Mo.App. 1905. The malicious annoyance of another by loud noises, consisting of screaming and pounding on tin pans, fences, and iron, in consequence of which another is injured in health and business, is a “nuisance,” which equity will abate.—Shellabarger v. Morris, 91 S.W. 1005, 115 Mo.App. 566.

Mo.App. 1905. In an action for injuries to plaintiff by the collapse of a bridge, plaintiff

charged in the first count certain sections of foreign statutes prescribing the powers of the county commissioners to erect a bridge and certain other sections defining "nuisance," and alleged that defendant constructed the bridge under contract with the commissioners, and when completed, it was opened by defendant for public use shortly before the accident, but had not been accepted or approved by the commissioners. The specifications of the contract were then alleged, followed by a charge that defendant negligently constructed the piers, etc., of insufficient and improper materials, by reason of which the structure then was and thereafter continued to be a public nuisance. The second count was in substance the same, except that the allegations that the bridge was a nuisance were omitted, and additional averments were made that the structure was imminently dangerous to all persons attempting to cross, which conditions were known to defendant, etc. Held that, though the bridge was not a nuisance, both counts contained sufficient allegations of negligence to withstand a demurrer.—Casey v. Hoover (State Report Title: Casey v. Wrought Iron Bridge Co.), 89 S.W. 330, 114 Mo. App. 47.—Neglig 1524(5).

Mont. 1982. Old slag pile which existed for many, many years along highway in full public view and which was not shown ever to have previously caused fires in area or to have been considered hazard to neighboring property owners was not public or private "nuisance." MCA 27-30-101.—Belue v. State, 649 P.2d 752, 199 Mont. 451.—Nuis 3(1), 61.

Mont. 1962. Violations of Milk Control Act are misdemeanors and constitute "nuisance", so that remedy of injunction is properly made available to enforce the act. R.C.M.1947, §§ 27-401, 27-422, 27-424, 57-101, 57-102.—Montana Milk Control Bd. v. Rehberg, 376 P.2d 508, 141 Mont. 149.—Food 12; Nuis 65, 80.

Mont. 1955. Neither original construction and subsequent enlargement of dam nor use of the dam and reservoir behind it to impound water for irrigation of ranch was a "nuisance", but was a "lawful undertaking". Const. art. 3, § 15.—Richland County v. Anderson, 291 P.2d 267, 129 Mont. 559.—Nuis 3(1).

Mont. 1941. Under statute penalizing as a misdemeanor operation of any game of chance played with any device for money, checks, credit or any representative of value, a pinball machine in the operation of which a certain amount of skill could be developed, but which as played by patronizing public was purely a game of chance, and which paid off in trade checks if metal ball shot from spring or mechanical device fell into proper hole designated by lighted numbers on back of machine which changed each time machine was played, was a "gambling device" and building in which it was used was properly enjoined as a "nuisance." Laws 1937, c. 153; Rev. Codes 1935, §§ 11124, 11159.—State ex rel. Dussault v. Kilburn, 109 P.2d 1113, 111 Mont. 400, 135 A.L.R. 99.—Gaming 68(3); Nuis 65.

Mont. 1935. Operation in residential district of any business materially injuring property and annoying residents may be enjoined as "nuisance" (Rev. Codes 1921, § 8642).—Purcell v. Davis, 50 P.2d 255, 100 Mont. 480.—Int Liq 261; Nuis 80.

Mont. 1917. In a suit to enjoin defendant labor union in furtherance of a boycott of plaintiff's theater from picketing the same with men carrying banners, stating that plaintiff was unfair to organized labor, and with others, who attempted to dissuade patrons from entering, held that the findings below were insufficient to show that defendant's acts constituted a "nuisance" within Rev. Codes, § 6162, declaring that a nuisance must be either injurious to health, indecent or offensive to the senses, obstructive to the free use of property, or an unlawful obstruction of the free passage or use of streets, etc.—Empire Theater Co. v. Cloke, 163 P. 107, 53 Mont. 183, L.R.A. 1917E,383.

Mont. 1911. The word "nuisance" means that which annoys or gives trouble; annoys or disturbs one in the possession of his property, making its ordinary use or occupation physically uncomfortable to him.—Iverson v. Dilno, 119 P. 719, 44 Mont. 270.—Nuis 1.

Mont. 1905. The use of water by an upper riparian proprietor in such a way as to carry sand, gravel, and mining debris over the land of a lower proprietor, rendering it valueless, constitutes a "nuisance," both at common law and under Civ. Code, § 4550, defining a nuisance as anything injurious to health or interfering with the comfortable enjoyment of life or property or unlawfully obstructing the customary use of a river.—Chessman v. Hale, 79 P. 254, 31 Mont. 577, 3 Am. Ann. Cas. 1038, 68 L.R.A. 410.

Mont. 1893. Nuisances arise from a misuse of property, real or personal, or from a person's own improper conduct, but the idea of a "nuisance" generally is associated with and more commonly arises from the wrongful use of real property. It is only in special and infrequent instances that it arises otherwise. Nuisances are always injuries that result as a consequence of an act done outside of the property injured, and are the indirect and remote effects of an act, rather than a direct and immediate consequence. It is a species of invasion of another's property by agencies operating entirely outside of the property itself, and imperceptible and invisible except in the results produced which are often even themselves not visible, and whose presence at times is only appreciable by one of the senses, and that, generally, not by the sense of seeing.—Durfee v. Granite Mountain Min. Co., 33 P. 3, 13 Mont. 181.

Neb. 1997. With respect to action in equity, legitimate business enterprise is not "nuisance" per se, but it may become nuisance in fact by reason of conditions implicit in and unavoidably resulting from its operation or because of manner of its operation.—Omega Chemical Co., Inc. v. United Seeds, Inc., 560 N.W.2d 820, 252 Neb. 137.—Nuis 3(1).

Neb. 1997. Defendant landowner created "nuisance" by constructing large grain bin on its own property so close to plaintiffs' already existing building, which sat parallel to and slightly over common property line between parties, that grain bin's footing flange was only 1½ inches from footing or wall of plaintiff's building; engineering expert testified that construction of grain bin so close to plaintiff's building caused specific, identifiable, and continuing injury to building's foundation, basement floor, and east wall.—Omega Chemical Co., Inc. v. United Seeds, Inc., 560 N.W.2d 820, 252 Neb. 137.—Nuis 3(1).

Neb. 1997. Defendant's construction of grain bin on its own property less than four feet from plaintiff's already existing building, which sat parallel to and slightly over parties' common property line, effected substantial invasion in private use of plaintiff's building by placing its roof structure at risk of collapse due to increase snow-load potential; thus, defendant's grain bin constituted "nuisance."—Omega Chemical Co., Inc. v. United Seeds, Inc., 560 N.W.2d 820, 252 Neb. 137.—Nuis 3(1).

Neb. 1968. Operation of anhydrous ammonia installation on premises near park would constitute a "nuisance" and warranted issuance of injunction.—City of Syracuse v. Farmers Elevator, Inc., 157 N.W.2d 394, 182 Neb. 783.—Nuis 3(5), 19.

Neb. 1962. Where business operation, as conducted, materially and injuriously affects comfort and enjoyment of property rights of those in vicinity, it becomes "nuisance" and may be enjoined.—Karpisek v. Cather & Sons Const., Inc., 117 N.W.2d 322, 174 Neb. 234.—Nuis 3(1), 61.

Neb. 1950. A legitimate business conducted in a residential neighborhood that pollutes or contaminates the air through noisome and noxious odors created by it and that by noises emanating from it disturbs the peace, quiet and comfort of the residents thereof and injuriously affects property rights of adjoining and nearby property owners is a "nuisance" in fact.—Sarraillon v. Stevenson, 43 N.W.2d 509, 153 Neb. 182, 18 A.L.R.2d 1025.—Nuis 3(3).

Neb. 1950. On appeal from a judgment enjoining use of premises in a residential area as a stockyards and for the slaughtering of animals thereon, a cross-appeal by plaintiffs was not a prerequisite to consideration by Supreme Court of the issue of whether such use of premises constituted a nuisance, though trial court did not by use of the word "nuisance" expressly find that one existed.—Sarraillon v. Stevenson, 43 N.W.2d 509, 153 Neb. 182, 18 A.L.R.2d 1025.—App & E 878(5).

Neb. 1933. "Nuisance" is a violation of an absolute duty, while "negligence" is failure to use the degree of care required in the particular circumstances—a violation of relative duty; in other words, a nuisance may be created or maintained with the highest degree of care, and the negligence of a defendant, unless in exceptional cases, is not material.—Toft v. City of Lincoln, 250 N.W. 748, 125 Neb. 498.

Nev. 1971. Engaging in an intrinsically lawful business in a building not yet fully completed in accordance with county's building code does not constitute an "unlawful business" or "nuisance" within meaning of statute governing notices to quit when tenant has set up or carried on an unlawful business or permitted or maintained a nuisance. N.R.S. 40.250, subds. 4, 5.—Gasser v. Jet Craft Limited, 487 P.2d 346, 87 Nev. 376.—Land & Ten 291(1).

Nev. 1955. A "nuisance" may be defined as such unreasonable, unwarrantable or unlawful use by a person of his own property, or his improper, indecent, or unlawful conduct which operates as an obstruction or injury to the right of another or to the public and which produces such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage.—Jezowski v. City of Reno, 286 P.2d 257, 71 Nev. 233, 52 A.L.R.2d 1127.—Nuis 1.

Nev. 1949. Maintenance and public operation of house of prostitution was a "nuisance" within statute defining nuisance as something indecent and offensive to the senses, and as such was properly enjoined by district court at suit of county commissioners. N.C.L.1929, §§ 2043, 9051.—Cunningham v. Washoe County, 203 P.2d 611, 66 Nev. 60.—Nuis 62, 80.

N.H. 1968. Even if icy condition of metered municipal parking lot could be called "nuisance", plaintiff who slipped and fell in the lot could not recover from municipality. RSA 31:3, 31:4, subd. 3, 249:1, 249:2; Const. pt. 2, art. 6-a.—Stott v. City of Manchester, 242 A.2d 58, 109 N.H. 59.—Mun Corp 736.

N.H. 1939. Where city by deed had right to maintain a ditch over plaintiff's land, with understanding that ditch should be constructed so as to reduce water level of surrounding land and that no unnecessary or unreasonable damage to premises would be caused by its construction or maintenance, ditch became a "nuisance" and plaintiff was entitled to its abatement when city failed to maintain it so as to reduce the water level.—Leary v. City of Manchester, 6 A.2d 760, 90 N.H. 256.—Mun Corp 846.

N.J. 1951. A "nuisance" signifies anything that worketh hurt, inconvenience or damage to others.—Mayor & Council of Borough of Alpine v. Brewster, 80 A.2d 297, 7 N.J. 42.—Nuis 59.

N.J. 1951. Though "nuisance" in its primary significance does not involve element of negligence as one of its essential factors, a continuous threat to the public by an obstruction or dangerous condition in a highway constitutes a common "nuisance", though dependent on negligence.—Milstrey v. City of Hackensack, 79 A.2d 37, 6 N.J. 400.—High 153.

N.J. 1951. A municipal corporation is not answerable for damages incident to road falling out of repair, but where settlement and breaking of a patched pavement surface are due primarily to structural fault that could have been avoided by exercise of reasonable care, and are not normal

incidents of wear and tear and public use, resulting danger constitutes a "nuisance" in legal intention, for it was the reasonably foreseeable consequence of the structural deficiency.—Milstrey v. City of Hackensack, 79 A.2d 37, 6 N.J. 400.—Mun Corp 767.

N.J. 1951. Where director of public works and engineer of city had trench dug in concrete sidewalk for installation of conduit for operation of intersectional traffic signals, and, after installation was made he had excavation refilled with broken concrete and had area resurfaced with a paving composition known as "blacktop", which was substantially less resistant than concrete, and the patchwork of blacktop disintegrated which was reasonably foreseeable as a consequence of structural deficiency, and pedestrian caught her heel in depression and was injured, city and director of public works and engineer were liable for negligently patching the sidewalk so that a "nuisance" resulted.—Milstrey v. City of Hackensack, 79 A.2d 37, 6 N.J. 400.—Mun Corp 768(3).

N.J.Err. & App. 1947. A directional sign constructed at or near a highway curb line which was damaged by defendant so as to constitute an obstruction of a public highway was a "nuisance" and while it so remained, defendant was continuously liable for any loss or damage attributable thereto.—Ross v. O'Keefe, 51 A.2d 23, 135 N.J.L. 287.—High 154.

N.J.Err. & App. 1942. Liability of a landowner for injuries resulting from "nuisance" maintained on the land is not limited to cases in which the effect of the nuisance extends beyond the boundaries of the land.—Trondle v. Ward, 28 A.2d 509, 129 N.J.L. 179.—Nuis 4.

N.J.Err. & App. 1942. Where there was no proof concerning who was responsible for construction of premises used as hotel by tenant, or proof that latent defect in construction existed at time owner of premises acquired title to them or at time tenant took possession thereof, the owner could not be held liable for injuries sustained by hotel guest in fall which occurred when hotel floor gave way, on theory that a "nuisance" for which owner was liable existed.—Trondle v. Ward, 28 A.2d 509, 129 N.J.L. 179.—Land & Ten 170(1).

N.J.Err. & App. 1941. In order to constitute a noise an actionable and enjoinable "nuisance", the noise must be one which affects injuriously the health or comfort of ordinary people in the vicinity to an unreasonable extent, and which passes the limits of reasonable adjustment to the conditions of the locality and of the needs of the maker to the needs of the listener, to be determined in the light of the circumstances of the particular case.—Benton v. Kernan, 21 A.2d 755, 130 N.J.Eq. 193.—Nuis 3(3), 19.

N.J.Err. & App. 1941. Evidence failed to establish that noise from quarry blasts, which was only momentary and the blasts not of frequent occurrence, only 14 to 23 occurring per month, injuriously affected health or comfort of residents of vicinity to such an unreasonable degree as to render such

noise actionable and enjoinable "nuisance".—Benton v. Kernan, 21 A.2d 755, 130 N.J.Eq. 193.—Nuis 33.

N.J.Err. & App. 1941. Filling the air around a dwelling with noxious or offensive vapors or odors with accompanying noises to such a degree as renders persons of ordinary sensitiveness living in the house uncomfortable and sick constitutes an unlawful and enjoinable "nuisance".—Benton v. Kernan, 21 A.2d 755, 130 N.J.Eq. 193.—Nuis 3(3), 19.

N.J.Err. & App. 1941. Where service station lessee by terms of lease had exclusive control of premises and equipment and agreed to indemnify oil company from all claims arising through operation of premises, and motorist whose automobile was being serviced was injured when automobile rolled off of hydraulic lift, and there was nothing to indicate that installation of lift by lessor was improper, and it appeared that it was a regularly manufactured product and that many automobiles were raised and lowered on it without resulting difficulties, and that exclusive use was in the lessee, lessor was not liable for motorist's injuries on ground that it constructed and maintained a "nuisance" which caused injuries.—Brittain v. Atlantic Refining Co., 19 A.2d 793, 126 N.J.L. 528.—Land & Ten 170(1).

N.J.Err. & App. 1941. To hold a landlord responsible for injuries to strangers on demised premises because of a "nuisance", existence of a condition inherently or continuously capable of harm which is not to be avoided by tenant's exercise of reasonable care must be shown.—Brittain v. Atlantic Refining Co., 19 A.2d 793, 126 N.J.L. 528.—Land & Ten 170(1).

N.J.Err. & App. 1937. Any obstruction unnecessarily impeding the lawful use of a street by the public is a "nuisance" which will render creator liable for accident resulting therefrom.—Christine v. Mutual Grocery Co., 194 A. 625, 119 N.J.L. 149.—Mun Corp 809(1).

N.J.Err. & App. 1934. By common law, street and every part of it is so far dedicated to public that any act or obstruction that unnecessarily incommodes or impedes lawful use by public is "nuisance."—Sammak v. Lehigh Valley R. Co., 172 A. 60, 112 N.J.L. 540.—Mun Corp 755(1).

N.J.Err. & App. 1934. Where there was no legislative authority for erection in New York of concrete signal tower in highway of village by railroad, presence without lights constituted tower a "nuisance," and railroad was liable to motorist whose automobile, without motorist's negligence, collided with tower.—Sammak v. Lehigh Valley R. Co., 172 A. 60, 112 N.J.L. 540.—R R 303(3).

N.J.Err. & App. 1930. Situation created where street terminated at railroad right of way held not "nuisance," permitting recovery for death of motorist struck by train.—Lennon v. Atlantic City R. Co., 151 A. 747, 107 N.J.L. 297.—R R 303(1).

N.J.Err. & App. 1927. Smoke, unaccompanied with noise or noxious vapor, noise alone, offensive vapors alone, although not injurious to health, may

severally constitute a "nuisance" to the owner of adjoining or neighboring property. \* \* \* The real question in all the cases is the question of fact, viz., whether the annoyance is such as materially to interfere with the ordinary comfort of human existence.—Ross v. Denan, 137 A. 416, 101 N.J.Eq. 281.

N.J.Sup. 1942. A borough having actual control of work of improving its streets or the privilege to control the manner in which such work is done, regardless of whether it pays the salaries of the workmen, would be answerable for damages sustained by any person as a result of fall into excavation in street left unguarded at night, on the theory that the manner in which work was done created a "nuisance."—Reardon v. Borough of Wanaque, 28 A.2d 54, 129 N.J.L. 18.—Mun Corp 751(3).

N.J.Sup. 1941. Where the relaying of a sidewalk was structurally faulty, so that subsidence to an extent constituting a public hazard was a probability if not a certainty in course of time, the condition was a "nuisance" in legal intendment, rendering owner of building adjacent to sidewalk liable for injuries sustained by a pedestrian who fell because of the subsidence.—Gainfort v. 229 Raritan Avenue Corp., 22 A.2d 893, 127 N.J.L. 409.—Mun Corp 808(1).

N.J.Sup. 1941. A building which is likely to fall and injure persons because of inherent weakness is a "nuisance".—State v. Ireland, 20 A.2d 69, 126 N.J.L. 444, appeal dismissed 23 A.2d 560, 127 N.J.L. 558.—Nuis 62.

N.J.Sup. 1941. The operation of a manufacturing plant in such manner as to injure others is an act of "negligence" which results in a "nuisance" for which the wrongdoer is responsible.—Garfield Box Co. v. Clifton Paper Board Co., 17 A.2d 588, 125 N.J.L. 603.—Nuis 3(5).

N.J.Sup. 1940. One who starts a fire in a public street commits a "nuisance" and is responsible for consequential damages which may be reasonably anticipated as result of leaving fire burning and unguarded.—Ostrowski v. Zolnierowicz, 16 A.2d 803, 125 N.J.L. 516.—Mun Corp 809(1).

N.J.Sup. 1940. The street, and every part of it, by force of the common law, is so far dedicated to the public that any act or obstruction that unnecessarily incumbers or impedes its lawful use by the public is a "nuisance".—Kilian v. Prudential Ins. Co. of America, 16 A.2d 468, 125 N.J.L. 530, affirmed 19 A.2d 829, 126 N.J.L. 369.

N.J.Sup. 1939. The mere lack of a crossbar or like protective guard for doors of sidewalk opening did not constitute structure a "nuisance" at time of letting of premises so as to render landowner liable for injuries allegedly resulting from absence of guard.—Fletcher v. Greater Newark Bldg. & Loan Ass'n of Irvington, 7 A.2d 871, 123 N.J.L. 59.—Land & Ten 170(1).

N.J.Sup. 1938. The construction of a footwalk in a public highway so out of alignment with the true pavement level as to constitute a danger in its use, and the continuation of that condition by the

owner of abutting property, constitute a "nuisance."—Slutsky v. Bohen, 198 A. 389, 120 N.J.L. 102.—Mun Corp 768(2), 808(1).

N.J.Sup. 1938. A well conducted bathing establishment is not a "nuisance."—Watchung Lake v. Mobus, 196 A. 223, 119 N.J.L. 272.—Nuis 61.

N.J.Sup. 1937. While a "nuisance" may exist notwithstanding exercise of due care in the legal sense, it is often, if not usually, the consequence of negligence.—Brownsey v. General Printing Ink Corp., 193 A. 824, 118 N.J.L. 505.—Nuis 7.

N.J.Sup. 1937. Every part of a street is so dedicated to public that any act or obstruction which when left unprotected unnecessarily incommodes or impedes lawful use of street by public is a "nuisance."—McHugh v. Hawthorne Bldg. & Loan Ass'n, 191 A. 548, 118 N.J.L. 78.—Mun Corp 736; Nuis 63.

N.J.Sup. 1936. Erection by contractor of crypt on land of Cathedral from step of which member of congregation fell and sustained injury *held* not proximate cause of injury so as to render contractor liable on ground that it constructed "nuisance," since construction of step was not "nuisance per se," but could only be made a nuisance by use through invitation by Cathedral, which invitation was proximate cause of injury.—Randolph v. Karno Smith Co., 190 A. 486, 15 N.J.Misc. 261.—Nuis 1.

N.J.Sup. 1924. Abandonment of chattel causing nuisance no defense; "nuisance." One cannot so terminate his relationship and responsibility of ownership in a chattel as to cast it upon his neighbor's property, and thus *ipso facto* create a nuisance, and thereby seek to relieve himself of incidental responsibility on the theory of abandonment; such species of tort-feasance being defined as anything done to the hurt or annoyance of the lands, tenements, and hereditaments of another.—New York Dock Co. v. Schultz, 124 A. 318, 99 N.J.L. 336.—Nuis 1.

N.J.Super.L. 1998. "Nuisance" may merely be a right thing in a wrong place or condition, like a pig in a parlor instead of the backyard.—Colts Run Civic Ass'n v. Colts Neck Tp. Zoning Bd. of Adjustment, 717 A.2d 456, 315 N.J.Super. 240.—Nuis 3(1).

N.J.Super.Ch. 1951. Anything that unduly interferes with the exercise of the common rights may be declared a "nuisance" and rendered abatable as such and otherwise remediable.—Yanow v. Seven Oaks Park, 83 A.2d 28, 15 N.J.Super. 73.—Nuis 1, 19.

N.J.Ch. 1945. Any business, however lawful, which causes annoyances that materially interfere with ordinary comfort, physically, of human existence, is a "nuisance" and should be restrained.—Kosich v. Poultrymen's Service Corp., 43 A.2d 15, 136 N.J.Eq. 571.—Nuis 3(5), 19.

N.J.Ch. 1945. The throwing of sand, earth or water on lands of another, in ever so small a quantity, is an invasion of property and a "trespass", and to continue to do so constitutes a "nuisance".

sance".—*Kosich v. Poultrymen's Service Corp.*, 43 A.2d 15, 136 N.J.Eq. 571.—Nuis 3(1); Tresp 10.

N.J.Ch. 1945. A noise, to be an actionable and enjoinable "nuisance", must be one which affects injuriously the health or comfort of ordinary people in vicinity to an unreasonable extent and which passes limits of reasonable adjustment to conditions of locality and of needs of maker to needs of listener, to be determined in light and circumstances of particular case.—*Kosich v. Poultrymen's Service Corp.*, 43 A.2d 15, 136 N.J.Eq. 571.—Nuis 3(3).

N.J.Ch. 1940. Picketing in its mildest form is a "nuisance" and, even if not intimidating, should be enjoined when no reason for it exists.—*Miller's, Inc. v. Journeyman Tailors Union Local No. 195*, 15 A.2d 822, affirmed 15 A.2d 824, 128 N.J.Eq. 162, reversed 61 S.Ct. 732, 312 U.S. 658, 85 L.Ed. 1106.—Nuis 3(1), 23(1).

N.J.Ch. 1940. Method and manner of keeping and using celluloid and cellulose products in defendants' plant did not constitute a "nuisance", in view of locality and surrounding circumstances.—*Kocska v. Gering Bros.*, 15 A.2d 220, 128 N.J.Eq. 74, affirmed 20 A.2d 442, 129 N.J.Eq. 548.—Nuis 3(5), 3(6).

N.J.Ch. 1940. Explosion of dynamite in blasting stone in operation of stone quarry, which sets up vibration causing windows and doors in complainants' houses to rattle, foundations, sidewalls and ceilings to crack, houses to shake and vibrate, and stones to be thrown upon complainants' premises, and which produces such noise as to disturb and annoy complainants and their families in use and enjoyment of houses and grounds, is an actionable and enjoinable "nuisance".—*Benton v. Kernan*, 13 A.2d 825, 127 N.J.Eq. 434, modified 21 A.2d 755, 130 N.J.Eq. 193.—Nuis 3(6), 19.

N.J.Ch. 1940. In operation of stone quarry, employment of rock crusher, steam engine, drills and other machinery and equipment producing such noise as to disturb and annoy occupants of adjoining homes and their families in the use and enjoyment of their respective houses and grounds, is an actionable and enjoinable "nuisance".—*Benton v. Kernan*, 13 A.2d 825, 127 N.J.Eq. 434, modified 21 A.2d 755, 130 N.J.Eq. 193.—Nuis 3(5), 19.

N.J.Ch. 1940. The blowing of a factory whistle which is not necessary in the successful prosecution of a business and is a source of annoyance to persons living in the neighborhood may be enjoined as a "nuisance".—*Benton v. Kernan*, 13 A.2d 825, 127 N.J.Eq. 434, modified 21 A.2d 755, 130 N.J.Eq. 193.—Nuis 3(5), 19.

N.J.Ch. 1940. Noise and offensive odors, even when not injurious to health, may constitute a "nuisance" if they render the lives of complainants uncomfortable.—*Benton v. Kernan*, 13 A.2d 825, 127 N.J.Eq. 434, modified 21 A.2d 755, 130 N.J.Eq. 193.—Nuis 3(3).

N.J.Ch. 1940. A "nuisance" may be merely a right thing in the wrong place.—*Benton v. Kernan*,

13 A.2d 825, 127 N.J.Eq. 434, modified 21 A.2d 755, 130 N.J.Eq. 193.—Nuis 5.

N.J.Ch. 1940. Conducting a business which discharges offensive odors and vapors which render the air in the neighborhood unwholesome, unsanitary or uncomfortable to occupants in the use and occupation of their houses is an enjoinable "nuisance".—*Benton v. Kernan*, 13 A.2d 825, 127 N.J.Eq. 434, modified 21 A.2d 755, 130 N.J.Eq. 193.—Nuis 3(5), 19.

N.J.Ch. 1940. In a continuing nuisance affecting use and enjoyment of homes, every day's continuance is a new or fresh "nuisance".—*Benton v. Kernan*, 13 A.2d 825, 127 N.J.Eq. 434, modified 21 A.2d 755, 130 N.J.Eq. 193.—Nuis 29.

N.J.Ch. 1939. The blasting of stone in a quarry so as to cause stones to be cast onto premises of complainants, and so as to cause their homes to be shaken, jarred, and damaged by the vibration due to such blasting, was a "nuisance" which would be enjoined.—*Benton v. Kernan*, 6 A.2d 195, 125 N.J.Eq. 412, modified 8 A.2d 719, 126 N.J.Eq. 343.—Nuis 3(6), 23(1).

N.J.Ch. 1934. Conditions which are offensive and hazardous to health of persons generally constitute "nuisance," notwithstanding such conditions are not unpleasant or disagreeable to some persons because of their peculiar habits or occupations.—*Board of Health of Lyndhurst Tp. v. United Cork Cos.*, 172 A. 347, 116 N.J.Eq. 4, affirmed 176 A. 142, 117 N.J.Eq. 437.—Nuis 62.

N.J.Ch. 1933. Picketing in its mildest form is "nuisance" which Legislature is powerless to legalize.—*Elkind & Sons v. Retail Clerks' Intern. Protective Ass'n*, 169 A. 494, 114 N.J.Eq. 586.—Labor 295.

N.J.Ch. 1931. Playing of professional baseball in public park, on Sunday afternoon, in view of attendant noise and conduct of spectators, held to constitute "nuisance". N.J.S.A. 2A:171-1 et seq.—*Baird v. Board of Recreation Com'r's of Village of South Orange*, 154 A. 204, 108 N.J.Eq. 91, reversed 160 A. 537, 110 N.J.Eq. 603.—Nuis 62.

N.J.Ch. 1913. Any business, however lawful, which causes annoyance that materially interferes with the ordinary comfort, physically, of human existence is a "nuisance" that should be restrained.—*Kroecker v. Camden Coke Co.*, 88 A. 955, 82 N.J.Eq. 373.

N.J.Ch. 1911. The "nuisance" contemplated by Health Act, 2 Gen.St.1895, p. 1637, § 28, permitting any local board of health to file a bill in the name of the state for an injunction to prohibit the continuance of a nuisance hazardous to public health, is a nuisance which is hazardous to public health, and hence the subject of indictment.—*Board of Health of Pompton Lakes v. E.I. Du Pont De Nemours Powder Co.*, 80 A. 998, 79 N.J.Eq. 31.—Nuis 78.

N.J.Ch. 1907. The operation of a crematory and fertilizer plant, in which ordinary garbage and other waste matter are subjected to a burning process,

and the residue, in the shape of ashes, used in connection with other elements to make a fertilizer, in such a manner that, under certain conditions of the atmosphere and direction of the wind, the smoke arising from the cremation and the odor due to the method of handling the elements of the fertilizer compels those residing within a distance of from 2,000 to 2,500 feet to keep their windows closed, and renders their houses uncomfortable for habitation, and prevents them from sitting out of doors, constitutes a "nuisance."—*Laird v. Atlantic Coast Sanitary Co.*, 67 A. 387, 73 N.J.Eq. 49.

N.J.Ch. 1906. A building used as a hospital for the treatment of contagious diseases is not a "nuisance" per se. Where buildings used as a hospital for contagious diseases were located in a sparsely settled neighborhood on land entirely surrounded by highways, and on which there were no other buildings, and with ordinary caution there was no probability of communication of contagious diseases from the hospital unless by transmission through the air, and the buildings were at a greater distance from the highways than smallpox is transmissible in the open air, there was no showing of a "nuisance."—*Board of Health of Hamilton Tp. v. Inhabitants of City of Trenton*, 63 A. 897.

N.M. 1957. The creation or maintenance of a "nuisance" is the violation of an absolute duty, the doing of an act which is wrongful in itself, whereas "negligence" is the violation of a relative duty, the failure to use the degree of care required under particular circumstances in connection with act or omission which is not of itself wrongful.—*Huntsman v. Smith*, 312 P.2d 103, 62 N.M. 457.—Neglig 210; Nuis 1.

N.M.App. 1975. Manufacture by defendant of liquid seed disinfectant, which was sprayed on seed that was ingested by hog, eventually leading to injury to central nervous systems of children after they ate meat of the hog, did not constitute a "nuisance" as a matter of law where the disinfectant was manufactured pursuant to authority granted by the federal government. 1953 Comp. § 40A-8-1.—*First Nat. Bank in Albuquerque v. Nor-Am Agr. Products, Inc.*, 537 P.2d 682, 88 N.M. 74, certiorari denied New Mexico Mill & Elevator Co. v. First National Bank in Albuquerque, 536 P.2d 1085, 88 N.M. 29.—Nuis 53.

N.Y. 1997. Evidence that landlords were repeatedly forced to institute nonpayment proceedings and to serve rent demands on rent-controlled tenant in order to collect chronically late rental payments did not prove "nuisance" warranting eviction of tenant under city regulations, absent showing that tenant's conduct interfered with use or enjoyment of their property. N.Y.Comp. Codes R. & Regs. title 9, § 2204.2(a)(2).—*Sharp v. Norwood*, 659 N.Y.S.2d 834, 89 N.Y.2d 1068, 681 N.E.2d 1280, reargument denied 661 N.Y.S.2d 833, 90 N.Y.2d 889, 684 N.E.2d 283.—Land & Ten 296(1).

N.Y. 1977. The term "nuisance," in itself, means no more than harm, injury, inconvenience, or annoyance.—*Copart Industries, Inc. v. Consolidated Edison Co. of New York, Inc.*, 394 N.Y.S.2d

169, 41 N.Y.2d 564, 362 N.E.2d 968, reargument denied 399 N.Y.S.2d 1028, 42 N.Y.2d 1102, 369 N.E.2d 1198.—Nuis 1.

N.Y. 1942. Property owner's maintenance of courtyard enclosed by an 18-inch wire fence partly within legal sidewalk area was not a "nuisance" as a matter of law.—*Hayton v. McLaughlin*, 43 N.E.2d 813, 289 N.Y. 66.—Mun Corp 821(8).

N.Y. 1942. In action for injuries sustained by boy while attempting to retrieve ball from a courtyard extending into sidewalk area of street and enclosed by an 18-inch wire fence, whether the fence constituted a foreseeable danger to children at play so as to render it a "nuisance" as to the boy was a question for jury.—*Hayton v. McLaughlin*, 43 N.E.2d 813, 289 N.Y. 66.—Mun Corp 821(8).

N.Y. 1940. Where ceiling was in a dangerous condition, it constituted a "nuisance" under the Multiple Dwelling Law, and liability of owner persisted beyond conveyance at least until new owner had reasonable opportunity to discover the condition on prompt inspection and to make necessary repairs. Multiple Dwelling Law, § 78, and § 4, subd. 30.—*Pharm v. Lituchy*, 27 N.E.2d 811, 283 N.Y. 130.—Land & Ten 170(2).

N.Y. 1940. Where on March 14, 1938, ceiling of room in tenant's apartment in multiple dwelling was in dangerous condition and notice was given to agent of landlord who promised to repair, but when landlord conveyed premises it did not notify grantee of dangerous condition and on March 19, ceiling fell and inflicted injuries, the vendor-landlord was liable for injury, since dangerous condition of ceiling constituted a "nuisance". Multiple Dwelling Law, § 78, and § 4, subd. 30.—*Pharm v. Lituchy*, 27 N.E.2d 811, 283 N.Y. 130.—Land & Ten 170(2).

N.Y. 1936. Natural tendency of presence of scaffold above street without barricades or warning signals is to create danger and inflict injury and may be held a "nuisance."—*Rohlf v. Weil*, 3 N.E.2d 588, 271 N.Y. 444.—Mun Corp 779.

N.Y. 1930. "Nuisance" may be a dangerous condition due to negligence.—*Kilmer v. White*, 171 N.E. 908, 254 N.Y. 64.—Nuis 7.

N.Y. 1927. Roof collecting snow and ice and discharging it on passers-by in public street is "nuisance." Roof, so constructed as to collect snow and ice and discharge it on passers-by in public street, necessarily imperiling safety of public, becomes "nuisance."—*Klepper v. Seymour House Corporation of Ogdensburg*, 158 N.E. 29, 246 N.Y. 85, 62 A.L.R. 955.—Mun Corp 779.

N.Y. 1927. Act of individual performed on own soil detracting from safety of travelers is "nuisance." Any act of individual, though performed on own soil, detracting from safety of travelers, is "nuisance."—*Klepper v. Seymour House Corporation of Ogdensburg*, 158 N.E. 29, 246 N.Y. 85, 62 A.L.R. 955.—Neglig 1152.

N.Y. 1927. Roof, so constructed as to collect snow and ice and discharge it on passers-by in public street, necessarily imperiling safety of public,

becomes “nuisance.”—*Klepper v. Seymour House Corporation of Ogdensburg*, 158 N.E. 29, 246 N.Y. 85, 62 A.L.R. 955.—Mun Corp 779, 808(5).

N.Y. 1927. Any act of individual, though performed on own soil, detracting from safety of travelers, is “nuisance.”—*Klepper v. Seymour House Corporation of Ogdensburg*, 158 N.E. 29, 246 N.Y. 85, 62 A.L.R. 955.—Neglig 1152.

N.Y. 1915. “Nuisance” is a violation of an absolute duty.—*Herman v. City of Buffalo*, 108 N.E. 451, 214 N.Y. 316.—Nuis 1.

N.Y. 1908. The primary meaning of “nuisance” is that which injures. If the natural tendency of the act complained of is to create danger and inflict injury upon person or property, it may properly be found a nuisance as a matter of fact; but, if the act in its inherent nature is so hazardous as to make the danger extreme and serious injury so probable as to be almost a certainty, it should be held a “nuisance” as a matter of law. The exhibition of fireworks, allowed to be given in a public street, where a large number of people are assembling, is not a “nuisance” as a matter of law, and whether it is a nuisance in fact is a question for the jury.—*Melker v. City of New York*, 83 N.E. 565, 190 N.Y. 481.

N.Y. 1907. Where a drain laid by property owners in a public street, under permission from the city, empties into a natural stream, and thereafter, without express license from the city, is used as a sewer to discharge sewage into the stream to the injury of a lower riparian owner, the drain is a “nuisance,” and the city is liable for negligence in not abating it.—*Schlesinger v. Gilhooly*, 81 N.E. 619, 189 N.Y. 1.

N.Y. 1907. The use of soft coal in a factory so situated in a country district suitable for country homes that black smoke therefrom, great in volume and dense in quality, envelops and discolors a neighboring dwelling, causing discomfort and financial loss to the occupants, is a “nuisance,” where the use of soft coal is not necessary for the running of the factory, and is not a reasonable use of the manufacturer’s property.—*McCarty v. Natural Carbolic Gas Co.*, 81 N.E. 549, 189 N.Y. 40.

N.Y. 1890. A “nuisance,” as ordinarily understood, is that which is offensive and annoys and disturbs.—*Bohan v. Port Jervis Gas-Light Co.*, 25 N.E. 246, 122 N.Y. 18.

N.Y. 1890. The general definition of a “nuisance” given by Blackstone is anything that works hurt, inconvenience, or damage. It is generally true that nuisances arise from violation of the common law, and not from the violation of a public statute; but it is true only where the statute grants a right or imposes an obligation, and affixes a penalty for its violation, or gives a specific remedy which, by the terms of the statute or by construction, is exclusive. But the principle stated has no application where the statute itself prescribes that a particular act or property used for a noxious purpose shall be deemed a nuisance.—*Lawton v. Steele*, 23 N.E. 878,

119 N.Y. 226, reargument denied 23 N.E. 1151, affirmed 14 S.Ct. 499, 152 U.S. 133, 38 L.Ed. 385.

N.Y.A.D. 1 Dept. 1996. In order to establish that tenant’s untimely rent payments constituted “nuisance” within meaning of rent and eviction regulation, landlord had to demonstrate that it was compelled to bring numerous nonpayment proceedings within relatively short period, and that nonpayment was willful, unjustified, without explanation, or accompanied by intent to harass landlord. Rent and Eviction Regulations, §§ 2100.1, 2204.2(a)(2), McK.Unconsol.Laws.—*Sharp v. Norwood*, 643 N.Y.S.2d 39, 223 A.D.2d 6, leave to appeal granted 647 N.Y.S.2d 939, 231 A.D.2d 974, affirmed 659 N.Y.S.2d 834, 89 N.Y.2d 1068, 681 N.E.2d 1280, reargument denied 661 N.Y.S.2d 833, 90 N.Y.2d 889, 684 N.E.2d 283.—Land & Ten 296(1).

N.Y.A.D. 1 Dept. 1996. In order to establish that tenant’s untimely rent payments constituted “nuisance” within meaning of rent and eviction regulation, landlord had to prove that nonpayment proceedings brought within relatively short period were brought in good faith to collect outstanding rent, and not as pretense to meet definition of “nuisance” for purposes of bringing holdover action. Rent and Eviction Regulations §§ 2100.1, 2204.2(a)(2), McK.Unconsol.Laws.—*Sharp v. Norwood*, 643 N.Y.S.2d 39, 223 A.D.2d 6, leave to appeal granted 647 N.Y.S.2d 939, 231 A.D.2d 974, affirmed 659 N.Y.S.2d 834, 89 N.Y.2d 1068, 681 N.E.2d 1280, reargument denied 661 N.Y.S.2d 833, 90 N.Y.2d 889, 684 N.E.2d 283.—Land & Ten 296(1).

N.Y.A.D. 1 Dept. 1996. Rent-controlled tenant who had resided in same apartment for 33 years and, over course of previous nine years, had paid her rent on average of two weeks late, while accumulating no arrears, had not committed “nuisance” forfeiting her leasehold; landlord documented only 11 occasions over course of 33-year rental history where rent was late 30 days or more, nonpayment proceedings were not commenced in those instances, and there was no evidence that tenant intended to harass or injure landlord or that landlord was in any way prejudiced by payment after date reserved in lease, nor was it shown that landlord was compelled to bring the two nonpayment proceedings which were brought over course of nine years. Rent and Eviction Regulations §§ 2100.1, 2204.2(a)(2), McK.Unconsol.Laws.—*Sharp v. Norwood*, 643 N.Y.S.2d 39, 223 A.D.2d 6, leave to appeal granted 647 N.Y.S.2d 939, 231 A.D.2d 974, affirmed 659 N.Y.S.2d 834, 89 N.Y.2d 1068, 681 N.E.2d 1280, reargument denied 661 N.Y.S.2d 833, 90 N.Y.2d 889, 684 N.E.2d 283.—Land & Ten 296(1).

N.Y.A.D. 1 Dept. 1949. Any building that is dangerous to life, overcrowded, or not provided with adequate means of ingress and egress is a “nuisance” within statute giving department of housing and buildings power to cause the vacating of any dwelling that constitutes a nuisance. Multiple Dwelling Law, §§ 302, 309.—People on Complaint of *Waldron v. Broadway-Sheridan Arms*, 90 N.Y.S.2d 445, 275 A.D. 352, affirmed People v.

Broadway-Sheridan Arms, Inc., 89 N.E.2d 522, 300 N.Y. 559.—Health 391.

N.Y.A.D. 1 Dept. 1943. Where sink in back yard over which plaintiff who lived with tenants of first floor of two-family house fell when she stepped backwards was a large and conspicuous object, and was not an obstruction in the path of anyone using the yard for ordinary purposes, sink did not constitute a "nuisance" or a "trap", rendering owners of house liable for plaintiff's injuries.—*Pepper v. Schmidlin*, 42 N.Y.S.2d 219, 266 A.D. 824, motion granted 51 N.E.2d 938, 291 N.Y. 668.—Land & Ten 170(1).

N.Y.A.D. 1 Dept. 1938. The natural tendency of the presence of a scaffold above a street, without barricades or warning signals, is to create danger and to inflict injury, and a "nuisance" in fact may be held to exist.—*Simmons v. Radio Printing Corp.*, 5 N.Y.S.2d 345, 254 A.D. 521, affirmed 18 N.E.2d 866, 279 N.Y. 783, reargument denied 20 N.E.2d 20, 280 N.Y. 571.—Mun Corp 779.

N.Y.A.D. 1 Dept. 1916. A pile of lumber, left without necessity and without permit partly on the sidewalk and partly in the roadway by a contractor for a work of public improvement, is a "nuisance."—*Triay v. Richard Carvel Co.*, 158 N.Y.S. 739, 172 A.D. 615.

N.Y.A.D. 1 Dept. 1911. A "nuisance" involves the element of positive wrongdoing, as distinguished from mere negligence; and the mere "permitting" of a dog to lie in a hallway of an apartment house does not amount to a private nuisance.—*McCluskey v. Wile*, 129 N.Y.S. 455, 144 A.D. 470.—Nuis 7.

N.Y.A.D. 1 Dept. 1904. A "nuisance" is defined as an "unreasonable, unwarrantable, or unlawful use of one's own property, to the annoyance, inconvenience, discomfort, or damage of another." Under this definition, the jury was justified in finding that an electric light plant, erected in a residential neighborhood, was a nuisance, where the evidence showed that the machinery produced a vibration of an adjoining hotel, that dirt and cinders came into the rooms of the hotel, that noise and bad odors invaded the premises, and that the income derived from rental of rooms had decreased since the plant was established.—*Pritchard v. Edison Electric Illuminating Co.*, 87 N.Y.S. 225, 92 A.D. 178, affirmed 72 N.E. 243, 179 N.Y. 364.

N.Y.A.D. 2 Dept. 1954. In action for injuries sustained by passenger when his leg went into the space between the side of the train and the station platform, allegations that the danger resulted from a maintenance of a nuisance or from the negligent omission to provide a reasonably safe place to alight, was insufficient to avoid the bar of three-year statute of limitations; the term "nuisance" as applied to such a situation merely meaning continued negligence. Civil Practice Act, § 49.—*Zihal v. Staten Island Rapid Transit Ry. Co.*, 129 N.Y.S.2d 406, 283 A.D. 889.—Lim of Act 31.

N.Y.A.D. 2 Dept. 1942. A restaurateur was liable for injuries sustained by employee assaulted by

restaurateur's wife employed in restaurant, on theory that restaurateur was under duty not to maintain a "nuisance" to employee's detriment in the person of his wife who, to restaurateur's knowledge, had been guilty of vicious conduct, which duty restaurateur breached by permitting the wife to remain employed in restaurant.—*Bomba v. Borowicz*, 38 N.Y.S.2d 403, 265 A.D. 198.—Emp Liab 114.

N.Y.A.D. 2 Dept. 1942. An actionable "nuisance" or danger may be animate or it may be inanimate, such as an unsafe condition in one's premises.—*Bomba v. Borowicz*, 38 N.Y.S.2d 403, 265 A.D. 198.—Nuis 1.

N.Y.A.D. 2 Dept. 1942. Property owner's maintenance of courtyard, structure, or article on public street for a street purpose, pursuant to express permission under an ordinance, is not a "nuisance" as a matter of law, in absence of danger due to its form, character, or condition of disrepair.—*Hayton v. McLaughlin*, 32 N.Y.S.2d 292, 263 A.D. 245, reversed 43 N.E.2d 813, 289 N.Y. 66.—Mun Corp 821(17).

N.Y.A.D. 2 Dept. 1942. Where property owner, to eke out inconvenience of his premises, for purposes of trade or business, for use which is not a customary or traditional street purpose, maintains an incumbrance or obstruction on public street, it is a "nuisance" as a matter of law.—*Hayton v. McLaughlin*, 32 N.Y.S.2d 292, 263 A.D. 245, reversed 43 N.E.2d 813, 289 N.Y. 66.—Mun Corp 821(17).

N.Y.A.D. 2 Dept. 1942. Where property owner, without express permit, indulges in a customary or traditional street use to beautify his property or to facilitate its enjoyment, the maintenance of such a structure, article or object on public street, as distinguished from its intrinsic character or condition, is not a "nuisance" as a matter of law.—*Hayton v. McLaughlin*, 32 N.Y.S.2d 292, 263 A.D. 245, reversed 43 N.E.2d 813, 289 N.Y. 66.—Mun Corp 821(17).

N.Y.A.D. 2 Dept. 1942. Property owner's maintenance of courtyard enclosed by an 18-inch fence, partly within legal sidewalk area, was not a "nuisance" as a matter of law, as to 13½ year old boy who was injured while stepping over it in attempting to retrieve ball.—*Hayton v. McLaughlin*, 32 N.Y.S.2d 292, 263 A.D. 245, reversed 43 N.E.2d 813, 289 N.Y. 66.—Mun Corp 821(17).

N.Y.A.D. 2 Dept. 1937. Vegetable stand maintained in front of store without a license was a "nuisance," as regards liability for injury sustained on slipping on vegetable matter on sidewalk.—*Tagg v. Senner*, 299 N.Y.S. 150, 252 A.D. 784, appeal denied 300 N.Y.S. 1346, 252 A.D. 866, appeal granted 13 N.E.2d 481, reversed 14 N.E.2d 628, 277 N.Y. 692.—Mun Corp 809(1).

N.Y.A.D. 2 Dept. 1925. A condition is a "nuisance" when it clearly appears that enjoyment of property is materially lessened, and physical comfort of persons in their homes is materially interfered with thereby.—*Russell v. Nostrand Athletic*

Club, 209 N.Y.S. 76, 212 A.D. 543, affirmed as modified 148 N.E. 756, 240 N.Y. 681.—Nuis 4.

N.Y.A.D. 2 Dept. 1920. Complaint alleging that defendant city "maintained" manhole in a "wrongful, careless and negligent manner," so as "to constitute an obstruction," and "to render" the highway "dangerous," and that plaintiff sustained injuries through the careless and negligent manner in which defendants "maintained" such manhole, held to state a cause of action for negligence, as against contention that cause of action was for a nuisance, and that pleading of limitations pertinent to an action for negligence was not applicable, notwithstanding complaint characterized the "manhole" as a "nuisance," and alleged that defendant was "wrongful," since the term "wrongful" may be regarded as a synonym for "negligent."—Belmont v. City of New York, 182 N.Y.S. 173, 191 A.D. 717.—Lim of Act 183(4).

N.Y.A.D. 2 Dept. 1915. Driving on the left side of a highway is not a "nuisance," and does not violate Penal Law, § 1530, providing that a "public nuisance" is a crime, and consists in unlawfully doing an act or omitting to perform a duty, which act or omission annoys, injures, or endangers the comfort, repose, health, or safety of any considerable number of persons, or unlawfully interferes with or obstructs, or tends to obstruct, a public highway.—People v. Martinitis, 153 N.Y.S. 791, 168 A.D. 446.

N.Y.A.D. 2 Dept. 1912. The word "nuisance" designates a class of wrongs arising from an unreasonable or unlawful use of property, so as to produce such material discomfort or injury to another that the law presumes damage; every use of property, so as to materially violate the rights of another being, as a rule, an actionable nuisance.—McNulty v. Ludwig & Co., 138 N.Y.S. 84, 153 A.D. 206.

N.Y.A.D. 2 Dept. 1911. "Crime" and "nuisance" are not convertible terms.—Hefferon v. New York Taxicab Co., 130 N.Y.S. 710, 146 A.D. 311.

N.Y.A.D. 2 Dept. 1905. Irrespective of its public or private nature, a "nuisance" is "literally an annoyance, and signifies in law such a use of property or such a course of conduct as, irrespective of actual trespass against others or of malicious or actual criminal intent, transgresses the just restrictions upon use or conduct which the proximity of other persons or property in civilized communities imposes upon what would otherwise be rightful freedom."—Johnson v. City of New York, 96 N.Y.S. 754, 109 A.D. 821, reversed 78 N.E. 715, 186 N.Y. 139, 116 Am.St.Rep. 545, 9 Am.An.Cas. 824.

N.Y.A.D. 2 Dept. 1898. Pen.Code, § 385, defines a "nuisance" as consisting, among other things, of an act which "unlawfully interferes with, or obstructs or tends to obstruct, \* \* \* a public street or highway." A wall of masonry erected along the middle of the highway by a surface railroad company to connect its tracks with those of an elevated railroad company, without any competent legal authority for such erection, constitutes a nuisance.—Eldert v. Long Island Electric Ry. Co., 51

N.Y.S. 186, 28 A.D. 451, affirmed 59 N.E. 1122, 165 N.Y. 651.

N.Y.A.D. 3 Dept. 1941. In actions against village to recover for injuries sustained by pedestrian at night in fall when she allegedly tripped over curb which was about six and one-half inches above sidewalk level, whether curb constituted a "nuisance" negligently maintained by village so as to warrant recovery from village was a fact question for jury.—Croner v. Village of Monticello, 26 N.Y.S.2d 63, 261 A.D. 360.—Mun Corp 821(8).

N.Y.A.D. 3 Dept. 1939. Where telephone company had authority under statute to place pole in highway, the pole did not constitute an absolute "nuisance" as a matter of law. Transportation Corporations Law, § 27.—Wagner v. City of Amsterdam, 9 N.Y.S.2d 750, 256 A.D. 144.—Tel 103.

N.Y.A.D. 3 Dept. 1935. Primary meaning of "nuisance" does not involve negligence as essential factor, as one sometimes acts at his peril, in which case duty to desist from conduct bringing damage to another, if persisted in, is absolute.—Khoury v. Saratoga County, 277 N.Y.S. 3, 243 A.D. 195, affirmed 196 N.E. 299, 267 N.Y. 384.—Nuis 7.

N.Y.A.D. 3 Dept. 1935. Long-continued negligence of municipalities, charged with maintenance of bridge, in failing to remedy dangerous situation, created at recurring intervals by coating of driveway with ice in freezing weather when mist or spray rose from river, after ample notice thereof, ripened into "nuisance," rendering them absolutely liable for death of one pedestrian and injury to another when struck by automobile skidding onto sidewalk of bridge.—Khoury v. Saratoga County, 277 N.Y.S. 3, 243 A.D. 195, affirmed 196 N.E. 299, 267 N.Y. 384.—Autos 270.

N.Y.A.D. 3 Dept. 1934. Generally, "nuisance" involves idea of continuity or recurrence, though it is not always necessary that act complained of should be habitual or periodical.—Ford v. Grand Union Co., 270 N.Y.S. 162, 240 A.D. 294.—Nuis 59.

N.Y.A.D. 3 Dept. 1934. Use on single occasion of store basement for target practice with .22 caliber rifle held not to constitute "nuisance."—Ford v. Grand Union Co., 270 N.Y.S. 162, 240 A.D. 294.—Nuis 61.

N.Y.A.D. 3 Dept. 1928. Noise of such a character as to produce actual physical discomfort and annoyance to a person of ordinary sensibilities is a "nuisance," even though it is caused by conducting a trade or business in a city.—Dillon v. Cortland Baking Co., 230 N.Y.S. 289, 224 A.D. 303.—Nuis 3(3).

N.Y.A.D. 3 Dept. 1928. Noise resulting from loading and operation of defendant's delivery trucks at his place of business in city may constitute a "nuisance."—Dillon v. Cortland Baking Co., 230 N.Y.S. 289, 224 A.D. 303.—Nuis 3(5).

N.Y.A.D. 3 Dept. 1916. Where the officers of a municipality invited the citizens to deposit rubbish in the streets, which the city undertook to remove,

the deposit, and failure to remove it within a reasonable time, was a "nuisance."—*Lyman v. Village of Potsdam*, 159 N.Y.S. 71, 173 A.D. 390.

N.Y.A.D. 4 Dept. 1959. The term "nuisance" applies only to conditions or activities which threaten injury to persons outside the defendant's premises, either upon a public highway or upon the premises of others in the neighborhood.—*Miller v. Morse*, 192 N.Y.S.2d 571, 9 A.D.2d 188, motion denied 195 N.Y.S.2d 398, 10 A.D.2d 598.—Nuis 1.

N.Y.A.D. 4 Dept. 1954. Defendants' placing of rack containing garden tools on sidewalk in front of their place of business so that rack interfered with full use of sidewalk by pedestrians created a "nuisance."—*Robbins v. Boyer*, 128 N.Y.S.2d 720, 283 A.D. 449, appeal dismissed 129 N.Y.S.2d 224, 283 A.D. 854, appeal and reargument denied 131 N.Y.S.2d 924, 284 A.D. 835, appeal dismissed 122 N.E.2d 332, 307 N.Y. 840.—Mun Corp 808(2).

N.Y.Sup. 2000. "Nuisance" consists of the wrongful or unlawful maintenance of a property.—*Sabater ex rel. Santana v. Lead Industries Ass'n, Inc.*, 704 N.Y.S.2d 800, 183 Misc.2d 759.—Nuis 3(1).

N.Y.Sup. 2000. Generally at common law, a "nuisance" is a wrong arising from an unreasonable or unlawful use of a house, premises, place, or property, to the discomfort, annoyance, inconvenience, or damage of another.—*Sabater ex rel. Santana v. Lead Industries Ass'n, Inc.*, 704 N.Y.S.2d 800, 183 Misc.2d 759.—Nuis 3(1), 4.

N.Y.Sup. 1996. Former owner of apartment complex (defendant) was potentially liable for plaintiff's fall down elevator shaft at apartments, even though accident occurred 139 days after building was transferred from defendant pursuant to mortgage foreclosure proceeding; because plaintiffs alleged that defendant knew that defective condition existed with elevator due to prior similar accident involving fall down same elevator shaft, claim was not one for negligence (which would be barred on ground that any duty defendant owed ceased upon building's passing out of defendant's control), but essentially alleged maintenance of "nuisance."—*Morris v. Freudenheim*, 641 N.Y.S.2d 788, 168 Misc.2d 417, reversed 709 N.Y.S.2d 312, 273 A.D.2d 885.—Carr 306(1).

N.Y.Sup. 1966. If blasting is dangerous and continuous, it constitutes a "nuisance" and there is liability without fault.—*Heimer v. Johnson, Drake and Piper*, 274 N.Y.S.2d 520, 51 Misc.2d 958.—Explos 7.

N.Y.Sup. 1960. A defendant's unwarranted and unreasonable use of its property, to the damage of plaintiffs' properties, as the result of earth washing from defendant's lands onto lands of plaintiffs, constituted a "nuisance."—*Burk v. High Point Homes, Inc.*, 197 N.Y.S.2d 969, 22 Misc.2d 492, appeal dismissed 205 N.Y.S.2d 862, 11 A.D.2d 701.—Nuis 3(1).

N.Y.Sup. 1955. A "nuisance" is anything that by its use or by its permitted existence works annoy-

ance, harm, inconvenience or damage to another.—*Tenperal Homes v. Italiano*, 140 N.Y.S.2d 148.

N.Y.Sup. 1949. Failure of tenant repeatedly to pay rent on time, so as to necessitate repeated resort by landlord to summary proceedings, did not constitute a "nuisance" so as to entitle landlord to certificate of eviction on ground of nuisance.—*Sanfilippo v. Coster*, 91 N.Y.S.2d 738, appeal dismissed 100 N.Y.S.2d 144.—Land & Ten 278.9(3).

N.Y.Sup. 1947. Any act of individual, though performed on his own soil, is a "nuisance" if it detracts from safety of travelers.—*Hopper v. Comfort Coal & Lumber Co.*, 80 N.Y.S.2d 351, affirmed 80 N.Y.S.2d 357, 274 A.D. 797.—Neglig 1152.

N.Y.Sup. 1947. If natural tendency of an act is to create danger and inflict injury upon person or property it may be found to be a "nuisance" as a matter of fact.—*Hopper v. Comfort Coal & Lumber Co.*, 80 N.Y.S.2d 351, affirmed 80 N.Y.S.2d 357, 274 A.D. 797.—Nuis 1.

N.Y.Sup. 1943. Depreciation of neighboring property due to mere presence of factory which would not exist if area were entirely residential does not tend to establish "nuisance".—*Incorporated Village of North Hornell v. Rauber*, 40 N.Y.S.2d 938, 181 Misc. 546.—Nuis 62.

N.Y.Sup. 1943. A sawmill does not constitute "nuisance", even if some damage, annoyance, and injury has resulted to others because of smoke and noise therefrom, unless use of mill is unreasonable.—*Incorporated Village of North Hornell v. Rauber*, 40 N.Y.S.2d 938, 181 Misc. 546.—Nuis 62.

N.Y.Sup. 1943. Where a sawmill was destroyed by fire to extent of more than 75 per cent. of its assessed valuation, but less than 25 per cent. of its true value, including concrete foundation and machinery not destroyed, its operation should not be enjoined as "nuisance" under village zoning ordinance prohibiting reconstruction of pre-existing nonconforming buildings destroyed by fire to extent of over 75 per cent. of their assessed valuations, as effect of such injunction would be to confiscate undamaged portion of mill, though some of unburned part could be salvaged and reconstructed elsewhere.—*Incorporated Village of North Hornell v. Rauber*, 40 N.Y.S.2d 938, 181 Misc. 546.—Nuis 81.

N.Y.Sup. 1942. Where apartment house owner, to prevent tenants' children from walking on top of low wire fence in front of building, placed metal pointed spikes about 1½ inches high on fence, maintenance of fence with spikes thereon was negligence and constituted a "nuisance".—*O'Driscoll v. Metropolitan Life Ins. Co.*, 33 N.Y.S.2d 557, 178 Misc. 372.—Land & Ten 170(1).

N.Y.Sup. 1941. Where torts are coexisting and practically inseparable, as where the same acts or omissions constituting negligence give rise to a nuisance, the rules applicable to negligence will be applied, since the existence of a "nuisance" in many if not in most instances presupposes negligence.—*Jablon v. City of New York*, 31 N.Y.S.2d 764, 177 Misc. 838, affirmed 51 N.Y.S.2d 82, 268 A.D. 859,

appeal denied 52 N.Y.S.2d 799, 268 A.D. 1026.—Nuis 1.

N.Y.Sup. 1940. Whether a particular act or thing constitutes a "nuisance" may depend on the circumstances and surroundings and the test of the permissible use of one's own land is not whether the use or the act causes injury to neighbor's property or whether the injury is the natural consequence of such use or act or whether the act is in the nature of a nuisance but whether the act or use is the reasonable exercise of dominion which the owner of property has, having regard to all interests affected and public policy.—*Messina v. Scarlata*, 26 N.Y.S.2d 594, appeal dismissed 23 N.Y.S.2d 833, vacated 23 N.Y.S.2d 834, affirmed 26 N.Y.S.2d 597, 261 A.D. 875.—Nuis 3(1).

N.Y.Sup. 1939. The sounds of music, if disturbing, may be regarded as a "nuisance."—*Peters v. Moses*, 12 N.Y.S.2d 735, 171 Misc. 441, modified 19 N.Y.S.2d 168, 259 A.D. 307.—Nuis 3(3).

N.Y.Sup. 1939. The playing of outdoor music at outdoor pavilion in residential district after midnight except Saturday nights and evenings preceding holidays when playing for an additional hour was permitted, was enjoined as a "nuisance."—*Peters v. Moses*, 12 N.Y.S.2d 735, 171 Misc. 441, modified 19 N.Y.S.2d 168, 259 A.D. 307.—Nuis 3(3).

N.Y.Sup. 1938. A town could not maintain suit to restrain removal of top soil of certain lands which had been in process of development for residential purposes and was zoned as residence A, on ground that the removal of the top soil constituted a "nuisance."—*Town of Harrison v. Sunny Ridge Builders*, 7 N.Y.S.2d 521, 169 Misc. 471.—Nuis 61.

N.Y.Sup. 1938. A property owner making an unreasonable use of his property so as to produce material detriment to a neighbor creates a "nuisance" for which he is responsible.—*Walker v. Wearb*, 6 N.Y.S.2d 548.—Nuis 4, 7.

N.Y.Sup. 1938. To constitute a "nuisance," the use must be such as to produce a tangible and appreciable injury, and to render the enjoyment of property especially uncomfortable or inconvenient.—*Walker v. Wearb*, 6 N.Y.S.2d 548.—Nuis 4.

N.Y.Sup. 1938. Noises and disturbances of such a character as to produce actual physical discomfort and annoyance to a person of ordinary sensibilities are a "nuisance."—*Walker v. Wearb*, 6 N.Y.S.2d 548.—Nuis 3(3), 4.

N.Y.Sup. 1938. Ordinary operation activities on dairy and live stock farm which surrounded lot on three sides were not a "nuisance" which could be enjoined by person purchasing house and lot thereon with knowledge that lot was surrounded by such farm, notwithstanding that farm was not actively operated when purchase was made.—*Walker v. Wearb*, 6 N.Y.S.2d 548.—Nuis 3(10).

N.Y.Sup. 1938. Regular weekly live stock auction sales conducted on farm adjoining plaintiff's home were not a "nuisance" where they were con-

ducted during reasonable hours, but were a "nuisance" which plaintiff was entitled to enjoin where they were conducted after 5:30 p.m., and live stock and other merchandise were delivered for sale at auctions before 7 o'clock a.m., and after 6 o'clock p.m., and stock or other merchandise was removed at conclusion of auction after 7 o'clock p.m. or before 7 o'clock a.m.—*Walker v. Wearb*, 6 N.Y.S.2d 548.—Nuis 3(3).

N.Y.Sup. 1938. A housekeeper who tripped and fell over her employer's dog as she was going from kitchen to dining room, was not entitled to recover for injuries sustained on ground that permitting the dog to lie about within the confines of the residence created a "nuisance."—*Fedick v. Fenton*, 2 N.Y.S.2d 436, 166 Misc. 707, affirmed 3 N.Y.S.2d 870, 254 A.D. 704.—Emp Liab 50.

N.Y.Sup. 1937. Whether use of property amounts to "nuisance" depends upon specific facts of given case, and trifling results will be disregarded, for courts proceed with great caution, and will not interfere with use of property by owner thereof unless such use is unreasonable and injury is material and actual, and not fanciful and sentimental.—*Masso v. Hanscom Realty Corp.*, 295 N.Y.S. 922, 162 Misc. 864, reversed 4 N.Y.S.2d 216, 254 A.D. 756.—Nuis 3(1).

N.Y.Sup. 1937. Operation of bakery, involving noise from trucks and from revolving fans, and emission from pipes or flues of noxious stenches and odors, held a "nuisance" enjoinable by nearby residence owners, notwithstanding that bakery was modern and that neighborhood was unrestricted.—*Masso v. Hanscom Realty Corp.*, 295 N.Y.S. 922, 162 Misc. 864, reversed 4 N.Y.S.2d 216, 254 A.D. 756.—Nuis 4.

N.Y.Sup. 1934. Meat processing plant causing smoke, meaty odors, soot, and black grease to enter adjoining apartment, producing discomfort to persons of ordinary sensibility, annoying tenants, and causing financial loss to owner, held "nuisance" entitling owner to injunction or damages for continued operation of plant, regardless of negligence in its operation.—*De Muro v. Havranek*, 275 N.Y.S. 186, 153 Misc. 787.—Nuis 3(5).

N.Y.Sup. 1927. Village garbage disposal plant and incinerator, operated in such a manner as to cause noxious and nauseating odors and flaky and oily particles from burned materials to reach residences and properties of persons in vicinity, and materially interfering with their enjoyment, held to constitute a "nuisance," though annoyance was intermittent and not constant.—*Nicoll v. President and Trustees of Village of Ossining*, 220 N.Y.S. 345, 128 Misc. 848.—Nuis 4.

N.Y.Sup. 1926. "Nuisance" is derived from French word "nuire," which means to injure, hurt, or harm. It is anything done to the hurt or annoyance of lands, tenements, or hereditaments of another. The injury also may be to person or property, to health, comfort, safety or morality.—*People v. Conti*, 216 N.Y.S. 442, 127 Misc. 244.

N.Y.Sup. 1915. A building or obstruction within the channel of a river, which, in times of high water, causes it to overflow and inundate surrounding property, is a "nuisance," both as to the city and persons injured.—*Powell v. City of Rochester*, 157 N.Y.S. 109, 93 Misc. 227.

N.Y.Sup. 1915. The distinction between "trespass" and "nuisance" is that the former is a direct wrong, while in the latter the infringement is the result of an act not wrongful in itself, but only in the consequences which may follow from it.—*Hamilin v. Bender*, 155 N.Y.S. 963, 92 Misc. 16, 34 N.Y.Crim.R. 16, affirmed 159 N.Y.S. 1117, 173 A.D. 958.—Nuis 59.

N.Y.Sup. 1904. Every person is bound to make a reasonable use of his property, so as to occasion, no unnecessary damage or annoyance to his neighbor. If he make an unreasonable, unwarrantable, or unlawful use of it, so as to produce material annoyance, inconvenience, discomfort, or hurt to his neighbor, he will be guilty of a "nuisance" to his neighbor. And the law will hold him responsible for the consequent damage. "What is a reasonable use of one's own property cannot be defined by any certain general rules, but must depend upon the circumstances of each case. A use of property in one locality and under some circumstances may be lawful and reasonable, which under other circumstances would be unlawful, unreasonable, and a nuisance. To constitute a "nuisance," the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable or inconvenient." The operation of the works of a cement company, during the season for harvesting ice, in such manner as to throw on the ice cinders, ashes, coal dust, and other substances which might sink into the ice and render it unmerchantable, was a nuisance.—*American Ice Co. v. Catskill Cement Co.*, 88 N.Y.S. 455, 43 Misc. 221, reversed 90 N.Y.S. 801, 99 A.D. 31, appeal dismissed 75 N.E. 1127, 182 N.Y. 553.

N.Y.Sup. 1903. The action of a railroad in permitting surface water from one side of its track to escape to the other side alongside of a highway does not create an actionable "nuisance."—*Townsend v. New York Cent. & H.R.R. Co.*, 106 N.Y.S. 381, 56 Misc. 253.

N.Y.Sup. 1899. The term "nuisance" imports something that annoys the public, and does not embrace hubstones, which are useful, if not necessary, appliances in streets to keep trucks in their proper place and prevent them from sliding into places where they may receive and do damage.—*Jordan v. City of New York*, 55 N.Y.S. 716, 26 Misc. 53, affirmed 60 N.Y.S. 696, 44 A.D. 149, affirmed 59 N.E. 1124, 165 N.Y. 657.

N.Y.Sup.App.Term 1993. Pursuant to Rent Stabilization Code, landlord was entitled to recover possession of premises on ground that tenant's conduct substantially interfered with comfort and safety of her neighbors, despite tenant's claim that "unintentional" conduct precipitated by mental illness could not constitute "nuisance"; even assum-

ing that tenant's actions were involuntary, dispositive issue was not tenant's state of mind, but nature of tenant's conduct and its effect upon comfort and safety of other tenants and building staff. Rent Stabilization Code, § 2524.3(b), McK.Unconsol.Laws.—*301 East 69th Street Associates v. Eskin*, 600 N.Y.S.2d 887, 156 Misc.2d 122.—Land & Ten 296(1).

N.Y.Sup.App.Term 1949. Single act of tenant in kicking and scratching elevator door did not constitute a "nuisance" authorizing a summary proceeding to evict tenant.—*Madison Central Corp. v. Weider*, 91 N.Y.S.2d 437.—Land & Ten 296(1).

N.Y.Sup.App.Term 1947. In action by landlord to recover the possession of a rented apartment under the O.P.A. rent regulations on the ground that the tenant committed a nuisance, evidence that the tenant's wife left her children on several occasions in the apartment unattended and that the gas jets on the stove were found open did not establish a "nuisance" authorizing the award of possession to the landlord.—*Vasapollo v. Zullo*, 72 N.Y.S.2d 393.—Land & Ten 278.14(5); War 236.

N.Y.Sup.App.Term 1947. Evidence established that tenant committed a "nuisance" and was permitting the premises to be used as a nuisance under the O.P.A. rent regulations, because of conduct offensive to other tenants so as to justify an award of possession of the premises to the landlord.—*New York City Soc. of Methodist Church v. Thomas*, 72 N.Y.S.2d 384.—Land & Ten 278.14(5); War 236.

N.Y.Sup.App.Term 1946. Where husband and wife occupied apartment as tenants, wife's attempt at self-destruction during period of mental depression following childbirth was not a "nuisance" which would justify landlord's attempted termination of lease.—*Metropolitan Life Ins. Co. v. Molloff*, 63 N.Y.S.2d 385, 187 Misc. 458, affirmed 74 N.Y.S.2d 910, 272 A.D. 1039.—Land & Ten 278.9(4); War 228.

N.Y.Sup.App.Term 1938. A fuel company, by driving its truck upon sidewalk and breaking it, committed a "nuisance," rendering it liable to any one injured, while exercising due care, because sidewalk was left in dangerous condition.—*Riesenberg v. Cullen Fuel Co.*, 2 N.Y.S.2d 814, 166 Misc. 663.—Autos 15.

N.Y.Sup.App.Term 1905. A temporary obstruction of a street or highway with the consent of the proper public authorities, in the course of construction of a building, sidewalk, or other work, is not a "nuisance."—*Malkan v. Carlin*, 93 N.Y.S. 378.

N.Y.Sup.App.Term 1905. A lease limiting the liability of the tenant respecting orders of a city department to those issued for the correction, prevention, and abatement of "nuisances" or "other grievances" does not render the tenant liable for the cost of a fire escape, as the words are to be taken in their natural and usual sense. The absence of a fire escape is not a "nuisance," as that word is commonly used, and the more generic words "other grievances" do not extend the plaintiff's liability so far as to render him liable for the cost of the fire

escape.—*Kalman v. Cox*, 92 N.Y.S. 816, 46 Misc. 589.

N.Y.Mun.Ct. 1945. Conduct of tenant in posting on his apartment door, which adjoined door leading to landlord's apartment, religious placards which could reasonably be regarded as a taunt or a reflection on landlord's religious beliefs, and in refusing to remove the cards upon request, constituted the commission of a "nuisance" within meaning of O.P.A. rent regulation excluding from protection of regulations tenants committing a nuisance.—*Mendoza v. Syme*, 53 N.Y.S.2d 390, 184 Misc. 98.—War 228.

N.Y.Mun.Ct. 1945. The word "nuisance", as used in O.P.A. rent regulation excluding tenants who commit or permit a nuisance on premises from protection of the rent regulation, means act or conduct causing, and which might reasonably be expected to cause, to normal persons, vexation, annoyance, or disturbance of a substantial nature, or an unreasonable and continued or repeated interference, by deliberate conduct, with the comfort or peace of mind of a person of normal sensibilities.—*Mendoza v. Syme*, 53 N.Y.S.2d 390, 184 Misc. 98.—War 228.

N.Y.Mun.Ct. 1943. To constitute a "nuisance" the use of one's property must be unwarrantable, unreasonable or unlawful to annoyance or damage of another.—*Twin Elm Management Corp. v. Banks*, 46 N.Y.S.2d 952, 181 Misc. 96.—Nuis 1.

N.Y.Mun.Ct. 1943. Evidence that tenant's daughter practiced piano in apartment to annoyance of other apartment dwellers for about 12 hours daily, but not establishing that piano playing was exceptionally loud or that piano was used at unreasonable hours did not establish a "nuisance" so as to justify termination of lease by landlord, where lease contained provision that landlord permitted piano playing during certain reasonable hours.—*Twin Elm Management Corp. v. Banks*, 46 N.Y.S.2d 952, 181 Misc. 96.—Land & Ten 105.

N.Y.Mun.Ct. 1935. Evidence held insufficient to justify recovery for corrosion of radio transmitting station's underground water pipes, allegedly caused by electric current escaping from tracks of street railway, on ground that railway company was negligent. "Nuisance" consists in wrongful maintenance of thing itself, while "negligence" usually consists in the manner of doing the thing. Hence, in nuisance, it is the wrongful or unlawful maintenance of the thing resulting in damage to others that gives the right of action, irrespective of whether its operation is careful or careless; while in negligence it is the careless operation of the thing whereby others are damaged, irrespective of whether it is lawful or unlawful.—*Gildon Holding Corporation v. New York & Queens Transit Corporation*, 284 N.Y.S. 539, 157 Misc. 644.

N.Y.Ct.Cl. 1949. "Nuisance" denotes the wrongful invasion of a legal right or interest and comprehends not only such invasion of property but of personal legal rights and privileges generally, and includes intentional harms and harms caused by negligence, reckless or ultra hazardous conduct.—

*Sweet v. State*, 89 N.Y.S.2d 506, 195 Misc. 494.—Nuis 1, 2, 7.

N.Y.Ct.Cl. 1949. The primary meaning of "nuisance" does not involve the element of negligence as one of its essential factors, and nuisance does not rest on degree of care used, but on degree of danger existing even with the best of care.—*Sweet v. State*, 89 N.Y.S.2d 506, 195 Misc. 494.—Nuis 7.

N.Y.Ct.Cl. 1942. A fixed base type traffic signal in center of highway, which was three feet in diameter, blended in color with pavement, and was the only remaining stanchion on the highway, all others having been replaced by centrally suspended light panels, was a "nuisance", and failure of state to warn highway users of its existence was negligence.—*Wenzel v. State*, 36 N.Y.S.2d 943, 178 Misc. 932.—High 192.

N.Y.Ct.Cl. 1938. Generally, every unlawful use by a person of his own property in such way as to cause material annoyance, discomfort, or hurt to other persons, or the public generally, and every enjoyment by one of his own property which violates rights of another in any essential degree, constitutes a "nuisance."—*Everett v. State*, 2 N.Y.S.2d 117, 166 Misc. 58.—Nuis 3(1), 62.

N.Y.City Civ.Ct. 1992. "Nuisance," as ground for evicting tenant in summary proceeding, is condition which conceivably threatens conduct and safety of building occupants. McKinney's RPAPL § 711, subd. 5.—*1021-27 Ave. St. John Housing Development Fund Corp. v. Hernandez*, 584 N.Y.S.2d 990, 154 Misc.2d 141.—Land & Ten 296(1).

N.Y.City Civ.Ct. 1983. "Nuisance" is conduct that is either unreasonable or unlawful and causes annoyance, inconvenience, discomfort or damage to others.—*Sourian v. Poisson De Menars*, 460 N.Y.S.2d 905, 118 Misc.2d 509.—Nuis 3(1).

N.Y.City Civ.Ct. 1967. "Nuisance" is anything that by its use or by its admitted existence works annoyance, harm, inconvenience or damage to another.—*Joyce Properties, Inc. v. Rubi*, 277 N.Y.S.2d 18, 52 Misc.2d 825, affirmed 282 N.Y.S.2d 66, 54 Misc.2d 360.—Nuis 3(1).

N.Y.City Ct. 1946. Under Rent Regulations for Housing, tenants are bound to a rule of reasonable conduct, taking in consideration the housing accommodations, the environment, the neighborhood, the size of the family, and the ordinary conduct of people under the conditions in question, and continuance of frequent violation of such rule would constitute a "nuisance" within Rent Regulations authorizing eviction of tenants.—*Di Lella v. O'Brien*, 68 N.Y.S.2d 374, 187 Misc. 922.—Land & Ten 278.9(4); War 228.

N.Y.City Ct. 1946. Under Rent Regulations for Housing, tenant is required to conduct himself as a reasonable person over a period of time, having regard to the comfortable enjoyment of the premises by others, and continuance of frequent violations of such rule constitutes "nuisance" within Rent Regulations authorizing eviction of tenant.—*Di Lella v. O'Brien*, 68 N.Y.S.2d 374, 187 Misc. 922.—Land & Ten 278.9(4); War 228.

N.Y.City Ct. 1946. Landlord is not required to establish that tenant was guilty of such acts as would warrant criminal prosecution under appropriate statutes to establish "nuisance" within Rent Regulations for Housing authorizing eviction.—Di Lella v. O'Brien, 68 N.Y.S.2d 374, 187 Misc. 922.—Land & Ten 278.9(4); War 228.

N.Y.City Ct. 1946. One act of disorderly conduct on the part of tenants, even though there is a conviction therefor would not constitute a "nuisance" within OPA rent regulation authorizing eviction of tenants on such ground.—Metzger v. Hecht, 66 N.Y.S.2d 47, 187 Misc. 399.—Land & Ten 278.9(4); War 228.

N.Y.City Ct. 1940. A feed pipe which ran from fuel oil tank underneath sidewalk to abutting premises, and which protruded above dirt strip between concrete flagging and curb, was an unauthorized obstruction and a "nuisance."—Knoechel v. Inzirillo, 16 N.Y.S.2d 680.—Mun Corp 808(2).

N.Y.City Ct. 1939. Restaurant customer who, while returning to restaurant from lavatory used by restaurant customers, fell down elevator shaft, could not recover from lessee of the building in which the restaurant and lavatory were located on ground that lessee's alleged violation of Industrial Code provisions relating to maintenance of elevator constituted a "nuisance." Labor Law, § 28, subd. 4.—Mortimer v. Natapow, 14 N.Y.S.2d 971, reversed 31 N.Y.S.2d 844, 263 A.D. 786.—Neglig 1117.

N.Y.City Ct. 1939. If natural tendency of act complained of is to create danger and inflict injury upon person or property, the act may properly be found a "nuisance" as a matter of fact.—Berl v. Rochester State Corp., 14 N.Y.S.2d 516.—Nuis 3(1).

N.Y.Super. 1891. Nuisance, to an extent, is a question of locality and degree. In considering whether an act is a nuisance, regard must be had not only to the thing done, but to the surrounding circumstances. What would be a nuisance in one neighborhood might not be so in another. A lawful trade may be so offensive that it should be carried on only in an out-of-the-way place. Blackstone defines "nuisance" as being anything to the hurt or annoyance of another. By "hurt or annoyance" here is meant not a physical injury necessarily, but an injury to the owner or possessor of premises as respects his dealings with or his mode of enjoying them.—Rowland v. Miller, 39 N.Y.St.Rep. 115, 15 N.Y.S. 701, affirmed 46 N.Y.St.Rep. 967, 18 N.Y.S. 793, 29 Jones & S. 163, affirmed 34 N.E. 765, 139 N.Y. 93.

N.C. 1965. A "nuisance" is a condition, not an act or omission, and a structure or condition which is lawful may be nuisance by reason of manner of its maintenance or management.—Midgett v. North Carolina State Highway Commission, 144 S.E.2d 121, 265 N.C. 373.—Nuis 1, 5.

N.C. 1952. That which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomforta-

ble to him, is a "nuisance", and it is a public nuisance if it injuriously affects the rights of all the people of the community in a manner inherently injurious to the public health, safety or morals.—Wilcher v. Sharpe, 72 S.E.2d 662, 236 N.C. 308.—Nuis 3(1), 62.

N.C. 1949. Where "nuisance" results in violation of private rights, and is such as to constitute a private wrong by injuring property or health, or where by the use of structures and permitted conditions a nuisance has been created, causing annoyance to the individual and disturbing him in the possession of his premises rendering the use and occupancy thereof uncomfortable, injuriously affecting the peace and menacing the health and safety of his home, the law affords the injured person redress, remedial or preventive.—Barrier v. Troutman, 55 S.E.2d 923, 231 N.C. 47.—Nuis 23(1), 42.

N.C. 1949. That is a "nuisance" which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him, and for such annoyance and discomfort the courts of law will afford redress by giving damages against the wrong-doer, and when the cause of annoyance and discomfort are continuous, courts of equity will interfere and restrain the nuisance.—Barrier v. Troutman, 55 S.E.2d 923, 231 N.C. 47.—Nuis 1, 23(1), 42.

N.C. 1942. It was not essential to constitute a "nuisance", defined by statute, that acts of customers in betting on horse races which imparted that quality to defendant's premises and business conducted there should be violations of criminal law, either generally speaking or under terms of statute. C.S. §§ 2142, 2143, 3180, 4430.—State v. Brown, 20 S.E.2d 286, 221 N.C. 301.—Nuis 61.

N.C. 1942. Persons whose conduct or whose enterprise is harmful to the public may be dealt with directly on theory of "nuisance", although the facilities they offer to social misconduct or acts contrary to public policy or injurious to welfare of community, do not amount to open crime. C.S. § 3180.—State v. Brown, 20 S.E.2d 286, 221 N.C. 301.—Nuis 62.

N.C. 1942. The Legislature cannot by mere fiat make that a "nuisance" which has none of the characteristics of nuisance and which has no tendency to injure public health, morals or interests, but Legislature may make new definitions and categories within constitutional limitations, where evil intended to be reached is noxious to public welfare and means employed have a reasonable relation to the result intended to be produced.—State v. Brown, 20 S.E.2d 286, 221 N.C. 301.—Nuis 65.

N.C. 1939. An action wherein plaintiffs alleged that they were unable to dispose of their land for any appreciable sum because of odors, falling ashes and other conditions resulting from maintenance by city of incinerator and abattoir nearby, was an action for taking on account of a "nuisance" and was not an action in tort for negligence.—Investor v. City of Winston-Salem, 1 S.E.2d 88, 215 N.C. 1.—Em Dom 271.

N.C. 1935. A “private nuisance” is an act done unaccompanied by an act of trespass which causes a substantial prejudice to the hereditaments, corporeal or incorporeal, of another, while “nuisance” means an annoyance, anything that works hardship, inconvenience, or damage, or which essentially interferes with the enjoyment of life or property.—*King v. Ward*, 178 S.E. 577, 207 N.C. 782.—Nuis 1.

N.C. 1934. The term “nuisance” means literally annoyance; anything which works hurt, inconvenience or damage or which essentially interferes with the enjoyment of life or property.—*Lightner v. City of Raleigh*, 174 S.E. 272, 206 N.C. 496.

N.C. 1931. Term “nuisance” literally means annoyance, anything which works hurt, inconvenience, or damage, or which essentially interferes with enjoyment of life or property.—*Holton v. Northwestern Oil Co.*, 161 S.E. 391, 201 N.C. 744.—Nuis 1.

N.C. 1931. Hydrant attached to building, and projecting nine inches over sidewalk, is not necessarily “nuisance,” which depends on surroundings and conditions.—*Swinson v. Cutter Realty Co.*, 156 S.E. 545, 200 N.C. 276.—Mun Corp 777.

N.C. 1931. “Nuisance” may or may not involve negligence, and may exist both by positive act and by negligent failure to perform duty.—*Swinson v. Cutter Realty Co.*, 156 S.E. 545, 200 N.C. 276.—Nuis 1.

N.C. 1931. Primarily, “nuisance” is condition, not act, although lawful thing or act may be nuisance due to negligent use, operation, or performance.—*Swinson v. Cutter Realty Co.*, 156 S.E. 545, 200 N.C. 276.—Nuis 1.

N.C. 1931. “Nuisance” may be both public and private, and act or thing may be nuisance per se, or may become nuisance by reason of locality and surroundings.—*Swinson v. Cutter Realty Co.*, 156 S.E. 545, 200 N.C. 276.—Nuis 1, 59.

N.C. 1926. Parties knowing acts combined would cause pollution of stream and “nuisance” held joint tort-feasors.—*Moses v. Town of Morgan-ton*, 133 S.E. 421, 192 N.C. 102.—Waters 71.

N.C. 1912. A “nuisance” is confined to such matters of annoyance as the law recognizes, and for which it gives a remedy by way of redress or abatement, or, in a proper case, by restraining process.—*Berger v. Smith*, 75 S.E. 1098, 160 N.C. 205.—Nuis 59.

N.C. 1907. A fence obstructing a street, which is a public highway, and thereby rendering its use less convenient, would be an indictable “nuisance.”—*State v. Godwin*, 59 S.E. 132, 145 N.C. 461, 122 Am.St.Rep. 467.

N.D. 1986. Corporation engaged in preparing and marketing agricultural products, but which did not meet statutory [NDCC 10-06-01 et seq.] requirements of corporation allowed to engage in farming, was not entitled to invoke protections of NDCC 42-04-02, providing that agricultural operation is not “nuisance”, unless negligently or improperly operated.—*Knoff v. American Crystal Sugar Co.*, 380 N.W.2d 313.—Nuis 3(1).

Ohio 2002. An edge drop on the berm of a county or city road is not, in and of itself, a “nuisance” within the meaning of the Political Subdivision Tort Liability Act making political subdivisions liable for failure to keep public roads, highways, and streets in repair, and free from nuisance. (Per the Chief Justice with two justices concurring and one justice concurring in the judgment). R.C. § 2744.02(B)(3).—*Haynes v. Franklin*, 767 N.E.2d 1146, 95 Ohio St.3d 344, 2002-Ohio-2334, reconsideration denied 772 N.E.2d 126, 96 Ohio St.3d 1455, 2002-Ohio-3819.—Autos 252.

Ohio 2002. Circumstances may exist in which a defect in the berm arising after the design and completion of construction of a roadway, including a defect creating an edge drop between the pavement and the adjoining berm, is a “nuisance” as used in the Political Subdivision Tort Liability Act making political subdivisions liable for failure to keep public roads, highways, and streets in repair, and free from nuisance. (Per the Chief Justice with two justices concurring and one justice concurring in the judgment). R.C. § 2744.02(B)(3).—*Haynes v. Franklin*, 767 N.E.2d 1146, 95 Ohio St.3d 344, 2002-Ohio-2334, reconsideration denied 772 N.E.2d 126, 96 Ohio St.3d 1455, 2002-Ohio-3819.—Autos 252.

Ohio 2002. A condition in the right-of-way of a road is a “nuisance” within the meaning of the Political Subdivision Tort Liability Act making political subdivisions liable for failure to keep public roads, highways, and streets in repair, and free from nuisance, if the condition creates a danger for ordinary traffic on the regularly traveled portion of the road and the cause of the condition was not a decision regarding design and construction. (Per the Chief Justice with two justices concurring and one justice concurring in the judgment). R.C. § 2744.02(B)(3).—*Haynes v. Franklin*, 767 N.E.2d 1146, 95 Ohio St.3d 344, 2002-Ohio-2334, reconsideration denied 772 N.E.2d 126, 96 Ohio St.3d 1455, 2002-Ohio-3819.—Autos 252.

Ohio 2002. If a dangerous condition in the right-of-way of a road is the result of negligent design or construction decisions, the condition is not a “nuisance” within the meaning of the Political Subdivision Tort Liability Act making political subdivisions liable for failure to keep public roads, highways, and streets in repair, and free from nuisance; thus, immunity attaches. (Per the Chief Justice with two justices concurring and one justice concurring in the judgment). R.C. §§ 2744.01(A)(1), 2744.02(B)(3).—*Haynes v. Franklin*, 767 N.E.2d 1146, 95 Ohio St.3d 344, 2002-Ohio-2334, reconsideration denied 772 N.E.2d 126, 96 Ohio St.3d 1455, 2002-Ohio-3819.—Autos 259.

Ohio 1992. Permanent obstruction to visibility in right-of-way, which renders regularly traveled portions of highway unsafe for usual and ordinary course of travel, can be “nuisance” for which political subdivision may be liable. R.C. § 2744.02(B)(3).—*Manufacturer's Natl. Bank of Detroit v. Erie Cty. Road Comm.*, 587 N.E.2d 819, 63 Ohio St.3d 318.—High 192.

Ohio 1974. "Motion picture" may be defined as "a series of pictures \* \* \*" and thus exhibition of single obscene motion picture film is sufficient to render theater a "nuisance" under statute defining nuisance as any place, in or upon which obscene "films" are photographed, exhibited, etc. R.C. §§ 3767.01 et seq., 3767.01(C).—State ex rel. Ewing v. "Without A Stitch", 307 N.E.2d 911, 37 Ohio St.2d 95, 66 O.O.2d 223, appeal dismissed Art Theater Guild, Inc. v. Ewing, 95 S.Ct. 1649, 421 U.S. 923, 44 L.Ed.2d 82.—Nuis 61.

Ohio 1947. Where a village maintained a rifle range on its public grounds within the village limits, which range was open to the public and, by permission of police authorities, was used by children, and a person lawfully on such grounds was injured by use of the range by children, a *prima facie* case was made for recovery of damages on the ground of "nuisance" created and maintained by the village in violation of statute. Gen.Code, §§ 3714, 12635.—Gaines v. Village of Wyoming, 72 N.E.2d 369, 147 Ohio St. 491, 34 O.O. 406.—Mun Corp 851.

Ohio 1944. "Nuisance" is a term used to designate the wrongful invasion of a legal right or interest, and it comprehends not only the wrongful invasion of the use and enjoyment of property, but also the wrongful invasion of personal legal rights and privileges generally.—Taylor v. City of Cincinnati, 55 N.E.2d 724, 143 Ohio St. 426, 28 O.O. 369, 155 A.L.R. 44.—Nuis 1.

Ohio 1944. The tort of "nuisance" includes intentional harms and harms caused by negligent, reckless or ultra-hazardous conduct.—Taylor v. City of Cincinnati, 55 N.E.2d 724, 143 Ohio St. 426, 28 O.O. 369, 155 A.L.R. 44.—Nuis 1, 2.

Ohio 1942. Where concrete pilaster separated vehicular and pedestrian traffic lanes on bridge and city widened street approaching bridge in such a manner that pilaster stood approximately in middle of eastbound traffic lane, whether city's action caused a "nuisance" to exist so that passenger in automobile could recover from city for injuries sustained about a month after street was opened to traffic, after widening thereof, when automobile struck pilaster during snowstorm, was for jury. Gen. Code, § 3714.—Kocher v. City of Barberton, 42 N.E.2d 977, 140 Ohio St. 240, 23 O.O. 439.—Mun Corp 821(8).

Ohio 1942. Stone wall or barricade about four feet high and several feet beyond ends of two city streets intersecting at right angles at brink of a ravine, was not a "nuisance" within meaning of statute requiring municipalities to keep their streets free from nuisance, and did not render city liable to guest in automobile for injuries sustained when automobile struck the wall at night, though the two nearest lamps on the streets were 150 and 300 feet from the intersection, and stone wall had become discolored by the weather. Gen.Code, § 3714.—Ellis v. City of Youngstown, 42 N.E.2d 760, 140 Ohio St. 133, 23 O.O. 357.—Autos 264.

Ohio 1941. Although a city council might pass an ordinance attempting to regulate location of a rural mailbox, before the mailbox could be declared

a "nuisance", either under or in absence of the ordinance, it would be necessary to show that it had not been so placed on a post road with the approval of an agent of the Post Office Department. Gen. Code, §§ 3714, 9170; 5 U.S.C.A. §§ 1, 22; 39 U.S.C.A. § 481; Const.Ohio art. 1, § 19; U.S.C.A. Const. art. 1, § 8.—Black v. City of Berea, 32 N.E.2d 1, 137 Ohio St. 611, 19 O.O. 427, 132 A.L.R. 1391.—Autos 264.

Ohio 1941. A rural mailbox located on post road in sparsely settled part of municipality in substantial compliance with requirements of Post Office Department and in same proximity to paved portion of highway as other mailboxes erected and maintained along the road, did not create a "nuisance" as to the traveling public, and could not be removed by the municipality. Gen.Code, §§ 3714, 9170; 5 U.S.C.A. §§ 1, 22; 39 U.S.C.A. § 481; Const.Ohio art. 1, § 19; U.S.C.A. Const. art. 1, § 8.—Black v. City of Berea, 32 N.E.2d 1, 137 Ohio St. 611, 19 O.O. 427, 132 A.L.R. 1391.—Autos 266.

Ohio 1939. The construction or operation by a railroad with reference to the streets of a municipality, in excess of the limitations of the authority given, is not only a "nuisance," but makes the railroad, a "trespasser," liable, in absence of contributory negligence on the part of one injured, for such damages as proximately result to him or his property. Gen.Code, §§ 8763, 8770.—Yackee v. Village of Napoleon, 21 N.E.2d 111, 135 Ohio St. 344, 14 O.O. 231.—R R 113(3), 113(12), 222(3).

Ohio 1939. Whoever, without express authority, materially obstructs or renders hazardous the use of a public street by placing structures thereon, above or below the surface thereof, is guilty of maintaining a "nuisance," and persons sustaining special damages as the result of such nuisance, if themselves free from fault, have a right of action against the one causing or continuing the nuisance.—Yackee v. Village of Napoleon, 21 N.E.2d 111, 135 Ohio St. 344, 14 O.O. 231.—Mun Corp 809(1).

Ohio 1937. "Nuisance" is not synonymous with "negligence," and does not necessarily rest upon degree of care used, although nuisance frequently is consequence of negligent act.—Selden v. City of Cuyahoga Falls, 6 N.E.2d 976, 132 Ohio St. 223, 7 O.O. 511.—Nuis 7.

Ohio 1937. Swimmer injured when he dived into shallow place in municipal swimming pool held not entitled to recover from city on theory that swimming pool constituted "nuisance," where only evidence thereof was that there were no signs to indicate depth of water and that small, short, low board, from which swimmer dived, was placed at edge of pool where water was 3 feet deep, in view of fact that large, long, high board was located above deepest water near center of pool, and that pool was constructed for use of children as well as of adults. Gen.Code, § 3714.—Selden v. City of Cuyahoga Falls, 6 N.E.2d 976, 132 Ohio St. 223, 7 O.O. 511.—Mun Corp 736.

Ohio 1937. "Negligence" is a failure to use such care as persons of ordinary prudence are accustomed to exercise under the same or similar cir-

cumstances, while a “nuisance” is that which causes hurt, inconvenience, annoyance, or damage to rights of another or the public. “Nuisance” does not rest upon the degree of care used, but upon the injury done, irrespective of the care exercised.—Selden v. City of Cuyahoga Falls, 6 N.E.2d 976, 132 Ohio St. 223, 7 O.O. 511.—Nuis 7.

Ohio 1907. Where a drain laid by property owners in a public street, under permission from the city, empties into a natural stream, and thereafter, without express license from the city, is used as a sewer to discharge sewage into the stream to the injury of a lower riparian owner, the drain is a “nuisance,” and the city is liable for negligence in not abating it.—City of Mansfield v. Brister, 81 N.E. 631, 5 Ohio Law Rep. 111, 76 Ohio St. 270, 10 L.R.A.N.S. 806, 118 Am.St.Rep. 852, 10 Am.Ann.Cas. 767.

Ohio 1889. The term “nuisance,” derived from the French word “nuire,” to do hurt or annoy, is applied in the English law indiscriminately to infringements upon the enjoyment of proprietary and personal rights (citing Add. Torts, 155, “Nuisance”); something noxious or offensive; anything not authorized by law which maketh hurt, inconvenience, or damage.—Village of Cardington v. Fredericks’ Adm’r, 21 N.E. 766, 46 Ohio St. 442, 21 W.L.B. 395.

Ohio App. 1 Dist. 1999. Under the common law, a “nuisance” is generally recognized as something that is either obnoxious or offensive to others.—Hunsche v. Loveland, 729 N.E.2d 393, 133 Ohio App.3d 535.—Nuis 3(1).

Ohio App. 1 Dist. 1998. Danger posed by unpainted curb in parking garage located adjacent to municipal baseball stadium was not a “nuisance,” for purposes of Political Subdivision Tort Liability Act, and thus, tort claims asserted against city and county by pedestrian who was injured in fall caused by curb did not come within exception to general grant of immunity under Political Subdivision Tort Liability Act for injury caused by a nuisance in public road, highway, or sidewalk; while unpainted, curb was not in defective condition, and had a purpose, as it directed flow of vehicles. R.C. § 2744.02(B)(3) (1995).—Hacker v. Cincinnati, 721 N.E.2d 416, 130 Ohio App.3d 764, appeal not allowed 709 N.E.2d 173, 85 Ohio St.3d 1467.—Counties 143; Mun Corp 848.

Ohio App. 1 Dist. 1998. A “nuisance” in public road, highway, or sidewalk, for purposes of exception to general grant of immunity under Political Subdivision Tort Liability Act for injury caused by such a nuisance, is generally recognized as something that is either obnoxious or offensive to others. R.C. § 2744.02(B)(3) (1995).—Hacker v. Cincinnati, 721 N.E.2d 416, 130 Ohio App.3d 764, appeal not allowed 709 N.E.2d 173, 85 Ohio St.3d 1467.—Mun Corp 766.

Ohio App. 1 Dist. 1992. “Nuisance” is distinct civil wrong, consisting of anything wrongfully done or permitted which interferes with or annoys another

in enjoyment of his legal rights.—State ex rel. Schoener v. Hamilton Cty. Bd. of Commsrs., 619 N.E.2d 2, 84 Ohio App.3d 794, cause dismissed 613 N.E.2d 648, 66 Ohio St.3d 1502.—Nuis 1.

Ohio App. 1 Dist. 1941. In action by infant for injuries resulting from collision, with barrier placed on sloping street set aside by city for coasting, whether the city was guilty of maintaining a “nuisance” by reason of its failure to provide means whereby sleds could be stopped before colliding with barrier extending to not more than 5 feet from each curb, was for jury.—Devine v. City of Cincinnati, 40 N.E.2d 176, 68 Ohio App. 241, 22 O.O. 393.—Mun Corp 821(12.1).

Ohio App. 1 Dist. 1939. A petition alleging that defendant, while temperature was below freezing, sprinkled sidewalk knowing that water would form ice and that defendant failed to take precautions to prevent sidewalk from becoming dangerous to users, alleged an actionable “nuisance” placed in street by defendant and case should have been tried and submitted to jury as a nuisance case.—Marziale v. Wilson, 31 N.E.2d 480, 15 O.O. 321, 29 Ohio Law Abs. 637.—Mun Corp 816(8.1).

Ohio App. 1 Dist. 1938. A kerosene-burning machine used for heating asphalt standing on city street was not a “nuisance” in the public highway within statute requiring cities to keep streets in repair and free from nuisance, and hence street car conductor who was injured by explosion in machine when street car passed machine could not maintain action against city under statute. Gen.Code, § 3714.—Kohake v. City of Cincinnati, 18 N.E.2d 501, 59 Ohio App. 403, 11 O.O. 335, 26 Ohio Law Abs. 502.—Mun Corp 736.

Ohio App. 1 Dist. 1936. If a city street is reasonably safe for travel in the ordinary mode, there is no condition therein constituting a “nuisance,” since essence of nuisance is that it renders street unsafe for travel in ordinary mode, and use of street in violation of law is not use thereof in the “ordinary mode.” Gen.Code, § 3714.—Mossman v. City of Cincinnati, 34 N.E.2d 246, 10 O.O. 335, 26 Ohio Law Abs. 61.—Mun Corp 764(2).

Ohio App. 1 Dist. 1936. A municipality has a right to establish safety zone structures in a street, and such a structure is not a “nuisance” in itself, and can only become so by improper construction or by city negligently allowing a properly constructed one to fall into disrepair so as to make the street unsafe for travel in the ordinary mode. Gen.Code, § 3714.—Mossman v. City of Cincinnati, 34 N.E.2d 246, 10 O.O. 335, 26 Ohio Law Abs. 61.—Mun Corp 776.

Ohio App. 1 Dist. 1935. An insecure brick wall left standing after most of interior and roof of municipal building was destroyed by fire was not a “trespass” as to occupant of premises on abutting lot, but was a “nuisance” so that municipality was liable for damages sustained by occupant when wall fell, whether or not building was being used for governmental purposes at time wall fell.—Village of Lebanon v. Loop, 32 N.E.2d 458, 4 O.O. 480, 20 Ohio Law Abs. 302.—Mun Corp 736, 737.

Ohio App. 1 Dist. 1935. Two-inch steam pipe exposed in corner of poorly illuminated photographic studio dressing room constituted "nuisance" at time premises were let, rendering landlord liable for injuries sustained by 8 month old patron who fell against pipe.—R.K.O. Midwest Corp. v. Berling, 199 N.E. 604, 51 Ohio App. 85, 3 O.O. 293, 20 Ohio Law Abs. 45.—Land & Ten 170(1).

Ohio App. 2 Dist. 1996. Accumulated rainfall is generally not "nuisance" within meaning of exception to political subdivision's immunity arising out of failure to keep public roads free from nuisance. R.C. § 2744.02(B)(3).—Feitshans v. Darke County, Ohio, 686 N.E.2d 536, 116 Ohio App.3d 14.—Autos 262.

Ohio App. 2 Dist. 1952. Under statute providing that city council shall have care, supervision and control of public grounds, and shall cause them to be kept free from nuisance, power mower operated by city employee who was engaged in cutting grass at a city park was neither an absolute nor qualified "nuisance", and city could not be held liable under such statute for injuries inflicted when city employee lost control of mower. Gen.Code, § 3714.—Ballinger v. City of Dayton, 117 N.E.2d 469, 66 Ohio Law Abs. 388.—Mun Corp 736.

Ohio App. 2 Dist. 1941. The erection of an embankment on one's own land, whereby the surface water on adjoining land is prevented from flowing in its natural course, is a "nuisance" for which an action may be maintained without showing actual damage.—McCoy v. Rankin, 42 N.E.2d 234, 35 Ohio Law Abs. 621.—Waters 123.

Ohio App. 2 Dist. 1941. In guests' actions against a municipality for injuries sustained when automobile collided with a pole in a street, petitions alleging that collision occurred at night, that municipality permitted a private corporation to erect and maintain an unlighted pole in center of street within municipality, that pole was dark, and that there were no warning signs about it to indicate its presence, and that driver could not see pole because of such conditions, stated a cause of action for injuries sustained through maintenance of a "nuisance". Gen.Code, § 3714; §§ 6310-1, 12603 (repealed 1941. See §§ 6307-85, 6307-87, 6307-21).—Miller v. City of Dayton, 41 N.E.2d 728, 70 Ohio App. 173, 24 O.O. 507, 35 Ohio Law Abs. 505.—Autos 301(3).

Ohio App. 2 Dist. 1941. Evidence that vegetable refuse amounting to about 500 pounds twice a day and packing boxes from five grocery stores were hauled to tract of some four acres where the boxes were thrown into a huge pile and where the refuse was placed less than 100 feet from neighboring residences for feeding 51 hogs, that the refuse emitted noxious and disagreeable odors, and that sickness resulted among some of the neighbors, supported finding that a common-law "nuisance" existed.—Kuhn v. Wood, 36 N.E.2d 1006, 34 Ohio Law Abs. 265.—Nuis 33.

Ohio App. 3 Dist. 1960. To constitute "nuisance", either public or private, thing or act com-

plained of as constituting nuisance must either cause injury to property of another, obstruct reasonable use or enjoyment of his property, or cause physical discomfort to him.—State ex rel. Chalfin v. Glick, 177 N.E.2d 293, 113 Ohio App. 23, 17 O.O.2d 33, affirmed 175 N.E.2d 68, 172 Ohio St. 249, 15 O.O.2d 410.—Nuis 1, 59.

Ohio App. 3 Dist. 1938. A city, which in a public park exhibited fireworks containing sufficient explosive matter to kill a spectator, was guilty of maintaining a "nuisance" in violation of statute and was liable for spectator's death. Gen.Code, § 3714.—Harris v. City of Findlay, 18 N.E.2d 413, 59 Ohio App. 375, 13 O.O. 172, 27 Ohio Law Abs. 623.—Mun Corp 736.

Ohio App. 3 Dist. 1938. In action against city for death of spectator at fireworks display, instruction that the term "nuisance" may be defined as anything not authorized by law, which causes injury, that nuisance is to be distinguished from negligence, though the dividing line between the two may sometimes be obscure, and that nuisance does not rest on the degree of care used but on the injury done, regardless of the care used, was correct.—Harris v. City of Findlay, 18 N.E.2d 413, 59 Ohio App. 375, 13 O.O. 172, 27 Ohio Law Abs. 623.—Mun Corp 742(6).

Ohio App. 4 Dist. 1993. "Nuisance" describes two separate fields of tort liability that, through the accident of historical development, are called by the same name; "public nuisance" covers the invasion of public rights which are common to all members of the public and was historically criminal in nature, with recovery limited to those who could show particular harm of a kind different from that suffered by the general public; "private nuisance" covered the invasion of the private interest in the use and enjoyment of land and the action was required to be founded upon an interest in land.—Brown v. Scioto Cty. Bd. of Commrs., 622 N.E.2d 1153, 87 Ohio App.3d 704.—Nuis 1, 59.

Ohio App. 5 Dist. 1940. "Nuisance" is not synonymous with "negligence", and does not necessarily rest upon degree of care used, although nuisance frequently is the consequence of a negligent act.—Kremer v. City of Uhrichsville, 35 N.E.2d 973, 67 Ohio App. 61, 21 O.O. 91.—Nuis 7.

Ohio App. 5 Dist. 1940. A "nuisance" does not necessarily grow out of acts of negligence, but may result from skillfully directed efforts taken without due regard to rights of others.—Kremer v. City of Uhrichsville, 35 N.E.2d 973, 67 Ohio App. 61, 21 O.O. 91.—Nuis 7.

Ohio App. 5 Dist. 1931. Dust, noise, and vibration, when sufficient to work annoyance and discomfiture, and when actual rental earnings are lessened and impaired, constitutes "nuisance."—Graham & Wagner v. Ridge, 179 N.E. 693, 41 Ohio App. 288, 11 Ohio Law Abs. 518.—Nuis 3(3).

Ohio App. 6 Dist. 1996. Usually a "nuisance," for purposes of Political Subdivision Tort Liability Act, is limited to actual physical conditions affect-

ing structure of highway or actual physical conditions such as obstructions upon highway. R.C. § 2744.02(B)(3).—Fowler v. Williams Cty. Commrs., 682 N.E.2d 20, 113 Ohio App.3d 760, appeal not allowed 674 N.E.2d 376, 77 Ohio St.3d 1526.—High 192.

Ohio App. 6 Dist. 1943. An actionable “nuisance” is anything wrongfully done or permitted which injures or annoys another in enjoyment of his legal rights, but things which may be annoying and damaging, but for which no one is in fault, are not nuisances, though all ordinary consequences of nuisances may flow from them.—Ainslee v. City of Bellevue, 57 N.E.2d 279, 73 Ohio App. 577, 29 O.O. 196.—Nuis 3(1).

Ohio App. 6 Dist. 1943. A discus which had been lying about a municipal playground for several months and which struck and injured a child when thrown by patron of playground was not a “nuisance” within statute, requiring municipalities to keep their parks free from nuisance so as to make city liable for child’s injury. Gen.Code, § 3714.—Ainslee v. City of Bellevue, 57 N.E.2d 279, 73 Ohio App. 577, 29 O.O. 196.—Mun Corp 851.

Ohio App. 6 Dist. 1938. A city which erected and maintained abutments at right angles to street, for purpose of building a bridge across gully in the future, and which, in front of abutments, erected posts that could not be seen at night except from distance of a few feet, and which failed to place lights so as to warn travelers of existence of posts and abutments, was guilty of maintaining a “nuisance” so as to be liable to one who was injured when automobile in which she was riding collided with abutments.—Craig v. City of Toledo, 21 N.E.2d 1003, 60 Ohio App. 474, 14 O.O. 509.—Autos 279.

Ohio App. 7 Dist. 1981. Posting of incorrect clearance sign for bridge underpass was failure by county commissioners to exercise reasonable care in carrying out duty required of them by statute and Department of Transportation regulation incorporated in such statute, and was therefore “negligence,” not “nuisance.” R.C. § 4511.11.—Covent Ins. Co., Ltd. v. Carroll County Com’rs, 442 N.E.2d 486, 2 Ohio App.3d 410, 2 O.B.R. 486.—Autos 279.

Ohio App. 7 Dist. 1969. Paint markings on a highway designating a crosswalk are physical conditions existing “in or on a highway” and, in situation where subsequent city ordinance eliminates such crosswalk without also eliminating the crosswalk markings on the roadway, constitute a “nuisance”. R.C. §§ 723.01, 4511.01(KK) (3).—Dollar Sav. & Trust Co. v. City of Youngstown, 250 N.E.2d 883, 19 Ohio App.2d 225, 48 O.O.2d 359.—Mun Corp 736.

Ohio App. 7 Dist. 1945. A “nuisance” is wrongful invasion of legal right or interest.—Kercher v. City of Conneaut, 65 N.E.2d 272, 76 Ohio App. 491, 32 O.O. 233.—Nuis 1.

Ohio App. 7 Dist. 1945. The term “nuisance” comprehends wrongful invasion, not only of use and enjoyment of property, but also of personal legal

rights and privileges generally.—Kercher v. City of Conneaut, 65 N.E.2d 272, 76 Ohio App. 491, 32 O.O. 233.—Nuis 4.

Ohio App. 7 Dist. 1941. If blasting by city in park damaged building located near park to any material extent, and there was evidence to that effect in the record, jury in action by owners of building against city could properly find that a “nuisance” was maintained within the park by the city contrary to statute. Gen.Code, § 3714.—Crino v. City of Campbell, 41 N.E.2d 583, 68 Ohio App. 391, 23 O.O. 119.—Mun Corp 851.

Ohio App. 7 Dist. 1940. Municipalities could not be held liable for death of a pedestrian struck by a speeding motorist driving a poorly lighted automobile on the wrong side of the street just as pedestrian was deviating from the left side of street to avoid a pool of water, the center of which was the corporation line common to both municipalities, on the theory that pool was a “nuisance” growing out of joint negligence of the municipalities, where pedestrian was walking at such a distance from left curb that automobile would have struck him even if he had not deviated from his course, since the “proximate cause” of the accident was the act of the motorist and the pool was only a “remote cause” not contributing to the injury. Gen. Code, § 3714.—Shevetz v. City of Campbell, 44 N.E.2d 141, 69 Ohio App. 479, 24 O.O. 198.—Autos 282.

Ohio App. 7 Dist. 1940. The mere fact that plaintiff in describing defendant’s conduct alleged that defendant was negligent did not limit her action for injuries sustained in falling over a keg of sand in front of defendant’s store to an action for negligence, where plaintiff alleged that defendant placed and permitted an obstacle and obstruction on the sidewalk and street in front of its store in a dangerous and careless place and manner, since those allegations alleged facts constituting a “nuisance” within statute. Gen.Code, § 13421.—Pitzer v. Sears, Roebuck & Co., 31 N.E.2d 450, 66 Ohio App. 35, 19 O.O. 292.—Mun Corp 816(8.1).

Ohio App. 7 Dist. 1939. The terms “negligence” and “nuisance” are not synonymous but a nuisance may arise out of negligence.—Dzuracky v. City of Campbell, 29 N.E.2d 49, 64 Ohio App. 521, 18 O.O. 234.

Ohio App. 7 Dist. 1937. A municipality while acting in its governmental capacity incurs no liability in tort for common-law negligence, but its sole liability arises under statute requiring it to keep its streets open, in repair, and free from nuisance, the term “nuisance” not being synonymous with negligence. Gen.Code, § 3714.—Rudibaugh v. City of Niles, 11 N.E.2d 193, 56 Ohio App. 451, 9 O.O. 477, 25 Ohio Law Abs. 166.—Mun Corp 733(2), 736.

Ohio App. 7 Dist. 1936. The parking of a municipally owned truck by city employee so that truck obstructed view of pedestrian in crossing street did not constitute a “nuisance” within statute requiring cities to keep streets open and free from nuisance so as to entitle pedestrian to recover for injuries

received when struck by automobile when it swerved around truck. Gen.Code, § 3714.—Galluppi v. City of Youngstown, 9 N.E.2d 739, 55 Ohio App. 331, 9 O.O. 71, 24 Ohio Law Abs. 455.—Autos 160(2).

Ohio App. 8 Dist. 1978. A “nuisance” within meaning of statute, which provides that legislative authority of municipal corporation shall have the care of streets within the municipal corporation and shall cause them to be kept open, in repair and free from nuisance, must be the product of a condition of the street itself or of a defective condition thereof; a “defect” in the street refers to the actual physical conditions existing in or on the street itself and to the actual physical conditions upon and above the surface of the street. R.C. § 723.01.—Zupancic v. City of Cleveland, 389 N.E.2d 861, 58 Ohio App.2d 61, 12 O.O.3d 213.—Mun Corp 766.

Ohio App. 8 Dist. 1943. A municipal corporation's violation of statute, requiring such corporations to keep streets in repair and free from nuisance, sounds in nuisance and not negligence; a “nuisance” signifying anything that causes hurt, inconvenience, annoyance, or damage, and “negligence” being failure to exercise ordinary care, and the two terms not being synonymous. Gen.Code, § 3714.—Corbin v. City of Cleveland, 57 N.E.2d 427, 74 Ohio App. 199, 29 O.O. 333, 41 Ohio Law Abs. 289, affirmed 56 N.E.2d 214, 144 Ohio St. 32, 28 O.O. 562, 154 A.L.R. 874.—Mun Corp 755(1).

Ohio App. 8 Dist. 1936. Thin ice on municipal park pond caused by rising temperature was created by nature and did not constitute a “nuisance” so as to render city liable for death of children falling through ice. Gen.Code, § 3714.—City of Cleveland v. Walker, 3 N.E.2d 990, 52 Ohio App. 477, 6 O.O. 138, 21 Ohio Law Abs. 494.—Mun Corp 851.

Ohio App. 8 Dist. 1934. Construction of tunnel underneath street by union depot company acting under contract with municipality sanctioned by statute was not “nuisance” as regards abutting owner's right to recover for temporary inconvenience in easement in and to street. Gen.Code, §§ 3714, 9163.—Colonial Furniture Co. v. Cleveland Union Terminal Co., 191 N.E. 903, 47 Ohio App. 399, 40 Ohio Law Rep. 339, 16 Ohio Law Abs. 342, error dismissed 190 N.E. 578, 40 Ohio Law Rep. 646, 128 Ohio St. 123.—Mun Corp 668.

Ohio App. 9 Dist. 2001. A guardrail that is located off the road which does not affect normal traffic on that road is not within the statutory definition of “nuisance” under Political Subdivision Tort Liability Act. R.C. § 2744.02.—Rehm v. General Motors Corp., 757 N.E.2d 1172, 143 Ohio App.3d 226, dismissed, appeal not allowed 747 N.E.2d 833, 91 Ohio St.3d 1536.—Autos 278.

Ohio App. 9 Dist. 1997. Finding that lewd behavior occurred at motorcycle enthusiasts' swap meet sufficient to render event a “nuisance” was supported by evidence that attendees engaged in sex acts out in the open and that attendees walked around fully or partially naked throughout event. R.C. § 3767.01(C).—State ex rel. Montgomery v.

Pakrats Motorcycle Club, Inc., 693 N.E.2d 310, 118 Ohio App.3d 458.—Nuis 84.

Ohio App. 9 Dist. 1993. Three-foot retaining wall located eight to 12 feet from end of city concrete sidewalk did not render sidewalk unsafe for usual and ordinary modes of travel, and therefore did not constitute “nuisance,” within meaning of statutory immunity exception for municipality's failure to keep road, sidewalk or public ground open, in repair, and free from “nuisance.” R.C. §§ 723.01, 2744.02(B)(3).—Palko v. Elyria, 620 N.E.2d 232, 86 Ohio App.3d 211.—Mun Corp 785.

Ohio App. 9 Dist. 1964. Automobile parking lot for public school is not a “nuisance” per se, but it may become a “nuisance” by negligence in its maintenance.—Wayman v. Board of Ed. of Akron City School Dist., 216 N.E.2d 637, 6 Ohio App.2d 94, 35 O.O.2d 188, affirmed 215 N.E.2d 394, 5 Ohio St.2d 248, 34 O.O.2d 473.—Nuis 3(1).

Ohio App. 9 Dist. 1948. To constitute a “nuisance” smoke, fumes, gases, stench and smell must result in a material injury to the comfort of the owner of adjacent property and his family.—Kepler v. Industrial Disposal Co., 85 N.E.2d 308, 84 Ohio App. 80, 39 O.O. 111.—Nuis 3(4).

Ohio App. 9 Dist. 1948. Stench and smoke arising from burning of industrial waste by private disposal company and interfering sensibly with use and occupancy of surrounding property constituted actionable “nuisance” and could be enjoined.—Kepler v. Industrial Disposal Co., 85 N.E.2d 308, 84 Ohio App. 80, 39 O.O. 111.—Nuis 3(5), 19.

Ohio App. 9 Dist. 1947. “Nuisance”, in law, for the most part consists in so using one's property as to injure the land or some incorporeal right of one's neighbor.—Antonik v. Chamberlain, 78 N.E.2d 752, 81 Ohio App. 465, 37 O.O. 305.—Nuis 1.

Ohio App. 9 Dist. 1942. A “nuisance”, in its broadest sense, is that which annoys or gives trouble and vexation, that which is offensive or noxious; anything that works hurt, inconvenience or damage.—Boone v. City of Akron, 43 N.E.2d 315, 69 Ohio App. 95, 23 O.O. 505.—Nuis 1.

Ohio App. 9 Dist. 1942. The word “nuisance”, as used in statute giving municipalities special power to regulate use of streets and directing them to cause streets to be kept open, in repair, and free from nuisance, is confined to physical conditions of streets and highways which affect travel and their use for purposes for which they were designed, and does not include conditions created by others and in nowise by the acts of the municipality which are merely offensive to sight and smell. Gen.Code, § 3714.—Boone v. City of Akron, 43 N.E.2d 315, 69 Ohio App. 95, 23 O.O. 505.—Mun Corp 736.

Ohio App. 9 Dist. 1942. Municipality's failure to abate a condition caused by acts of a third person in discharging refuse from sinks and septic tanks into a drainage ditch and highway, which substances were carried by natural drainage to a culvert over plaintiffs' premises, causing them hurt, inconvenience and annoyance, did not render municipality liable under statute requiring municipalities to keep

streets and highways free from nuisance, even though municipality had actual knowledge of such condition, since the existing condition did not constitute a “nuisance” within meaning of statute. Gen. Code, § 3714.—Boone v. City of Akron, 43 N.E.2d 315, 69 Ohio App. 95, 23 O.O. 505.—Mun Corp 736.

Ohio App. 9 Dist. 1939. The statute imposing upon a municipal corporation the duty to keep its streets and public highways open, in repair and free from nuisance is a requirement that municipal corporations shall prevent existence of nuisances in highways and streets within their corporate limits, and when a municipal corporation allows a street to become so out of repair as to be dangerous a jury may be justified in finding that corporation maintains a “nuisance”, and an action to recover for injuries occasioned by such condition must be for damages arising from maintenance of a nuisance and not upon basis of common law negligence. Gen. Code § 3714.—Neale v. Village of Tallmadge, 35 N.E.2d 158, 33 Ohio Law Abs. 573.—Mun Corp 755(1).

Ohio App. 9 Dist. 1938. An unlighted pile of dirt left in street by city in constructing sewer was not a “nuisance” as to pedestrian who was struck by automobile driving alongside dirt, where proximate cause of accident was not pile of dirt, but negligence of motorist who struck pedestrian and negligence of oncoming motorist who failed to give first motorist sufficient space to pass.—Hindman v. City of Akron, 34 N.E.2d 583, 30 Ohio Law Abs. 27.—Autos 282.

Ohio App. 10 Dist. 1991. Junkyard that was not entirely enclosed by fence as required by city ordinances constituted a “nuisance.”—Grove City v. Weethee, 594 N.E.2d 63, 71 Ohio App.3d 405.—Nuis 65.

Ohio App. 11 Dist. 1991. Test as to amount of annoyance necessary to constitute “nuisance” is measured by degree of discomfort that person of ordinary sensibilities would experience; in essence, trial court must look at what persons of ordinary tastes and sensibilities would regard as inconvenience or interference materially affecting their physical comfort to degree which would constitute nuisance.—O’Neil v. Atwell, 598 N.E.2d 110, 73 Ohio App.3d 631, dismissed, jurisdictional motion overruled 579 N.E.2d 1392, 62 Ohio St.3d 1453.—Nuis 4.

Ohio App. 11 Dist. 1991. Deck that was newly constructed on condominium unit constituted “nuisance” to owners of contiguous unit, in light of its close proximity to their deck, its disproportionate size, and fact it blocked view from their deck; new deck infringed upon the only private outdoor space contiguous owners’ unit offered and was not shown to be warranted or reasonable.—O’Neil v. Atwell, 598 N.E.2d 110, 73 Ohio App.3d 631, dismissed, jurisdictional motion overruled 579 N.E.2d 1392, 62 Ohio St.3d 1453.—Nuis 3(1).

Ohio App. 12 Dist. 2001. County’s failure to warn about steep incline of culvert, place guardrail at that site, and remove high grass growing there

did not create a “nuisance” for which county could be held liable, under statute imposing liability for political subdivision’s failure to keep public roads free from nuisance, to pedestrian who fell into culvert while walking along side of road; culvert was not part of paved or traveled portion of road, and high grass did not render road unsafe for customary vehicular or pedestrian travel and did not cause injury to a person using road in expected and ordinary manner. R.C. § 2744.02(B)(3) (1996).—Neudecker v. Butler Cty. Engineer’s Office, 767 N.E.2d 776, 146 Ohio App.3d 614, 2001-Ohio-8663, appeal not allowed 764 N.E.2d 1036, 94 Ohio St.3d 1506.—High 198.

Ohio App. 12 Dist. 1996. To constitute “nuisance,” either public or private, thing or act complained of must either cause injury to property of another or obstruct reasonable use or enjoyment of property.—Crown Property Dev., Inc. v. Omega Oil Co., 681 N.E.2d 1343, 113 Ohio App.3d 647.—Nuis 1, 59.

Ohio App. 12 Dist. 1995. Object that obstructs driver’s visibility on public roadway may be considered “nuisance,” for purposes of statute requiring political subdivisions to keep roadways free of nuisance, only where that object is permanently in place and renders usual and ordinary course of travel on roadways unsafe; political subdivision must also have actual or constructive notice of nuisance before liability may be imposed. R.C. § 2744.02(B)(3).—Young v. Sardinia, 658 N.E.2d 41, 102 Ohio App.3d 797.—Autos 264, 273.

Ohio App. 12 Dist. 1995. Dump truck that was parked along edge of roadway in front of motorist’s residence three or four times per week for brief periods of time was not “permanent obstruction,” and thus, it was not “nuisance,” for purposes of statute requiring political subdivisions to keep roadways free from nuisance; thus, village was not liable for child’s death, which occurred when he chased ball in front of dump truck and out into street and was struck by auto that passed truck from behind. R.C. § 2744.02(B)(3).—Young v. Sardinia, 658 N.E.2d 41, 102 Ohio App.3d 797.—Autos 264, 266.

Ohio App. 12 Dist. 1987. Lessee’s sand and gravel operation did not constitute “nuisance” to adjacent residential neighbors, where residences had been built on land which was zoned for heavy industry; interest of those enjoying nonconforming use of their property would not be permitted to overcome interest of those whose use fit applicable zoning scheme.—American Aggregates Corp. v. Warren County Com’rs, 528 N.E.2d 1266, 39 Ohio App.3d 5.—Nuis 3(1).

Ohio Com. Pl. 1963. “Nuisance” literally means annoyance, and in its broadest sense is that which annoys or gives trouble or vexation; that which is offensive or noxious.—Shew v. Deremer, 203 N.E.2d 863, 2 Ohio Misc. 65, 31 O.O.2d 210.—Nuis 1.

Ohio Com. Pl. 1961. “Nuisance” is anything which annoys or gives trouble or vexation and which is offensive or obnoxious or works hurt,

inconvenience or damage to another.—Harden Chevrolet Co. v. Pickaway Grain Co., 194 N.E.2d 177, 27 O.O.2d 144, 92 Ohio Law Abs. 161.—Nuis 1.

Ohio Com.Pl. 1957. Operation of quarry in unzoned area used exclusively for agricultural purposes was not a "nuisance" even though slight vibrations, which caused no damage, were recognized in a few nearby farm houses.—Henn v. Universal Atlas Cement Co., 144 N.E.2d 917, 76 Ohio Law Abs. 439.—Nuis 3(5).

Ohio Ct.Cl. 2001. To constitute a "nuisance," the thing or act complained of must either cause injury to the property of another, obstruct the reasonable use or enjoyment of such property, or cause physical discomfort to such person.—Maluke v. Ohio Dept. of Transp., 760 N.E.2d 936, 115 Ohio Misc.2d 24.—Nuis 1.

Ohio Ct.Cl. 1997. "Nuisance" is a distinct civil wrong, consisting of anything wrongfully done or permitted that interferes with or annoys another in the enjoyment of his legal rights.—Bays v. Kent State Univ., 684 N.E.2d 1328, 86 Ohio Misc.2d 69.—Nuis 1.

Ohio Ct.Cl. 1992. To constitute "nuisance," thing or act complained of must either cause injury to property of another, obstruct reasonable use or enjoyment of such property, or cause physical discomfort to such person.—Shunkwiler v. Ohio Dept. of Transp., 643 N.E.2d 593, 66 Ohio Misc.2d 96.—Nuis 1.

Oklahoma 1985. "Nuisance" signifies in law such use of property or such course of conduct irrespective of actual trespass against others, or of malicious or actual criminal intent, which transgresses the just restrictions upon use or conduct which proximity of other persons or property imposes. 50 O.S.1981, § 1.—Briscoe v. Harper Oil Co., 702 P.2d 33, 1985 OK 43.—Nuis 1.

Oklahoma 1972. A "nuisance," public or private, arises where a person uses his own property in such a manner as to cause injury to the property of another.—Fairlawn Cemetery Ass'n v. First Presbyterian Church, U. S. A. of Oklahoma City, 496 P.2d 1185, 1972 OK 66.—Nuis 7, 67.

Oklahoma 1971. City's proposed drainage ditch which would be 10 feet deep and 45 feet wide at the bottom and 87 feet wide at the top and enclosed by a 4-foot chain link fence with a top rail would not constitute a "nuisance." 11 O.S.1971, §§ 282, 663; 50 O.S.1971, § 4.—City of Bartlesville v. Ambler, 499 P.2d 433, 1971 OK 154.—Mun Corp 736.

Oklahoma 1949. Whether noise accompanying an otherwise lawful business is a "nuisance" depends on nature of locality, on degree of intensity and disagreeableness of the sounds, on their times and frequency, and on their effect, not on peculiar and unusual individuals, but on ordinary, normal, reasonable persons of the locality.—Smilie v. Taft Stadium Bd. of Control, 205 P.2d 301, 201 Okla. 303, 1949 OK 42.—Nuis 3(3).

Oklahoma 1947. Allegations that roots of poplar trees on adjoining land had invaded plaintiff's premises, clogging sewer and necessitating removal therefrom, were extracting from plaintiff's land elements necessary to growth of lawn, flowers and shrubs, and constituted a continual annoyance to plaintiff and interfered with her in use and enjoyment of her premises were sufficient to show that invading roots constituted a "nuisance" as defined by statute providing for recovery of damages and abatement thereof. 50 Okl.St.Ann. § 1, subd. 4; §§ 6, 12, 13.—Mead v. Vincent, 187 P.2d 994, 199 Okla. 508, 1947 OK 295.—Nuis 32.

Oklahoma 1947. Everyone has the right to reasonable use and enjoyment of his own property but he may not so use it as to unreasonably deprive an adjacent owner of lawful use and enjoyment of his property, and one using his property in an unwarrantable manner, and thereby injuring the comfort, health, and safety of another, creates a "nuisance" which may be abated at suit of person so injured.—Roberts v. C.F. Adams & Son, 184 P.2d 634, 199 Okla. 369, 1947 OK 340.—Nuis 1.

Oklahoma 1945. "Nuisance" as ordinarily used in nuisance cases is the wrong committed.—City of Holdenville v. Kiser, 156 P.2d 363, 195 Okla. 189, 1945 OK 69.—Nuis 1.

Oklahoma 1943. The operation of any plan or scheme which is a lottery within statutory definition is a "nuisance" and may be enjoined. 21 Okl.St. Ann. §§ 1051, 1052.—State ex rel. Draper v. Lynch, 137 P.2d 949, 192 Okla. 497, 1943 OK 215.—Nuis 65, 80.

Oklahoma 1942. Where one operating filling station on his own premises was obliged under contract with oil company to deliver underground tanks to it or pay for them after abandonment of station and he removed tanks with assistance of company's agent and filled depression to within about a foot of surrounding surface, such company was not maintaining "nuisance", if any existed because of remaining depression, and owed no duty to protect person standing on adjacent sidewalk from injury by fall into such hole.—Phillips Petroleum Co. v. Stephenson, 129 P.2d 575, 191 Okla. 294, 1942 OK 317.—Neglig 1140; Nuis 10.

Oklahoma 1941. A barrier, such as wire stretched along driveway leading from street to sidewalk by owners of adjoining property to protect grass in parkway between sidewalk and curb line, is not per se a "public nuisance", and it is not a "nuisance", unless so constructed as to endanger travelers on street or sidewalk while using ways provided for travel, though it may involve some element of danger to travelers leaving paved portion of street or sidewalk and going on parkway.—City of Tulsa v. Ensign, 117 P.2d 1013, 189 Okla. 507, 1941 OK 290.—Mun Corp 808(2).

Oklahoma 1941. The gist of an action for injury by a dog known by its owner or keeper to be vicious is not negligence in the manner of the keeping of the dog, but the keeping of it, and the action is founded on the maintenance of a "nuisance".—Tidal Oil Co.

v. Forcum, 116 P.2d 572, 189 Okla. 268, 1941 OK 169.—Anim 68.

Oklahoma. 1941. When prosecution of a business, of itself lawful, in a strictly residential district, impairs the enjoyment of homes in neighborhood and infringes upon well-being, comfort, repose, and enjoyment of ordinary normal individual residing therein, carrying on of such business in such locality becomes a "nuisance" and may be enjoined.—Jordan v. Luippold, 114 P.2d 917, 189 Okla. 189, 1941 OK 143.—Nuis 4, 19.

Oklahoma. 1938. A hard rubber stop sign, which city had allegedly permitted to become obscure and invisible by reason of having been worn even with the surface of the street, was not a "nuisance" within meaning of statute, so as to render the city liable, regardless of whether maintenance of sign was a governmental function, for death of guest when driver of automobile, in which guest was riding, drove on into intersection with a "through" street without stopping and collided with an automobile on the "through" street. 50 Okl.St.Ann. § 1.—Kirk v. City of Muskogee, 83 P.2d 594, 183 Okla. 536, 1938 OK 526.—Autos 252.

Oklahoma. 1938. The keeping of Shetland ponies in a strictly residential district, which impairs the enjoyment of homes in the neighborhood and infringes on the well-being, comfort, repose, and enjoyment of the ordinary normal individuals residing therein, becomes enjoinable as a "nuisance." 50 Okl.St.Ann. § 1.—Simons v. Fahnestock, 78 P.2d 388, 182 Okla. 460, 1938 OK 264.—Nuis 19.

Oklahoma. 1937. A lodge of Veterans of Foreign Wars, not being normally a "nuisance," landlord letting hall in building constructed on two separately owned lots to such lodge could not be held liable to owner of other lot on which building was located for alleged nuisance, though members of lodge may have so conducted themselves afterwards as to become nuisance.—Spellman v. Sherry, 72 P.2d 793, 181 Okla. 174, 1937 OK 475.—Land & Ten 170(1).

Oklahoma. 1937. A plumbing or electric shop is not ordinarily a "nuisance," and, unless so, landlord is not liable for acts of his tenants.—Spellman v. Sherry, 72 P.2d 793, 181 Okla. 174, 1937 OK 475.—Land & Ten 170(1).

Oklahoma. 1935. Filling station constructed, on triangular tract in center of intersection resulting from rounding of corners at intersection, so as to obstruct view of travelers constituted "nuisance" which could be abated. 50 Okl.St.Ann. §§ 1, 2, 11.—State ex rel. King v. McCurdy, 43 P.2d 124, 171 Okla. 445, 1935 OK 412.—Autos 395.

Oklahoma. 1933. At common law, any contracting or narrowing of the highway is a "nuisance."—State ex rel. King v. Friar, 25 P.2d 620, 165 Okla. 145, 1933 OK 501.

Oklahoma. 1928. A "nuisance" does not result where there is a mere trifling annoyance, inconvenience, or discomfort to one with too fastidious or refined tastes, but exists where noxious odors or other conditions are a substantial annoyance or physical discomfort to an ordinary person, or an injury to his

house or property, although they do not actually produce disease, and an undertaking establishment, especially when conducted in an exclusive residential district, may be or become a nuisance.—Jordan v. Nesmith, 269 P. 1096, 132 Okla. 226, 1928 OK 99.

Oklahoma. 1926. Gasoline filling station is not "nuisance per se" and whether it is "nuisance" depends on its surroundings, management, or other circumstances.—McPherson v. First Presbyterian Church of Woodward, 248 P. 561, 120 Okla. 40, 1926 OK 214, 51 A.L.R. 1215.—Autos 395.

Oklahoma. 1926. One using property in unwarrantable manner, injuring comfort, health, and safety of another, creates "nuisance," which may be enjoined.—McPherson v. First Presbyterian Church of Woodward, 248 P. 561, 120 Okla. 40, 1926 OK 214, 51 A.L.R. 1215.—Nuis 5.

Oklahoma. 1925. "Nuisance" is anything wrongfully done to hurt or annoy of lands, tenements, or hereditaments of another, and may be anything calculated to interfere with comfortable enjoyment of one's house, as smoke, noise, or bad odors, even when not injurious to health.—City of Tecumseh v. Deister, 239 P. 582, 112 Okla. 3, 1925 OK 661.—Nuis 1.

Oklahoma. 1920. A desiccating plant that corrupts the air by noisome smells and noxious odors so as to interfere with the ordinary comforts of existence is a "nuisance" within Rev.Laws 1910, §§ 4250-4252, 50 Okl.St.Ann. §§ 1-3, where the injury is a real and substantial annoyance or physical discomfort or an injury to health or property.—Kenyon v. Edmundson, 193 P. 739, 80 Okla. 3, 1920 OK 351.—Nuis 3(5).

Oklahoma. 1917. Under article 1 of chapter 51, Rev. Laws 1910, 50 Okl.St.Ann. § 1, a "nuisance" may consist of an act which unlawfully interferes with, obstructs, or tends to obstruct any public park, square, street, or highway.—Duncan Elec. & Ice Co. v. City of Duncan, 166 P. 1048, 64 Okla. 211, 1917 OK 398.

Oklahoma. 1916. Though every one has right to reasonable use of his property, use in unwarrantable manner injuring comfort, health, and safety of another creates "nuisance" which may be abated at suit of person injured.—Bixby v. Cravens, 156 P. 1184, 57 Okla. 119, 1916 OK 406, L.R.A. 1916E, 871.—Nuis 3(1).

Oklahoma. 1910. Comp.Laws 1909, § 4751, 50 Okl.St.Ann. § 1, defines a "nuisance" to consist in unlawfully doing an act or omitting to perform a duty, which act or omission, among other things, "unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake, or navigable river, bay, stream, canal, or basin, or any public park, square, street, or highway."—McKay v. City of Enid, 109 P. 520, 26 Okla. 275, 30 L.R.A.N.S. 1021, 1910 OK 143.

Oklahoma. 1940. A "nuisance" is such use of property or course of conduct as transgresses just restrictions imposed thereon by proximity of other persons or property in civilized communities, irre-

spective of actual trespass against others or malicious or actual criminal intent. 50 Okl.St.Ann. § 1.—Hummel v. State, 99 P.2d 913, 69 Okla.Crim. 38.—Nuis 2.

Okla.Crim.App. 1940. A “nuisance” is a wrong arising from an owner’s unreasonable, unwarranted, or unlawful use of property, working obstruction or injury to the right of another or the public, and producing such material annoyance, inconvenience, and discomfort that law will presume resulting damages. 50 Okl.St.Ann. § 1.—Hummel v. State, 99 P.2d 913, 69 Okla.Crim. 38.—Nuis 3(1), 62.

Okla.Crim.App. 1940. Under the statute defining a “nuisance,” and by common law, anything which annoys, injures, or endangers the comfort, repose, health, or safety of others, or in any way renders them insecure in life or in the use of property, is a “nuisance.” 50 Okl.St.Ann. § 1.—Hummel v. State, 99 P.2d 913, 69 Okla.Crim. 38.—Nuis 3(1).

Or. 1976. Actionable interference with possession of land constitutes a “nuisance.”—Smejkal v. Empire Lite-Rock, Inc., 547 P.2d 1363, 274 Or. 571.—Nuis 1.

Or. 1975. “Nuisance” is invasion of plaintiff’s interest in reasonable use and enjoyment of his land; that invasion can be caused by defendant’s conduct which is either intentional, negligent, reckless or ultrahazardous.—Phillips Ranch, Inc. v. Banata, 543 P.2d 1035, 273 Or. 784.—Nuis 1.

Or. 1975. A “nuisance” refers to the invasion of an interest in the use and enjoyment of one’s land.—Jacobson v. Crown Zellerbach Corp., 539 P.2d 641, 273 Or. 15.—Nuis 1.

Or. 1971. “Nuisance” refers to the interest invaded and not to the type of conduct which subjects the actor to liability; liability for the infliction of a nuisance may arise from an intentional, negligent or reckless act or from the operation of an abnormally dangerous activity.—Raymond v. Southern Pac. Co., 488 P.2d 460, 259 Or. 629.—Nuis 1.

Or. 1968. Permitting jury to consider intrusion of fumes, gases, and odors from defendant’s pulp and paper plant onto residential property as “trespass” was not error on theory that intrusion constituted “nuisance.”—Davis v. Georgia-Pacific Corp., 445 P.2d 481, 251 Or. 239.—Tresp 10.

Or. 1959. An actionable invasion of a possessor’s interest in the use and enjoyment of his land is a “nuisance”.—Martin v. Reynolds Metals Co., 342 P.2d 790, 221 Or. 86, certiorari denied 80 S.Ct. 672, 362 U.S. 918, 4 L.Ed.2d 739.—Nuis 1.

Or. 1953. A “nuisance” may arise from creation or maintenance of a condition having a natural tendency to cause danger and inflict injury, or from use of an intrinsically dangerous agency, the necessary and obvious effect of which is to cause harm.—Richardson v. Murphy, 259 P.2d 116, 198 Or. 640.—Nuis 1.

Or. 1953. Where city installed trash dump on timber land, and city’s street commissioner, who had sole charge of dump, deposited no garbage or

inflammable material in dump, but third persons did deposit inflammable material in dump, and evidence supported view that a fire would probably result at the dump and spread to city’s timber and to timber land of others, maintenance of the dump constituted a “nuisance” which would be enjoined. ORS 477.032, 477.072.—Richardson v. Murphy, 259 P.2d 116, 198 Or. 640.—Mun Corp 742(1).

Or. 1948. The casting of light of about intensity of moonlight 832 feet onto screen of drive-in open air moving picture theater outside limits of city by corporation operating a night horse race track where there were numerous floodlights, so as to interfere with proper showing of moving pictures, did not constitute actionable “nuisance”, where both theater and track were constructed about same time.—Amphitheaters, Inc. v. Portland Meadows, 198 P.2d 847, 184 Or. 336, 5 A.L.R.2d 690.—Nuis 3(9).

Or. 1946. The location of a meat processing plant or a slaughterhouse so near to private dwelling houses as to interfere with vested rights of owners thereof constitutes a “nuisance” that may be enjoined by the court.—Kramer v. Sweet, 169 P.2d 892, 179 Or. 324.—Nuis 19.

Or. 1943. A resolution by city council ordering abatement as nuisances of two concrete apron approaches to filling station was in effect an “ordinance” within statute providing that anything done or existing within limits of any city or town, which is or may be declared by law or by ordinance to be a nuisance, shall be a “nuisance”. ORS 221.915.—McGowan v. City of Burns, 137 P.2d 994, 172 Or. 63.—Autos 395; Nuis 60.

Or. 1943. In the application of the ancient definition of “nuisance” as that which worketh hurt, the decisions declare that any obstruction in a street, placed there without authority from the proper public body, constitutes a “public nuisance” and that any fixed permanent object built into a public thoroughfare without proper authorization, and interfering with the function of such public thoroughfare is a “public nuisance per se”.—McGowan v. City of Burns, 137 P.2d 994, 172 Or. 63.—Mun Corp 692.

Or. 1943. Upon improving a street so as to make it safe for travel, the public is entitled to have it remain in that condition, and any object placed in the street without public authority is a “nuisance” if it obstructs the street or renders travel upon it dangerous, irrespective of whether the object is merely a nuisance or a nuisance per se.—McGowan v. City of Burns, 137 P.2d 994, 172 Or. 63.—Mun Corp 692.

Or. 1943. The essential characteristic of a “nuisance” is that it imperils travel.—McGowan v. City of Burns, 137 P.2d 994, 172 Or. 63.—Mun Corp 692.

Or. 1940. As respects liability of lessor of store premises to store patron who fell through open trapdoor and down stairway unprotected by handrails or stair railing extending above floor level, maintenance of such condition, which existed on

premises both at time lease was given and after repairs by lessor following fire damage, was not a "nuisance" or any evidence of negligence, since there was nothing inherently dangerous about the "trapdoor," the only danger being in its use, over which lessor had no control.—*Staples v. Senders*, 101 P.2d 232, 164 Or. 244.—*Land & Ten* 167(8), 170(1).

Or. 1938. A trap door, guarded by a gate, which was located at one end of a pharmacy in a poorly lighted inclosure over a basement stairway, was not constructed or maintained in the manner of a "nuisance" so as to render the lessor of the building liable to an employee of the lessee when the employee fell through the open trap door.—*Whisler v. U.S. Nat. Bank of Portland*, 82 P.2d 1079, 160 Or. 10.—*Land & Ten* 170(2); Nuis 3(1).

Or. 1937. A dangerous instrumentality is a "nuisance" when its use is enjoined upon pupils in the course of their instruction in school.—*Ward v. School Dist. No. 18 of Tillamook County*, 73 P.2d 379, 157 Or. 500.—Schools 89.10.

Or. 1936. Bicyclist who was struck by overtaking automobile while riding on highway at twilight without lights held not a "trespasser" or a "nuisance," and was precluded from recovery against motorist who struck him only if his own negligence contributed to his injury. Laws 1931, pp. 652, 654, § 58(a, f), ORS 483.402 et seq.—*Landis v. Wick*, 57 P.2d 759, 154 Or. 199, rehearing denied 59 P.2d 403, 154 Or. 199.—Autos 226(2).

Or. 1932. Operation of scheme whereby fair association solicited contributions using sum obtained to offer prizes in horse races, discharge expenses, and create fund for distribution among contributors selecting winning horses constituted "nuisance" prohibited by statute. ORS 161.310.—*Multnomah County Fair Ass'n v. Langley*, 13 P.2d 354, 140 Or. 172.—Nuis 61.

Or. 1907. The maintenance of a place for selling for gain pools upon horses at an exhibition trial of their speed on a race track and the selling of the pools is punishable as a "nuisance" at common law and under B. & C. Comp. § 1930, providing for the punishment of any person who willfully or wrongfully commits any act which grossly disturbs the public peace or health, or which openly outrages the public decency and is injurious to the public morals.—*State v. Ayers*, 88 P. 653, 49 Or. 61, 10 L.R.A.N.S. 992, 124 Am.St.Rep. 1036.

Or. 1905. A pool room on one of the principal thoroughfares in the city, in which persons daily congregate to bet upon horse races reported to the proprietor by telegraph, is a gaming house, punishable as a "nuisance," at common law and under the statute providing for the punishment of any person who willfully and wrongfully commits any act which grossly disturbs the public peace or health, or which openly outrages the public decency, and is injurious to the public morals.—*State v. Nease*, 80 P. 897, 46 Or. 433.

Or.App. 1979. "Nuisance" refers to interest invaded and not to any type of culpable conduct.—

*Mikan v. Valley Pub., Inc.*, 589 P.2d 1201, 38 Or.App. 287.—Nuis 1.

Or.App. 1975. "Nuisance" refers to the interference with an interest or right of one party by some action on part of another party.—*Stroda v. State, By and Through State Highway Commission*, 539 P.2d 1147, 22 Or.App. 403.—Nuis 1.

Pa. 1959. A fair test as to whether a business lawful in itself, or a particular use of property, constitutes a "nuisance", is the reasonableness or unreasonableness of conducting the business or making the use of the property complained of in particular locality and in manner and under circumstances of the case.—*Reid v. Brodsky*, 156 A.2d 334, 397 Pa. 463.—Nuis 3(2).

Pa. 1955. The term "nuisance" applies to that class of wrongs which arise from unreasonable, unwarrantable, or unlawful use by person of his own property, real or personal, or from his own improper, indecent, or unlawful personal conduct and the producing of such material annoyance, inconvenience, discomfort or hurt as law will presume consequent damage.—*Anderson v. City of Philadelphia*, 112 A.2d 92, 380 Pa. 528.—Nuis 1.

Pa. 1951. Noise which constitutes an annoyance to a person of ordinary sensibilities to sound, so as to materially interfere with the ordinary comforts of life and to impair the reasonable enjoyment of his habitation to him, is a "nuisance".—*Firth v. Scherzberg*, 77 A.2d 443, 366 Pa. 443.—Nuis 3(3).

Pa. 1949. "Nuisance" and "negligence" are frequently closely related, nuisance presupposing negligence when omission to remove the nuisance after notice constitutes negligence.—*Reedy v. City of Pittsburgh*, 69 A.2d 93, 363 Pa. 365.—Nuis 7.

Pa. 1949. A mere annoyance or disagreeable intrusion does not constitute a "nuisance."—*Young v. St. Martin's Church*, 64 A.2d 814, 361 Pa. 505.—Nuis 1.

Pa. 1949. Mere fact of annoyance to dwellers in vicinity from use of property for other than residential purposes does not establish existence of a "nuisance" and is not of itself a sufficient basis for an injunction against the particular use from which alleged annoyance arises.—*Molony v. Pounds*, 64 A.2d 802, 361 Pa. 498.—Nuis 4, 23(1).

Pa. 1949. Evidence did not warrant that portion of decree enjoining defendants' operation of their restaurant between 1 a. m. and 6 a. m. as a "nuisance", where restaurant was located in a partly residential and partly commercial district, and only complaint related to noises occasionally made by people before entering or after leaving the restaurant.—*Molony v. Pounds*, 64 A.2d 802, 361 Pa. 498.—Nuis 33.

Pa. 1943. Annoyance from use of property for other than residential purposes does not establish existence of "nuisance" and is not sufficient basis for injunction.—*Essick v. Shillam*, 32 A.2d 416, 347 Pa. 373, 146 A.L.R. 1399.—Nuis 4.

Pa. 1943. That proposed super-market in residential district would attract numbers of motorists

did not, in itself, entitle nearby residents to injunction on ground that market would constitute a "nuisance".—*Essick v. Shillam*, 32 A.2d 416, 347 Pa. 373, 146 A.L.R. 1399.—Nuis 3(5).

Pa. 1943. The erection and operation of a supermarket, with parking lot for patrons, in residential district would not be enjoined on ground that market would be a "nuisance", where market would operate only on week days and would close at 6 p. m. daily except on Friday and Saturday, when it would be open until 9 p. m.—*Essick v. Shillam*, 32 A.2d 416, 347 Pa. 373, 146 A.L.R. 1399.—Nuis 3(5).

Pa. 1943. A fair test as to whether a business lawful in itself, or a particular use of property, constitutes a "nuisance", is the reasonableness or unreasonableness of conducting the business or making the use of the property complained of in the particular locality and in the manner and under the circumstances of the case.—*Hannum v. Gruber*, 31 A.2d 99, 346 Pa. 417.—Nuis 3(2).

Pa. 1943. An open-air, sound-equipped motion picture theater which was operated during summer months and spring from 8:30 o'clock each evening until as late sometimes as 1:30 in the morning and in such a manner as to require closing of windows on hot summer nights by residents in vicinity and leaving of their homes in order to escape from intolerable noises justified decree restraining operation of theater as a "nuisance".—*Anderson v. Guerrein Sky-Way Amusement Co.*, 29 A.2d 682, 346 Pa. 80, 144 A.L.R. 1258.—Nuis 3(9), 19.

Pa. 1942. Where operation of concrete block-manufacturing establishment in neighborhood otherwise purely residential, caused loud clanking noise, vibration which caused damage to homes and disturbed residents in their sleep and prevented peaceful and comfortable enjoyment of dwellings, the granting of permanent injunction on ground that the operation of the plant constituted a "nuisance" was justified.—*Borough of McKees Rocks v. Rennekamp Supply Co.*, 25 A.2d 710, 344 Pa. 443.—Nuis 3(5).

Pa. 1942. A defective sidewalk resulting in injury to pedestrian constituted a "nuisance".—*Knick-erbocker v. City of Scranton*, 25 A.2d 152, 344 Pa. 317.—Mun Corp 755(1).

Pa. 1941. Shade trees in city streets are regarded with favor, and do not constitute a "nuisance" unless they are an actual obstruction to travel along the street or highway.—*Shuck v. Borough of Ligonier*, 22 A.2d 735, 343 Pa. 265.—Mun Corp 678.

Pa. 1941. The term "nuisance" signifies such a use of property or such a course of conduct as, irrespective of actual trespass against others or of malicious or actual criminal intent, transgresses the just restriction upon use or conduct which the proximity of other persons or property in civilized communities imposes upon what would otherwise be rightful freedom.—*Kramer v. Pittsburgh Coal Co.*, 19 A.2d 362, 341 Pa. 379.—Nuis 1.

Pa. 1941. The term "nuisance" is applied to that class of wrongs that arise from the unreasonable, unwarrantable or unlawful use by a person of

his own property real or personal or his own improper, indecent or unlawful personal conduct working an obstruction or injury to a right of another or of the public and producing such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage.—*Kramer v. Pittsburgh Coal Co.*, 19 A.2d 362, 341 Pa. 379.—Nuis 1.

Pa. 1941. The distinction between "trespass" and "nuisance" is that the former is a "direct infringement" of one's right of property, whereas in the latter the infringement is the result of an act which is not wrongful in itself but only in the consequences which may flow from it.—*Kramer v. Pittsburgh Coal Co.*, 19 A.2d 362, 341 Pa. 379.—Nuis 1; Tresp 1.

Pa. 1941. Coasting by children on a street not extensively used by public, if not expressly prohibited by ordinance, is not necessarily a "nuisance", or "negligence per se".—*Smith v. Pachter*, 19 A.2d 85, 342 Pa. 21.—Mun Corp 706(7).

Pa. 1940. When a telegraph or an electric light pole is erected in a highway with consent of the proper municipal authorities, it is not *per se* a "nuisance".—*Nelson v. Duquesne Light Co.*, 12 A.2d 299, 338 Pa. 37, 128 A.L.R. 1257.—Electricity 9(2); Mun Corp 821(8); Tel 77.1.

Pa. 1940. Where tenant expressly agreed to take premises in obviously ruinous condition "as is" and acquired entire possession and control of premises, liability could not be imposed on landlord for death of subtenant's guest, who was killed when building collapsed, on theory that the letting of building in such a dilapidated state amounted to a "nuisance," and that guest should be regarded as a third person or stranger to the premises, since court could not ignore fact that deceased was guest of subtenant.—*Bouy v. Fidelity-Philadelphia Trust Co.*, 12 A.2d 7, 338 Pa. 5.—Land & Ten 170(1).

Pa. 1940. The word "nuisance" implies the transmission of the effects beyond the boundaries of the land where the objectionable condition exists.—*Bouy v. Fidelity-Philadelphia Trust Co.*, 12 A.2d 7, 338 Pa. 5.—Nuis 4.

Pa. 1937. Liability of landowner under doctrine of "condition amounting to a nuisance" is confined to liability to third persons or strangers to the premises, those who are either the owners or occupants of nearby property, persons temporarily on such property, or persons on a neighboring highway or other public place, and does not apply as between landlord and tenant. "Nuisance" implies the transmission of the effect beyond the boundaries of the land on which the objectionable condition exists.—*Harris v. Lewistown Trust Co.*, 191 A. 34, 326 Pa. 145, 110 A.L.R. 749.

Pa. 1937. Public gasoline filling station, while not a "nuisance *per se*," becomes a "nuisance" if conducted in residential neighborhood, from mere fact of operation.—*Thomas v. Dougherty*, 190 A. 886, 325 Pa. 525.—Autos 395.

Pa. 1932. Auditorium in residence locality held not "nuisance," even if attracting crowds and caus-

ing traffic congestion.—*Sheets v. Armstrong*, 161 A. 359, 307 Pa. 385.—Nuis 3(1).

Pa. 1931. Operation of gasoline filling station in purely residential district would constitute “nuisance,” regardless of zoning ordinance.—Appeal of Perrin, 156 A. 305, 305 Pa. 42, 79 A.L.R. 912.—Autos 395.

Pa. 1927. Private garage in residential neighborhood, consisting of two buildings of 10 stalls each, separated by 14 1/2-foot driveway, held “nuisance.” Private garage in residential neighborhood, consisting of two one-story buildings of 10 stalls each, facing each other, with 14 1/2-foot driveway between, held “nuisance,” in view of noise, danger to pedestrians, congestion of traffic, repairing in street, fumes, and depreciated property values.—*George v. Goodovich*, 135 A. 719, 288 Pa. 48, 50 A.L.R. 105.—Nuis 3(11).

Pa. 1927. What constitutes “nuisance” depends on nature and result of acts. Question as to what constitutes “nuisance” depends on nature and result of acts, and not on means by which produced or particular description applied to them.—*George v. Goodovich*, 135 A. 719, 288 Pa. 48, 50 A.L.R. 105.—Nuis 1.

Pa. 1927. What constitutes “nuisance” depends on nature and result of acts.—*George v. Goodovich*, 135 A. 719, 288 Pa. 48, 50 A.L.R. 105.—Nuis 1.

Pa. 1927. Private garage in residential neighborhood, consisting of two buildings of 10 stalls each, separated by 14½-foot driveway, held “nuisance.”—*George v. Goodovich*, 135 A. 719, 288 Pa. 48, 50 A.L.R. 105.—Nuis 3(11).

Pa. 1906. Anything which causes hurt or damage to the lands or tenements of another, or interferes with the reasonable employment of the same, is a “nuisance.” In an action against a railroad company, where the complaint alleges that plaintiff's land was injured by the negligent flow of acids from the tower house, and the testimony shows that defendant's employees constantly poured the contents of vessels containing acids on plaintiff's land, and that such acts had been done within six years before bringing suit, it is error to enter a nonsuit.—*Stokes v. Pennsylvania R. Co.*, 63 A. 1028, 214 Pa. 415.

Pa.Super. 1953. Term “nuisance” is applied to that class of wrongs which arises from unreasonable, unwarranted, or unlawful use by a person of his own realty or personality, producing such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage.—*Waschak v. Moffat*, 96 A.2d 163, 173 Pa.Super. 209, reversed 109 A.2d 310, 379 Pa. 441, 54 A.L.R.2d 748.—Nuis 1.

Pa.Super. 1953. The distinction between “trespass” and “nuisance” is that the former is a direct infringement of one's right of property, whereas in the latter the infringement is the result of an act which is not wrongful in itself but only in the consequences which may flow from it.—*Waschak v. Moffat*, 96 A.2d 163, 173 Pa.Super. 209, reversed

109 A.2d 310, 379 Pa. 441, 54 A.L.R.2d 748.—Nuis 1; Tresp 1.

Pa.Super. 1953. A fair test as to whether a business lawful in itself, or a particular use of property, constitutes a “nuisance”, is the reasonableness or unreasonableness of conducting the business or making the use of the property complained of in the particular locality and in the manner and under the circumstances of the case.—*Waschak v. Moffat*, 96 A.2d 163, 173 Pa.Super. 209, reversed 109 A.2d 310, 379 Pa. 441, 54 A.L.R.2d 748.—Nuis 3(2).

Pa.Super. 1953. The term “nuisance” signifies such a use of property or such a course of conduct as, irrespective of actual trespass against others or of malicious or actual criminal intent, transgresses the just restriction upon use or conduct which the proximity of other persons or property in civilized communities imposes upon what would otherwise be rightful freedom.—*Waschak v. Moffat*, 96 A.2d 163, 173 Pa.Super. 209, reversed 109 A.2d 310, 379 Pa. 441, 54 A.L.R.2d 748.—Nuis 1.

Pa.Super. 1937. Reconstruction of drainage on side of highway by substitution of terra cotta pipe with level surface for deep open gutter by abutting property owners was not enjoined as “nuisance” or “continuing trespass.”—*Township of Industry v. Lee*, 193 A. 74, 127 Pa.Super. 469.—High 120(3).

Pa.Cmwlt. 1974. “Nuisance” is such use of property or such course of conduct as, irrespective of actual trespass against others or of malicious or actual criminal intent, transgresses the just restrictions on use or conduct which the proximity of other persons or property in civilized communities imposes on what would otherwise be rightful freedom.—*Groff v. Borough of Sellersville*, 314 A.2d 328, 12 Pa.Cmwlt. 315.—Nuis 1.

R.I. 1974. Noise in and of itself can be a “nuisance” if it unreasonably interferes with a person's use and enjoyment of his property; the time when the noise is being made should be taken into account.—*DeNucci v. Pezza*, 329 A.2d 807, 114 R.I. 123.—Nuis 3(3).

R.I. 1958. A “nuisance” is an injury which results from an unreasonable or unlawful act.—*Hood v. Slefkis*, 143 A.2d 683, 88 R.I. 178, reargument granted in part 145 A.2d 549, 88 R.I. 178, opinion adhered to on reargument *Winsten v. Slefkis*, 150 A.2d 648, 88 R.I. 178.—Nuis 1.

R.I. 1937. Where a strip of land which had been deeded to city for highway purposes had never been accepted as such in accord with statute and had not been graded or improved and contained ruts, stones, and sand, although curb on street which intersected such strip had been cut and indented at such intersection, condition of strip did not constitute “nuisance” so as to render city liable for injuries sustained by plaintiff when deep ruts and stones caused plaintiff's automobile to strike a parked automobile, since conditions were from natural causes for which city was not responsible. Gen.Laws 1923, c. 95, § 25.—*O'Brien v. Fitzpatrick*, 195 A. 793, 59 R.I. 437.—Autos 258.

R.I. 1936. If city had constructive knowledge that metal beading on city hall had been in insecure position for many years, pedestrian struck by beading while using sidewalk would be entitled to recover from city on theory that defective condition of city hall was a "nuisance."—Gibbons v. Fitzpatrick, 183 A. 642, 56 R.I. 39.—Mun Corp 780.

R.I. 1934. Use of word "negligent" did not convert action for damages from nuisance of smoke and soot into one of negligence, where declaration taken as a whole complained, not of cause, but of effect which was produced by defendant in violating his duty to plaintiff, since negligence is not gist of action for "nuisance" and should be disregarded as surplusage. Gen.Laws 1923, c. 335, § 3.—Braun v. Iannotti, 175 A. 656, 54 R.I. 469.—Nuis 41.

R.I. 1934. Evidence that defendant caused smoke and soot from furnace to blow against premises of plaintiff because of smokestack erected in careless manner, and that plaintiff had been unable to obtain rents or profits from premises and would be required to make repairs *held* to show a "nuisance."—Braun v. Iannotti, 175 A. 656, 54 R.I. 469.—Nuis 49(5).

R.I. 1934. An actionable "nuisance" may be said to be anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights, but a nuisance does not necessarily exist even though one may by the use of his property cause an injury or damage to another.—Rose v. Socony-Vacuum Corp., 173 A. 627, 54 R.I. 411.

R.I. 1924. Every person is bound to use his property so as not to injure or interfere with the reasonable and proper enjoyment of that of another, and the carrying on of a business creating objectionable smells or causing disturbing noises or vibrations affecting injuriously neighboring property or rendering occupation thereof uncomfortable is a "nuisance," against which relief may be had by injunction.—Kennedy v. Frechette, 123 A. 146, 45 R.I. 399.—Nuis 3(5).

R.I. 1913. One must use his property so as not to injure another's or interfere with the reasonable and proper enjoyment thereof, and the carrying on of a business which creates noisome smells or noxious vapors, or causes great and disturbing noises, jarring, or vibrations, which injuriously affect property in the vicinity, or render the occupation thereof inconvenient or uncomfortable, is a "nuisance" for which a person whose property or health is injured, or whose reasonable enjoyment of his estate as a place of residence is impaired or destroyed, may sue for the injury; and in such case a court of equity may enjoin the continuance of the nuisance.—Blomen v. N. Barstow Co., 85 A. 924, 35 R.I. 198, 44 L.R.A.N.S. 236.

R.I. 1909. "Nuisance" is anything done to the hurt or annoyance of the land or hereditaments of another. The theory is the doing of something intrinsically lawful in a manner damaging to others; it being the resulting damage that creates the wrong.—Henry v. Cherry & Webb, 73 A. 97, 30 R.I.

13, 24 L.R.A.N.S. 991, 136 Am.St.Rep. 928, 18 Am. Ann.Cas. 1006.

S.C. 1962. A "nuisance" is anything which works hurt, inconvenience, or damage or which essentially interferes with enjoyment of life or property.—Strong v. Winn-Dixie Stores, Inc., 125 S.E.2d 628, 240 S.C. 244.—Nuis 1.

S.C. 1942. A lawful business, when inappropriately located, may be a "nuisance".—Fraser v. Fred Parker Funeral Home, 21 S.E.2d 577, 201 S.C. 88.—Nuis 3(2).

S.C. 1942. If an undertaking establishment in a purely residential section, from its normal operations, causes depressing feelings to the families in the immediate neighborhood and is a constant reminder of death, and appreciably impairs their happiness or weakens their power of resistance and depreciates the value of their properties, then such an establishment constitutes a "nuisance".—Fraser v. Fred Parker Funeral Home, 21 S.E.2d 577, 201 S.C. 88.—Nuis 3(7).

S.C. 1942. An undertaking establishment is not a "nuisance per se" and by some courts it is held that even when located in an exclusively residential district with the result, because of sentimental repugnance on the part of those who might reside near it, property values in the vicinity would depreciate, such establishment would not be enjoined. By what appears to be the weight of modern authority, however, it is held that the location of such a business in a residential district is sufficiently objectionable to make it a "nuisance." Thus it has been stated: The inherent nature of an undertaking establishment is such that, if located in a residential district, it will inevitably create an atmosphere detrimental to the use and enjoyment of resident property, produce material annoyance, and inconvenience to the occupants of adjacent dwellings and render them physically uncomfortable and in the absence of strong showing of public necessity, its location in such a district should not be permitted over the protest of those who would be materially injured thereby.—Fraser v. Fred Parker Funeral Home, 21 S.E.2d 577, 201 S.C. 88.

S.C. 1927. "Nuisance" is anything that unlawfully works inconvenience or damage to others from unreasonable or unlawful use of property.—Deason v. Southern Ry. Co., 140 S.E. 575, 142 S.C. 328.—Nuis 1.

S.C. 1909. A "nuisance" is anything which works hurt, inconvenience, or damage; anything which essentially interferes with the enjoyment of life or property.—State v. Columbia Water Power Co., 63 S.E. 884, 82 S.C. 181, 22 L.R.A.N.S. 435, 129 Am.St.Rep. 876, 17 Am. Ann.Cas. 343.

S.C. 1909. Any act, omission, or use of property which pollutes the atmosphere with offensive gases, stenches, or vapor, so as to cause material discomfort, or annoyance, or injury to health or property, is a "nuisance."—Woodstock Hardwood & Spool Mfg. Co. v. Charleston Light & Water Co., 63 S.E. 548.

S.C.App. 2002. “Nuisance” is a substantial and unreasonable interference with the plaintiff’s use and enjoyment of his land.—FOC Lawshe Ltd. Partnership v. International Paper Co., 574 S.E.2d 228, 352 S.C. 408.—Nuis 4.

S.C.App. 2001. Distinction between “trespass” and “nuisance” is that trespass is any intentional invasion of plaintiff’s interest in exclusive possession of his property, whereas nuisance is substantial and unreasonable interference with plaintiff’s use and enjoyment of his property.—Hedgepath v. American Tel. & Tel. Co., 559 S.E.2d 327, 348 S.C. 340, rehearing denied, and rehearing denied, and certiorari granted.—Nuis 2; Tresp 1.

S.C.App. 2001. Distinction between trespass and nuisance is that “trespass” is any intentional invasion of plaintiff’s interest in exclusive possession of his property, whereas “nuisance” is substantial and unreasonable interference with plaintiff’s use and enjoyment of his property.—Silvester v. Spring Valley Country Club, 543 S.E.2d 563, 344 S.C. 280, rehearing denied, and certiorari denied.—Nuis 1; Tresp 1.

S.C.App. 1984. “Nuisance” is anything which works hurt, inconvenience, or damage; anything which essentially interferes with enjoyment of life or property.—Neal v. Darby, 318 S.E.2d 18, 282 S.C. 277.—Nuis 1.

S.D. 1996. Generally, “nuisance” is condition which substantially invades and unreasonably interferes with another’s use, possession, or enjoyment of property.—Kuper v. Lincoln-Union Elec. Co., 557 N.W.2d 748, 1996 SD 145.—Nuis 1.

S.D. 1984. “Nuisance” must be condition which substantially invades and unreasonably interferes with another’s use, possession, or enjoyment of his land.—City of Aberdeen v. Wellman, 352 N.W.2d 204.—Nuis 1.

S.D. 1961. “Nuisance” is a condition which substantially invades and unreasonably interferes with another’s use, possession, or enjoyment of land and may be unintentionally or intentionally created, and may be created notwithstanding that due care was exercised and due precautions were taken against annoyance or injury complained of.—Greer v. City of Lennox, 107 N.W.2d 337, 79 S.D. 28.—Nuis 1.

S.D. 1939. A county was not liable for damages to crops resulting from diversion of waters from usual course by negligent construction or maintenance of highway and bridge on theory that county was liable for “nuisance” created by it to special injury of citizen where alleged omission of county was mere negligent conduct incident to and in direct course of performance of statutory duty and was not an act separate from duty of constructing and maintaining highways and bridges.—Vesely v. Charles Mix County, 287 N.W. 51, 66 S.D. 570.—High 120(4).

S.D. 1939. The term “nuisance” includes consequences arising from otherwise lawful use of property, notwithstanding that statute defining nuisance as anything injurious to health, or indecent, or offensive to the senses, was omitted from revised

code, and that overlapping definition describing a “nuisance” as unlawfully doing or omitting to do certain things was carried forward. Rev.Code 1919, §§ 2066, 2873.—Johnson v. Drysdale, 285 N.W. 301, 66 S.D. 436.—Nuis 3(1).

S.D. 1939. The ultimate question in each cause involving an alleged “nuisance” is whether the challenged use is reasonable in view of all the surrounding circumstances. Rev.Code 1919, §§ 45, 2066, 2873.—Johnson v. Drysdale, 285 N.W. 301, 66 S.D. 436.—Nuis 3(1).

S.D. 1939. Whether a use of property creating an alleged “nuisance” is “reasonable” cannot be judged solely by the necessities of the users. Rev. Code 1919, §§ 45, 2066, 2873.—Johnson v. Drysdale, 285 N.W. 301, 66 S.D. 436.—Nuis 3(1).

S.D. 1939. The maintenance of alleged “nuisance” consisting of horse barn in midst of residential district of city was “unreasonable” if, having regard for needs and methods of barn owner, for the degree of discomfort and injury occasioned house owner in person or enjoyment of his property, and for the present use and trends of use of surrounding property, the use made by barn owner was not such as an ordinary man would make, and resulting discomforts and injuries were not such as people of common sensibilities and tastes should be required to endure. Rev.Code 1919, §§ 45, 2066, 2873.—Johnson v. Drysdale, 285 N.W. 301, 66 S.D. 436.—Nuis 3(10).

S.D. 1939. In suit to enjoin maintenance of alleged nuisance consisting of keeping horse barn in midst of residential district of city, finding that maintenance of horses resulted in noxious exhalations, created breeding and feeding place for flies and damaged property of residence owner, supported conclusion of law that keeping of horses in barn constituted a “nuisance,” and justified issuance of injunction. Rev.Code 1919, §§ 45, 2066, 2873.—Johnson v. Drysdale, 285 N.W. 301, 66 S.D. 436.—Nuis 36.

S.D. 1939. Owner of house located 34 feet from horse barn in midst of residential district of city had suffered such “special damage” as to entitle her to maintain action to enjoin keeping horses in the barn as an alleged “nuisance,” even if nuisance was public. Rev.Code 1919, § 2075.—Johnson v. Drysdale, 285 N.W. 301, 66 S.D. 436.—Nuis 72.

S.D. 1910. A “nuisance” consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures, or endangers the comfort, repose, health, or safety of others.—Town of Colton v. South Dakota Cent. Land Co., 126 N.W. 507, 25 S.D. 309, 28 L.R.A.N.S. 122.

Tenn. 1954. The unlawful erection of a gate or obstruction across a public road is a “nuisance” which may be abated by public authorities.—Harkins v. Ramsey, 273 S.W.2d 1, 197 Tenn. 302.—High 158.

Tenn. 1952. Declaration failed to show creation or maintenance by city of such a “nuisance” as would render city liable for death by drowning of a nine year old patron of swimming pool operated by

city, in absence of allegation of any affirmative act by city other than alleged negligence of life-guards.—Vaughn v. City of Alcoa, 251 S.W.2d 304, 194 Tenn. 449.—Mun Corp 857.

Tenn. 1940. Element of motive or intent does not enter into the question of existence of a "nuisance", since otherwise the maxim "sic utere tuo ut alienum non laedas" would be unwarrantably limited.—State v. James, 145 S.W.2d 783, 177 Tenn. 21.—Nuis 59.

Tenn. 1932. That city permitted fire truck to be operated through street at from 50 to 65 miles per hour did not constitute "nuisance" rendering city liable for collision with automobile, notwithstanding city was performing governmental duty.—Burnett v. Rudd, 54 S.W.2d 718, 165 Tenn. 238.—Autos 187(2); Mun Corp 747(3).

Tenn.Ct.App. 1995. "Nuisance" is anything which annoys or disturbs free use of one's property, or which renders its ordinary use or physical occupation uncomfortable, and extends to everything that endangers life or health, gives offense to senses, violates laws of decency, or obstructs reasonable and comfortable use of property.—Jenkins v. CSX Transp., Inc., 906 S.W.2d 460, appeal denied.—Nuis 1.

Tenn.Ct.App. 1992. "Nuisance" is anything which annoys or disturbs free use of property or which renders use or physical occupation uncomfortable.—Zollinger v. Carter, 837 S.W.2d 613, appeal denied.—Nuis 1.

Tenn.Ct.App. 1990. "Nuisance" is anything which annoys or disturbs free use of one's property or which renders its ordinary use or physical occupation uncomfortable; it extends to everything that endangers health or life, offends senses, or obstructs reasonable and comfortable use of property.—Oakley v. Simmons, 799 S.W.2d 669.—Nuis 1.

Tenn.Ct.App. 1987. A "nuisance" is anything that annoys or disturbs free use of one's property, or that renders its ordinary use or physical occupation uncomfortable.—Hayes v. City of Maryville, 747 S.W.2d 346.—Nuis 1.

Tenn.Ct.App. 1976. Where parking problem engendered by use of portion of residence as a beauty salon existed for only a brief period of time prior to installation of a circular driveway, use of a portion of residence as a beauty salon did not create a "nuisance" within meaning of provision of restrictive covenant prohibiting doing anything on the lots which might become a nuisance.—Waller v. Thomas, 545 S.W.2d 745.—Covenants 52.

Tenn.Ct.App. 1969. City's removal of seats from cinder block supports of bleachers in city park leaving one block in loosened condition causing plaintiff to fall from block did not constitute creation of "nuisance".—Sewell v. City of Knoxville, 444 S.W.2d 177, 60 Tenn.App. 86.—Mun Corp 736.

Tenn.Ct.App. 1964. A "nuisance" is anything which annoys or disturbs free use of one's property, or which renders its ordinary use or physical occupation uncomfortable.—Caldwell v. Knox Concrete

Products, Inc., 391 S.W.2d 5, 54 Tenn.App. 393.—Nuis 1.

Tenn.Ct.App. 1961. A "nuisance" is an act or use of property which endangers the life or health of others, which violates the laws of decency or obstructs the reasonable and comfortable use of property.—Hagaman v. Slaughter, 354 S.W.2d 818, 49 Tenn.App. 338.—Nuis 1.

Tenn.Ct.App. 1943. Where city fireman in connection with fighting a fire removed cap from a fire hydrant permitting water to strike pedestrian, and location of hydrant near the edge of the sidewalk and its angle to the curb were not different from the customary location of such equipment, city was not liable to pedestrian for his ensuing injuries on ground that location of hydrant constituted a "nuisance".—Cuffman v. City of Nashville, 175 S.W.2d 331, 26 Tenn.App. 367.—Mun Corp 768(1).

Tenn.Ct.App. 1943. While a lawful thing or act may be a nuisance by reason of its negligent use or operation, "nuisance" is a condition, and not an act or failure to act, of the person responsible for the condition, and generally negligence is not involved in nuisance actions.—Cuffman v. City of Nashville, 175 S.W.2d 331, 26 Tenn.App. 367.—Nuis 7.

Tenn.Ct.App. 1940. If an obstruction or excavation be permitted which renders the alley, street, or highway unsafe or dangerous to persons or vehicles, whether it lie immediately in or on the alley, street, or highway, or so near it as to produce the danger to the passer at any time when he shall properly desire to use such highway, it is such a "nuisance" as renders the corporation liable.—City of Knoxville v. Baker, 150 S.W.2d 224, 25 Tenn.App. 36.—Mun Corp 776, 786.

Tenn.Ct.App. 1939. Neither board of park commissioners of city nor city was guilty of maintaining a "nuisance," so as to be liable for death of one who came into contact with a hanging and overcharged electric power wire in park, where the only inference as to the reason that wire was hanging was that it had become detached from its fastening or had broken during a windstorm shortly before, and wire contained excessive charge of electricity because transformer had caught fire from lightning during storm.—Rector v. City of Nashville, 134 S.W.2d 892, 23 Tenn.App. 495.—Mun Corp 210.

Tenn.Ct.App. 1939. In order to constitute a "nuisance" there must be some affirmative act on the part of those charged.—Rector v. City of Nashville, 134 S.W.2d 892, 23 Tenn.App. 495.—Nuis 61.

Tenn.Ct.App. 1938. The element of a "nuisance" is the wrongful use of one's property or right to injury of another.—Campbell County v. Ridenour, 120 S.W.2d 1000, 22 Tenn.App. 250.—Nuis 1.

Tenn.Ct.App. 1934. Transportation on county highway by county of steam shovel weighing 40,000 pounds on trailer weighing 10,000 pounds to place where steam shovel was needed in construction or repair of county highway held not a "nuisance" so as to render county liable for negligence of its agents for death of employee resulting from collapse of bridge beneath trailer and steam shovel.

Pub.Acts 1925, c. 130, § 1, 6.—Davidson County v. Blackwell, 82 S.W.2d 872, 19 Tenn.App. 47.—Bridges 37.

Tenn.Ct.App. 1933. Use of residence in commercial district for display and sale of caskets held not “nuisance” or “obnoxious” or “offensive” within zoning ordinance, and action of board of adjustment of Memphis in denying application for such use of premises was unwarranted. Priv.Acts 1921, c. 162, and c. 165, as amended by Priv.Acts 1925, c. 428.—City of Memphis v. Qualls, 64 S.W.2d 548, 16 Tenn.App. 387.—Zoning 392.

Tenn.Ct.App. 1932. Term “nuisance” includes everything endangering life or health, offending senses, violating laws of decency, or obstructing reasonable use of property.—Williams v. Cross, 65 S.W.2d 198, 16 Tenn.App. 454.—Nuis 3(1).

Tex. 1941. In order to create liability for the maintenance of a “nuisance”, the nuisance must in some way constitute an unlawful invasion of the rights of others.—Gotcher v. City of Farmersville, 151 S.W.2d 565, 137 Tex. 12.—Nuis 4.

Tex. 1941. In action for death of child drowned in cesspool, where there were no allegations of any unlawful invasion of the rights of others, and it appeared that child was not upon the premises because of any attraction or allurement of the cesspool, but was attracted to cesspool after going to premises for other purposes city was not liable either on theory that cesspool was a “nuisance” or an “attractive nuisance”.—Gotcher v. City of Farmersville, 151 S.W.2d 565, 137 Tex. 12.—Mun Corp 845(2); Neglig 1177.

Tex. 1936. Operation of place for betting on results of dog races under pari mutuel system, held not enjoinable as “nuisance” under statute. Vernon’s Ann.Civ.St. arts. 4664-4666.—State ex rel. Shook v. All Texas Racing Ass’n, 97 S.W.2d 669, 128 Tex. 384, rehearing overruled 100 S.W.2d 348, 128 Tex. 384.—Nuis 65.

Tex.Com.App. 1920. Anything that works hurt, inconvenience, or damage, or which is done to the hurt of the lands, tenements, or hereditaments of another, is a “nuisance,” and it is not necessary that the annoyance should endanger health: it being sufficient if it occasion that which is offensive to the senses, and which renders the enjoyment of life and property uncomfortable.—Brewster v. City of Forney, 223 S.W. 175.

Tex.Crim.App. 1954. Fireworks constitute such danger to public health and safety that they constitute a “nuisance”.—Treadgill v. State, 275 S.W.2d 658, 160 Tex.Crim. 658.—Nuis 61.

Tex.Crim.App. 1905. A gambling house, under the statute and as recognized by the courts, is a “nuisance,” and even at common law such a nuisance could be enjoined at the instance of any person who was injured thereby.—Ex parte Allison, 90 S.W. 492, 48 Tex.Crim. 634, 3 L.R.A.N.S. 622.

Tex.App.—Houston [1 Dist.] 1994. “Nuisance” is condition that substantially interferes with use and enjoyment of land by causing unreasonable discom-

fort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it.—Maranatha Temple, Inc. v. Enterprise Products Co., 893 S.W.2d 92, rehearing denied, and writ denied.—Nuis 1.

Tex.App.—Dallas 2000. “Nuisance” is a condition which substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it.—General Mills Restaurants, Inc. v. Texas Wings, Inc., 12 S.W.3d 827.—Nuis 3(1).

Tex.App.—Texarkana 2000. A “nuisance” is a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use or enjoy it.—Nugent v. Pilgrim’s Pride Corp., 30 S.W.3d 562, rehearing overruled, and review denied.—Nuis 1.

Tex.App.—Texarkana 2000. A “nuisance” may arise by causing: (1) physical harm to property, such as by the encroachment of a damaging substance or by the property’s destruction; (2) physical harm to a person on his property from an assault on his senses or by other personal injury, and (3) emotional harm to a person from the deprivation of the enjoyment of his property through fear, apprehension, or loss of peace of mind.—Nugent v. Pilgrim’s Pride Corp., 30 S.W.3d 562, rehearing overruled, and review denied.—Nuis 4.

Tex.App.—Texarkana 1995. “Nuisance” may occur in one of three ways: (1) physical harm to property, such as encroachment of damaging substance or by property’s destruction; (2) physical harm to person on his or her property, such as by assault to his or her senses or by other personal injury; and (3) emotional harm to person from deprivation of enjoyment of his or her property, such as by fear, apprehension, offense, or loss of peace of mind.—Ward v. Northeast Texas Farmers Co-op. Elevator, 909 S.W.2d 143, rehearing overruled, and writ denied.—Nuis 1.

Tex.App.—El Paso 2001. A “nuisance” is a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use or enjoy it.—Walton v. Phillips Petroleum Co., 65 S.W.3d 262, review denied, and rehearing of petition for review denied.—Nuis 1.

Tex.App.—El Paso 2001. A “nuisance” is a condition which substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it.—Z.A.O., Inc. v. Yarbrough Drive Center Joint Venture, 50 S.W.3d 531.—Nuis 3(1).

Tex.App.—Beaumont 1998. “Nuisance” is a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it.—Wickham v.

San Jacinto River Authority, 979 S.W.2d 876, review denied.—Nuis 3(1).

Tex.App.—Waco 1993. “Nuisance” is condition which substantially interferes with use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it.—Bible Baptist Church v. City of Cleburne, 848 S.W.2d 826, rehearing denied, and writ denied.—Nuis 1.

Tex.App.—Houston [14 Dist.] 2001. A “nuisance” is a condition which substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it.—GTE Mobilnet of South Texas Ltd. Partnership v. Pascoet, 61 S.W.3d 599, rehearing overruled, and rehearing overruled, and review denied, and rehearing of petition for review denied.—Nuis 1.

Tex.App.—Houston [14 Dist.] 1997. “Nuisance” is condition which substantially interferes with use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it.—Loyd v. ECO Resources, Inc., 956 S.W.2d 110.—Nuis 1, 59.

Tex.App.—Houston [14 Dist.] 1997. To be classified as “nuisance” within nuisance exception to governmental immunity doctrine, condition must in some way constitute unlawful invasion of property or rights of others beyond that arising merely from its negligent or improper use.—Loyd v. ECO Resources, Inc., 956 S.W.2d 110.—Mun Corp 736.

Tex.App.—Houston [14 Dist.] 1997. City-owned sewage plant that emits odors onto another’s land is “nuisance” within nuisance exception to governmental immunity doctrine.—Loyd v. ECO Resources, Inc., 956 S.W.2d 110.—Mun Corp 736.

Tex.App.—Houston [14 Dist.] 1997. To constitute “nuisance,” danger must be inherent in the thing itself.—Loyd v. ECO Resources, Inc., 956 S.W.2d 110.—Nuis 4.

Tex.Civ.App.—Fort Worth 1955. A “nuisance” is anything that works injury, harm or prejudice to an individual or public, or which causes a well-founded apprehension of danger.—Parker v. City of Fort Worth, 281 S.W.2d 721.—Nuis 1, 59.

Tex.Civ.App.—Fort Worth 1955. A “nuisance” is anything that works injury, harm or prejudice to an individual or public, or which causes a well-founded apprehension of danger.—Stoughton v. City of Fort Worth, 277 S.W.2d 150.—Nuis 1, 59.

Tex.Civ.App.—Fort Worth 1954. If one does an act within itself lawful, which being done in that place necessarily tends to damage another’s property, it is a “nuisance”.—City of River Oaks v. Moore, 272 S.W.2d 389, ref. n.r.e.—Nuis 5.

Tex.Civ.App.—Fort Worth 1953. Continued maintenance by city of an automatic traffic control signal light which does not itself encroach upon a public street, but which is out of repair so as simultaneously to display green lights to traffic moving in intersecting directions, causing injury to a

motorist, would not be a “nuisance” within principle making a city liable for maintenance of a nuisance while city is engaged in a governmental function.—Parson v. Texas City, 259 S.W.2d 333, writ refused.—Mun Corp 736.

Tex.Civ.App.—Fort Worth 1950. It is not every use of one’s property which works an annoyance to the person or property of another that creates a “nuisance,” but rather there must be a material or substantial injury.—Gulf Oil Corp. v. Vestal, 231 S.W.2d 523, affirmed 235 S.W.2d 440, 149 Tex. 487.—Nuis 4.

Tex.Civ.App.—Fort Worth 1950. Pollution of atmosphere with noxious or offensive odors, gases or vapors may become a “nuisance” if it causes material discomfort and annoyance to those residing in the vicinity, or injures their health or property.—Gulf Oil Corp. v. Vestal, 231 S.W.2d 523, affirmed 235 S.W.2d 440, 149 Tex. 487.—Nuis 3(3).

Tex.Civ.App.—Fort Worth 1936. Lessors and lessees of swimming pool held not liable for drowning of plaintiff’s son when his leg was caught by suction of drainage pipe which extended above bottom of pool 18 inches and was about 8 inches in diameter and had no cap over it, since drainage pipe did not constitute a “nuisance” in that drainage was necessary to insure wholesome water for bathers and was not a “nuisance per se,” in that danger of such injury existed only when pool was drained through open pipe.—Medlin v. Havener, 98 S.W.2d 863.—Theaters 6(9).

Tex.Civ.App.—Fort Worth 1930. Instruction in action for polluting river, defining “nuisance” as pollution of atmosphere with offensive gases causing annoyance or injury to health or property enjoyment, held not erroneous. Rules of Civil Procedure, rule 277.—City of Wichita Falls v. Whitney, 26 S.W.2d 327, writ dismissed w.o.j.—Mun Corp 845(6).

Tex.Civ.App.—Fort Worth 1916. Act, omission, or use of property resulting in polluting atmosphere with noxious or offensive odors, gases, or vapors, thereby producing material discomfort and annoyance to persons residing in vicinity, or injuring their health or property, is a “nuisance.”—Moore v. Coleman, 185 S.W. 936.—Nuis 62.

Tex.Civ.App.—Austin 1944. To constitute a “nuisance” the lawful serviceable use of one’s property must be unreasonable.—City of Temple v. Mitchell, 180 S.W.2d 959.—Nuis 1.

Tex.Civ.App.—Austin 1944. In order to constitute a “nuisance”, invasion of one’s property rights must be substantial, and, to be “substantial”, invasion must involve more than slight inconvenience or petty annoyance.—City of Temple v. Mitchell, 180 S.W.2d 959.—Nuis 4.

Tex.Civ.App.—Austin 1914. That which is not in fact a “nuisance” or injurious to public health cannot be made so by a declaration of the Legislature or a city council.—Ray v. City of Belton, 162 S.W. 1015.

Tex.Civ.App.—San Antonio 1938. Where a child was injured in falling from buttress of school entrance upon tree planted near buttress and kept pruned by school authorities, independent school district could not be held liable on theory that tree was a “nuisance” and that agents of school were negligent in maintaining and not abating nuisance, since question of nuisance becomes relevant only when by maintenance of a nuisance private property or property rights have been involved.—Braun v. Trustees of Victoria Independent School Dist., 114 S.W.2d 947, writ refused.—Schools 89.10.

Tex.Civ.App.—San Antonio 1923. A “nuisance” is anything that works an injury, harm, or prejudice to an individual or the public, and will embrace everything that endangers life or health, offends the human senses, transgresses laws of decency, or obstructs, impairs, or destroys the reasonable, peaceful, and comfortable use of property.—Trueheart v. Parker, 257 S.W. 640.

Tex.Civ.App.—Dallas 1980. Condition on municipal land that is dangerous or hazardous to persons or vehicles coming on the land is not a “nuisance” within constitutionally based “nuisance” exception to rule of governmental immunity; it is immaterial whether condition is characterized as a nuisance in fact or a nuisance per se. Vernon’s Ann.St.Const. Art. 1, § 17; Vernon’s Ann.Civ.St. art. 46e-2(a).—Bragg v. City of Dallas, 605 S.W.2d 669, motion overruled 608 S.W.2d 696.—Mun Corp 736.

Tex.Civ.App.—Dallas 1938. Slight or trifling injury, inconvenience, discomfort, or annoyance, resulting in a business neighborhood of a city of modern progression, in absence of negligence, is not sufficient to declare a lawful business so conducted a “nuisance.”—City of Dallas v. Newberg, 116 S.W.2d 476, writ dismissed.—Nuis 5.

Tex.Civ.App.—Dallas 1938. Noise, vibration of earth, and concussion of the air, caused by lawful blasting operations, do not make a “nuisance,” as a matter of law, where the operations are conducted in a prudent manner, with due regard to the rights of others, productive of no substantial physical annoyance, inconvenience, or discomfort to another, and productive of no substantial damage or injury to the property of another.—City of Dallas v. Newberg, 116 S.W.2d 476, writ dismissed.—Nuis 53.

Tex.Civ.App.—Dallas 1926. Admission of ordinances declaring untreated stagnant pool of water “nuisance” in suit against city to abate nuisance caused by overflowing drainage system, if error, was harmless.—City of Dallas v. Early, 281 S.W. 883, writ dismissed w.o.j.—App & E 1050(1).

Tex.Civ.App.—Texarkana 1963. The existence of a “nuisance” is a question of law and not an issue of fact, and it is the doing, or not doing of things, that constitutes a nuisance, and jury must make findings of fact that constitute a nuisance, and it is improper, in a suit to enjoin a defendant from permitting noxious odors to escape from his premises, to refer to the word “nuisance” as an issue of fact.—Crumpler v. Bay Petroleum Corp., 366 S.W.2d 797, writ granted, reversed 372 S.W.2d 318.—Nuis 1.

Tex.Civ.App.—Amarillo 1955. A “nuisance” may be something injurious to personal or property rights or to both, or something impairing health, threatening safety, shocking moral sensibilities or offending senses or encroaching upon or injuring property.—Eakens v. Garrison, 278 S.W.2d 510, ref. n.r.e.—Nuis 1.

Tex.Civ.App.—Amarillo 1953. In action against city for damage caused by operation of city’s automobile by city’s plumbing inspector, petition alleging that operation of the automobile by plumbing inspector, who was allegedly intoxicated, was an unauthorized and unreasonable obstruction and encroachment in and on the public streets and therefore constituted a public or private nuisance failed to allege a “nuisance” and did not eliminate principle of nonliability of a city for the negligent acts of its employees while engaged in a governmental function.—Walker v. City of Dallas, 278 S.W.2d 215.—Autos 238(2).

Tex.Civ.App.—Amarillo 1945. A lawful business may become a “nuisance” if operated in such a manner as to be offensive to the senses of others and to render the enjoyment of life and property uncomfortable, or if its manner of operation works an injury to an individual or to the public.—Landwer v. Fuller, 187 S.W.2d 670, writ refused w.o.m.—Nuis 3(2).

Tex.Civ.App.—El Paso 1954. A concrete room, which was located in basement of city jail, which was below the surface of the ground, which had concrete walls, and which had only one door, which was constructed of solid iron, so that it was impossible to see into the room from the outside without opening the door and very difficult to hear any noise from the room, and which was without any furnishings, was not a “nuisance,” and city was not liable to widow of deceased prisoner, who was beaten to death by fellow prisoners in the room, on ground that the city was maintaining a nuisance.—Strickland v. City of Odessa, 268 S.W.2d 722.—Mun Corp 736.

Tex.Civ.App.—El Paso 1931. Maintenance of electric wires, disturbing peaceable possession of home and causing apprehension of danger, *held* “nuisance.”—Olivas v. El Paso Electric Co., 38 S.W.2d 165.—Nuis 3(2).

Tex.Civ.App.—Waco 1954. The orderly sale of dry goods, household goods, dishes and kitchen utensils, whether such sale be made by itinerant merchants, solicitors or peddlers, is not an occupation or business of such inherent nature as to constitute a “nuisance.”—Houston Credit Sales Co. v. City of Trinity, 269 S.W.2d 579, ref. n.r.e.—Nuis 61.

Tex.Civ.App.—Eastland 1938. “Negligence” cases are those which involve liability for injury to personal property, the injury not having been the consequence of conduct which was premeditated or accompanied by the intention or volition of the actor, whereas, if the injury or damage was shown to have been the intended result of the wrongdoer’s act, the legal situation is described in terminology of the common law by the words “assault,” “defa-

mation," "nuisance," and "trespass."—Michels v. Crouch, 122 S.W.2d 211.—Assault 3; Libel 2; Negligence 201; Nuis 2.

Tex.Civ.App.—Eastland 1934. Dangerous condition of floor in store, causing customer to run several large splinters in his foot, held not to constitute "nuisance" so as to make landlord liable for injuries.—Jackson v. Amador, 75 S.W.2d 892, writ dismissed.—Land & Ten 170(1).

Tex.Civ.App.—Eastland 1932. Where evidence did not conclusively show that defendant's business was such that oil necessarily escaped from defendant's land onto plaintiff's land, action for resulting damage held for "negligence," not "nuisance," which, as respects limitations, did not accrue prior to infliction of injuries complained of.—Abilene & S. Ry. Co. v. Herman, 47 S.W.2d 915, writ dismissed w.o.j.—Lim of Act 55(5).

Tex.Civ.App. 1909. A "nuisance" is an annoyance, and, according to Blackstone, it signifies anything that worketh hurt, inconvenience, or damage.—Hamm v. Briant, 124 S.W. 112, 57 Tex.Civ. App. 614.

Tex.Civ.App. 1909. A "nuisance" is anything that worketh hurt, inconvenience, or damage. A "private nuisance" is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another.—Boyd v. Schreiner, 116 S.W. 100, writ refused.—Nuis 1.

Tex.Civ.App. 1908. An actional "nuisance" is anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights. To constitute a nuisance, it is not necessary that the annoyance should be of a character to endanger health. It is sufficient if it occasions what is offensive to the senses and which renders the enjoyment of life and property uncomfortable. Even that which does but cause a well-founded apprehension of danger may be a nuisance. The unauthorized or unreasonable use of, or the neglect of properly and reasonably using, one's own property, to the detriment, hurt, annoyance, discomfort, injury, or damage of another in his property or legal rights, or of the public, is a nuisance. A use made by one of his own property, which works an irreparable injury to another's property, or which deprives his neighbor of the reasonable and comfortable enjoyment and use of his property, or which violates the unwritten but accepted law of decency, or which endangers or renders insecure the life and health of his neighbor, is a nuisance. It is difficult to define just what degree of injurious annoyance must be reached in order to warrant the court in determining what circumstances constitute a nuisance. A mere tendency to injury is not sufficient. There must be something actually appreciable which of itself arrests the attention, that rests not merely in theory, but strikes the common sense of the ordinary citizen. The determination, however, of the question rests in sound judgment, and depends upon common sense in each case.—Sanders v. Miller, 113 S.W. 996, 52 Tex.Civ.App. 372.

Tex.Civ.App. 1905. The mere imposition of more railway tracks, or the increased use of the

tracks beyond what may originally have been thought probable, resulting from the location of defendant's depot on land acquired by it adjoining the avenue, did not constitute a "nuisance."—Oklahoma City & T.R. Co. v. Dunham, 88 S.W. 849, 39 Tex.Civ.App. 575.

Utah 1978. "Nuisance" is a condition, not act or failure to act on part of person responsible for the condition.—Vincent v. Salt Lake County, 583 P.2d 105.—Nuis 3(1).

Utah 1978. "Nuisance" does not rest on degree of care used, but on degree of danger existing even with best of care; thus person who creates or maintains nuisance is liable for resulting injury to others, without regard to degree of care exercised by him to avoid the injury and notwithstanding that he exercises reasonable or ordinary care and skill or even highest possible degree of care.—Vincent v. Salt Lake County, 583 P.2d 105.—Nuis 7.

Utah 1971. An obstruction in a private road is not a "nuisance."—Blonquist v. Summit County, 483 P.2d 430, 25 Utah 2d 387.—Nuis 61.

Utah 1969. Operation of drive-in theater adjacent to plaintiffs' home was not "nuisance" in and of itself.—Johnson v. Mount Ogden Enterprises, Inc., 460 P.2d 333, 23 Utah 2d 169.—Nuis 3(9).

Utah 1943. Evidence that carnival, which was held for several days annually in street in front of plaintiff's premises, was noisy and interfered with plaintiff's free access to his premises and that crowds trespassed upon plaintiff's premises, authorized finding that carnival was a "nuisance" and judgment granting an injunction and damages. Utah Code 1943, 104-56-1.—Brough v. Ute Stampede Ass'n, 142 P.2d 670, 105 Utah 446.—Mun Corp 671(9).

Utah 1943. Where odors from rendering plant went off into atmosphere and intermittently reached various surrounding properties, and odors were obnoxious to such a degree that it was impossible to enjoy a meal when wind was in certain direction, and owners of nearby properties were awakened at nights and rendered sleepless by noxious smell, there was a "nuisance" within meaning of statutes. Utah Code 1943, 103-41-1, 104-56-1.—Ludlow v. Colorado Animal By-Products Co., 137 P.2d 347, 104 Utah 221.—Nuis 3(5).

Utah 1937. A city's operation of sprinkling truck to lay dust in public parks was not a "nuisance," despite facts that children playing in parks were attracted to truck in such numbers that truck became dangerous and that child was pushed into truck by other children and injured.—Husband v. Salt Lake City, 69 P.2d 491, 92 Utah 449.—Autos 162(1).

Utah 1936. Encroachment of adjoining landowner's building is not presently "nuisance" if not now causing plaintiff annoyance, inconvenience, or discomfort, as regards mandatory injunction.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.—Inj 5.

Utah 1927. "Nuisance" is wrong arising from unreasonable, unwarrantable, or unlawful use of property.—Dahl v. Utah Oil Refining Co., 262 P. 269, 71 Utah 1.—Nuis 1.

Vt. 1944. The presence on pent road of cattle belonging to owner of land crossed by road did not constitute "nuisance" subject to abatement by owner of other land to and through which road extended.—Judd v. Challoux, 39 A.2d 357, 114 Vt. 1.—Priv Roads 8.

Vt. 1906. The general rule is that any unauthorized obstruction or excavation in a public street, impairing its safety, constitutes a public "nuisance."—Mixer v. Herrick, 62 A. 1019, 78 Vt. 349.

Vt. 1890. "Nuisance" is a term for all practices, avocations, erections, establishments, etc., against which courts will give relief, although they are not intrinsically criminal, because of their tendency to create annoyance, ill health, or inconvenience.—Gifford v. Hulett, 19 A. 230, 62 Vt. 342.

Va. 2002. Even though the term "nuisance" includes everything that endangers life or health, or obstructs the reasonable and comfortable use of property, not every trifling or imaginary annoyance that may offend the sensibilities of a fastidious person is actionable.—Martin v. Moore, 561 S.E.2d 672, 263 Va. 640.—Nuis 3(1).

Va. 1985. Private, recreational, wooden deck or patio of home extending 40 feet onto the public, oceanfront beach area of the city fell within statute [Code 1950, § 15.1-316] making it a "nuisance" for a person to undertake to occupy or use any of the streets, avenues, parks, bridges or any other public places or public property or any public easement of any description in any city or town, in a manner not permitted to the general public, without having first legally obtained the consent thereto of the city council.—City of Virginia Beach v. Green, 334 S.E.2d 570, 230 Va. 84.—Nuis 63.

Va. 1982. The term "nuisance" includes everything that endangers life or health, or obstructs reasonable and comfortable use of property.—National Energy Corp. v. O'Quinn, 286 S.E.2d 181, 223 Va. 83.—Nuis 1.

Va. 1976. Portable toilets, in park, facing plaintiff's house which adjoined park, were not sufficient to constitute a "nuisance."—City of Newport News v. Hertzler, 221 S.E.2d 146, 216 Va. 587.—Mun Corp 736.

Va. 1963. When a business, although lawful in itself, becomes obnoxious to neighboring dwellings and renders their enjoyment uncomfortable, the carrying on of such business is a "nuisance". Barnes v. Graham Virginia Quarries, Inc., 182 S.E.2d 395, 204 Va. 414.—Nuis 5. "nuisance" Trustees

Va. 1948. Generally, there is a distinction between a "nuisance" and a "trespass", though many things are sometimes called nuisances which are mere trespasses, and though an action for a nuisance which violates a property right incident to the ownership of land, is in the nature of one for

trespass to realty.—Haywood v. Massie, 49 S.E.2d 281, 188 Va. 176.—Nuis 1; Tresp 1.

Va. 1947. A "nuisance" may be merely a right thing in wrong place.—Fairfax County v. Parker, 44 S.E.2d 9, 186 Va. 675.—Nuis 1.

Va. 1945. Any act, omission, or use of property which is of itself hurtful to health, tranquility, or morals, or outrages the decency of a community, is a "nuisance."—Ritholz v. Com., 35 S.E.2d 210, 184 Va. 339.—Nuis 59.

Va. 1940. That condition sought to be remedied by statute providing for prevention, control, and eradication of contagious and infectious diseases of livestock and poultry, injuriously affects "public interest" and has effect of a "public nuisance", authorizes exercise of state's "police power" regardless of whether the condition was a "nuisance" at common law and abatable as such. Code 1936, §§ 907-920, as amended by Acts 1938, c. 439.—Stickley v. Givens, 11 S.E.2d 631, 176 Va. 548.—Anim 29.

Va. 1940. State's "police power" is not limited to a condition constituting a "nuisance" at common law, but welfare of society and constantly changing conditions of life more nearly determine its limitations.—Stickley v. Givens, 11 S.E.2d 631, 176 Va. 548.—Const Law 81.

Va. 1940. Tourist business conducted in house in residential district was not a "nuisance" within restriction against using premises or building in manner that would create nuisance, where patrons were a very high type people.—Deitrick v. Leadbetter, 8 S.E.2d 276, 175 Va. 170, 127 A.L.R. 849.—Covenants 103(1).

Va. 1939. Odors which are offensive and disagreeable in such manner as to render life uncomfortable and damage property rights constitute a "nuisance."—G. L. Webster Co. v. Steelman, 1 S.E.2d 305, 172 Va. 342.—Nuis 3(3).

Va. 1927. Undertaking establishment, rendering homes physically uncomfortable, exposing occupants to disease, or depreciating value, constitutes "nuisance."—Bragg v. Ives, 140 S.E. 656, 149 Va. 482.—Nuis 3(7).

Va. 1927. Annoyance must affect sensibilities of ordinary man to render undertaking establishment "nuisance."—Bragg v. Ives, 140 S.E. 656, 149 Va. 482.—Nuis 4.

Va. 1915. Though the natural pollution of a stream through populous regions cannot ordinarily be restrained, any use of a stream materially fouling and adulterating the water thereof, or discharge therein of any filth or noxious substance impairing the value of the water for ordinary purposes, or rendering it less wholesome than in its ordinary state, which equity will enjoin.—McKinney v. Emory and Henry College, 86 S.E. 115, 117 Va. 763.

Wash. 1998. A "nuisance" is an unreasonable interference with another's use and enjoyment of property, but a "trespass" is an invasion of the interest in exclusive possession of property.—Kitsap

County v. Allstate Ins. Co., 964 P.2d 1173, 136 Wash.2d 567.—Nuis 1; Tresp 1.

Wash. 1951. "Nuisance" consists in unlawfully doing an act or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others or in some way renders other persons insecure in life, or in the use of property.—Turner v. City of Spokane, 235 P.2d 300, 39 Wash.2d 332.—Nuis 1.

Wash. 1948. "Nuisance" consists in unlawfully doing an act or omitting to perform a duty so that others are annoyed or injured, or their comfort, repose, health, or safety are endangered. RCW 7.48.120.—Shields v. Spokane School Dist. No. 81, 196 P.2d 352, 31 Wash.2d 247.—Nuis 62.

Wash. 1948. A fair test as to whether a business, lawful in itself, or a particular use of property, constitutes a "nuisance" is the reasonableness or unreasonableness of conducting the business or making the use of the property complained of in the particular locality and in the manner and under the circumstances of the case. RCW 7.48.120.—Shields v. Spokane School Dist. No. 81, 196 P.2d 352, 31 Wash.2d 247.—Nuis 59.

Wash. 1947. Where chocolate stored by chocolate company in portion of warehouse building leased from operator of warehouse was contaminated in part by rats, with result that contaminated chocolate was seized by the government, a "nuisance" existed and a "constructive eviction" of company occurred, entitling it to maintain action for damages against operator of warehouse.—Washington Chocolate Co. v. Kent, 183 P.2d 514, 28 Wash.2d 448.—Land & Ten 171(1), 180(1).

Wash. 1946. The establishment of a sanitarium for mental cases in a community which had been settled and long used as a residential district and which was peculiarly adaptable for improvement with substantial homes and rearing of children, would be enjoined as "nuisance", notwithstanding that such a sanitarium was a lawful and necessary undertaking. RCW 7.48.120.—Park v. Stolzheise, 167 P.2d 412, 24 Wash.2d 781.—Nuis 3(8), 19.

Wash. 1942. The test of "nuisance" is reasonableness of conducting business or using property in particular locality in the manner and under the circumstances.—Powell v. Superior Portland Cement, 129 P.2d 536, 15 Wash.2d 14.—Nuis 7.

Wash. 1941. The maintenance of a dam across a stream which dam did not unreasonably interfere with rights of others entitled to use stream, was not a "nuisance."—Diking Dist. No. 2 of Pend Oreille County v. Calispel Duck Club, 118 P.2d 780, 11 Wash.2d 131.—Nuis 3(1); Waters 167(1).

Wash. 1939. Police chief's placing of signs in street to protect children coasting on street did not create a "nuisance" so as to impose liability on city to pedestrian who was struck by automobile when motorist skidded up onto sidewalk while attempting to go around signs.—Crowley v. City of Raymond, 88 P.2d 858, 198 Wash. 432.—Autos 264.

Wash. 1932. Merry-go-round in city park, consisting of circular platform about 25 feet in diameter operated by exposed cogwheels, held not "nuisance" or dangerous appliance so as to render city liable to boy for injury while inserting stick in exposed cogwheels.—Stuver v. City of Auburn, 17 P.2d 614, 171 Wash. 76.—Mun Corp 851.

Wash. 1924. When a garage company's oil filling station unlawfully occupies railway property abutting on the Pacific Highway and interferes with the use of the highways so that in the opinion of the public highway commission it is an obstruction of the highway, it constitutes a "nuisance" as defined by Rem.Comp.Stat. §§ 943, 9914.—State v. Camp Lewis Service & Garage Co., 224 P. 584, 129 Wash. 166.—High 153.

Wash. 1922. An undertaking establishment not within the district from which undertaking establishments were excluded by ordinance held not a "nuisance" within Rem.Code 1915, § 8309, RCW 7.48.120, defining a nuisance.—Linsler v. Booth Undertaking Co., 206 P. 976, 120 Wash. 177.—Nuis 3(7).

Wash. 1919. Under Rem.Code, 1915, § 8309, RCW 7.48.120, defining nuisances, and section 943, RCW 7.48.010, providing that anything such "as to essentially interfere with the comfortable enjoyment of life and property, is a nuisance," an undertaking establishment and morgue, conducted in a dwelling house in a purely residential district, where bodies of persons dying from contagious or infectious diseases, as well as others, are prepared for burial, is a "nuisance," which may be enjoined.—Goodrich v. Starrett, 184 P. 220, 108 Wash. 437.—Nuis 3(1).

Wash. 1917. An indictment charging that women were employed upon a commission basis to solicit men to dance and "buy soft drinks was insufficient to show maintenance of a "nuisance," under Rem.Code 1915, § 8319, defining as a nuisance structures used as a place of resort, where women are employed to draw custom, dance, or for purposes of prostitution; it being necessary to allege that the character of the women was bad, that the quality and character of their conversation was bad, or that their conduct tended to collect crowds of disorderly persons to the place.—State v. Clancy, 168 P. 894, 99 Wash. 47.—Disorderly H.

Wash. 1910. A "nuisance" is anything which interferes with the rights of a citizen, either in person, property, the enjoyment of his property, or his comfort.—Thornton v. Dow, 111 P. 899, 60 Wash. 622, 32 L.R.A.N.S. 968.—Nuis 1.

Wash. 1910. Under the statute, Rem. & Bal. Code, § 8309, defining a nuisance as an act or omission which either annoys, injures, or endangers the comfort, health, or safety of others, the maintenance in a residential district of a city of a sanitarium for the treatment of tuberculosis patients is a "nuisance," where the fear induced by the proximity of the sanitarium disturbs the "comfortable enjoyment" of adjacent property, whether the fear is founded on scientific facts or not, for "comfortable enjoyment" means mental quiet as well as physical comfort, and the word "comfort" implies whatever

is requisite to give security from want and furnish reasonable physical, mental, and spiritual enjoyment.—*Everett v. Paschall*, 111 P. 879, 61 Wash. 47, 31 L.R.A.N.S. 827, Am. Ann. Cas. 1912B, 1128.

Wash. 1910. Laws 1905, c. 57 § 4, gives corporations organized for clearing and improving streams for logging purposes, power to build wing dams and sheer booms, etc., for the purpose of holding logs, providing that no such dam, etc., shall be so maintained as to obstruct the outlet of the stream, and that if such dam, etc., is constructed so as to interfere with the use of the stream for any other purpose or injure adjacent land, compensation shall be first determined, and the appropriation of the use made by eminent domain. Held, that the statute contemplated the obstruction of navigation at times by the construction of dams, etc., for driving timber, the only limitation being that the outlet of the stream be not obstructed, so that the fact that a boom built in a river navigable to some extent for three or four miles from its mouth at high tide for floating logs necessarily obstructed navigation above the boom would not be a "nuisance," as defined by Rem. & Bal. Code, § 943, 1 Ballinger's Ann. Codes & St. §§ 3085, 3093, Pierce's Code, §§ 1867, 1870, so that the boom company could condemn the privilege of using the river in that manner.—*State v. Superior Court of Chehalis County*, 109 P. 340, 58 Wash. 565.

Wash. 1906. Where defendant maintained a stairway leading to a basement, the top of the stairs being over 4½ feet from the sidewalk and in a private alley, the stairway was not a "nuisance," and defendant was not liable to a person who, while walking on the sidewalk and in attempting to avoid a runaway horse, fell down the stairs.—*Sheehan v. Bailey Bldg. Co.*, 85 P. 44, 42 Wash. 535.

Wash.App. Div. 1 1995. "Nuisance" is substantial and unreasonable interference with one's use and enjoyment of land.—*Bodin v. City of Stanwood*, 901 P.2d 1065, 79 Wash.App. 313, review granted 913 P.2d 816, 128 Wash.2d 1025, affirmed 927 P.2d 240, 130 Wash.2d 726, reconsideration denied.—Nuis 1.

Wash.App. Div. 3 1996. Trial court properly instructed jury that violation of Water Pollution Control Act constituted "nuisance," despite claim that Act did not create private cause of action for enforcement of its provisions, and that jury should have been instructed that plaintiffs had burden of proving that defendant's use of its property "unreasonably" interfered with plaintiffs' use; if jury determined that defendant was leaching pollutants into groundwater, then that act was unlawful under Act, and constituted nuisance. West's RCWA 7.48.120, 90.48.010, 90.48.020, 90.48.080.—*Tiegs v. Boise Cascade Corp.*, 922 P.2d 115, 83 Wash.App. 411, review granted 936 P.2d 416, 131 Wash.2d 1014, affirmed 954 P.2d 877, 135 Wash.2d 1.—Waters 104.

Wash.App. Div. 3 1996. Specific conduct which is approved and authorized by agency charged with enforcing act in question does not constitute "nuisance" per se.—*Tiegs v. Boise Cascade Corp.*, 922

P.2d 115, 83 Wash.App. 411, review granted 936 P.2d 416, 131 Wash.2d 1014, affirmed 954 P.2d 877, 135 Wash.2d 1.—Nuis 6.

W.Va. 1990. "Nuisance" is said to exist when a lawful business in a strictly residential district materially lessens the physical comfort of persons in their homes and materially interferes with enjoyment of property, and thereby impairs the enjoyment of homes in the neighborhood and infringes upon the well being, comfort, repose, and enjoyment of the ordinary normal individual residing there.—*Kahlbaugh v. A-1 Auto Parts*, 391 S.E.2d 382, 182 W.Va. 692.—Nuis 3(1).

W.Va. 1974. A "nuisance" is anything which interferes with the rights of the citizen, either in person, property, enjoyment of his property, or his comfort; condition is a nuisance when it clearly appears that enjoyment of property is materially lessened and physical comforts of persons in their homes are immaterially interfered with thereby.—*Mahoney v. Walter*, 205 S.E.2d 692, 157 W.Va. 882.—Nuis 1.

W.Va. 1968. Generally, test as to whether lawful business or particular use of property constitutes a "nuisance" is reasonableness or unreasonableness of conducting the business or making the use of the property in the particular locality and in the manner and under the circumstances of the case.—*Sanders v. Roselawn Memorial Gardens, Inc.*, 159 S.E.2d 784, 152 W.Va. 91.—Nuis 3(1).

W.Va. 1966. Debris, rubbish, and other unsightly material deposited on defendant's property did not constitute a "nuisance".—*State Road Commission v. Oakes*, 149 S.E.2d 293, 150 W.Va. 709.—Nuis 3(1).

W.Va. 1956. A "nuisance" is anything which annoys or disturbs free use of one's property, renders its ordinary use or physical occupation uncomfortable, or interferes with a citizen's rights, either in his person, property, enjoyment thereof, or comfort.—*Martin v. Williams*, 93 S.E.2d 835, 141 W.Va. 595, 56 A.L.R.2d 756.—Nuis 1.

W.Va. 1953. A "nuisance" is that class of wrongs which arises from unreasonable, unwarrantable, or unlawful use of one's own property and which produces such material annoyance, inconvenience, discomfort, or harm that consequent damage is presumed.—*Pope v. Edward M. Rude Carrier Corp.*, 75 S.E.2d 584, 138 W.Va. 218.—Nuis 1.

W.Va. 1953. The loading of dynamite, gasoline, gunpowder, naphtha, and other inflammable or explosive substances for transportation is necessary to commerce and is not a "nuisance".—*Pope v. Edward M. Rude Carrier Corp.*, 75 S.E.2d 584, 138 W.Va. 218.—Nuis 61.

W.Va. 1953. The mere transportation of dynamite in motor vehicle upon public highway by licensed contract carrier as agent of manufacturer and shipper was not a "nuisance".—*Pope v. Edward M. Rude Carrier Corp.*, 75 S.E.2d 584, 138 W.Va. 218.—Nuis 61.

W.Va. 1940. In action by board of commissioners of the county of Ohio to enjoin coal mining company from the maintenance of a public nuisance consisting of a burning pile of "gob" or refuse materials, which came from mine and from which emanated sulphur dioxide, evidence sustained chancellor's finding that fumes from the pile constituted a "nuisance" affecting the public health within meaning of statute authorizing an injunction to restrain, prevent, or abate a nuisance affecting public health. Code 1931, 16-3-6.—Board of Com'r's of Ohio County v. Elm Grove Mining Co., 9 S.E.2d 813, 122 W.Va. 442.—Nuis 62.

W.Va. 1937. Operation of automobile wrecking business on lot inclosed by barbed wire fence in section of city which was not clearly established as residential community held not enjoinable as "nuisance" merely because of its unsightliness.—Parkersburg Builders Material Co. v. Barrack, 191 S.E. 368, 118 W.Va. 608, 110 A.L.R. 1454.—Nuis 3(1).

W.Va. 1927. Fence across part of public street, obstructing public use thereof, constituted "nuisance," and granting preliminary mandatory injunction was proper.—Kennedy v. Klammer, 139 S.E. 713, 104 W.Va. 198.

W.Va. 1916. A place to be a "nuisance" under Barnes' Code c. 32a, § 14, must be one in which liquors are handled or used in the manner described in the act.—State v. Baltimore & O.R. Co., 89 S.E. 288, 78 W.Va. 526, L.R.A. 1916F,1001.

Wis. 2002. A "nuisance" is a condition or activity which unduly interferes with the use of land or of a public place.—Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co., 646 N.W.2d 777, 254 Wis.2d 77, 2002 WI 80.—Nuis 1, 59.

Wis. 1981. A "nuisance" is an unreasonable activity or use of property that interferes substantially with comfortable enjoyment of life, health, safety of another or others.—State v. Quality Egg Farm, Inc., 311 N.W.2d 650, 104 Wis.2d 506.—Nuis 59.

Wis. 1965. To constitute a "nuisance" the activity complained of must create more than inconvenience; it must be offensive to the person of ordinary and normal sensibilities.—Bie v. Ingersoll, 135 N.W.2d 250, 27 Wis.2d 490.—Nuis 1.

Wis. 1958. The term "nuisance" is normally used to characterize a continuing activity or condition which either gives rise to a hazard or injury for which the one maintaining it should be liable.—Wisconsin Power & Light Co. v. Columbia County, 87 N.W.2d 279, 3 Wis.2d 1.—Nuis 1.

Wis. 1956. A "nuisance" is a condition or activity which unduly interferes with use of land or of a public place; conduct which interferes solely with use of a relatively small area of private land is tortious but not criminal and is a "private nuisance", while conduct which interferes with use of a public place or with activities of an entire community is a "public nuisance", and is criminal and tortious to persons specially harmed.—Schiro v. Oriental Realty Co., 76 N.W.2d 355, 272 Wis. 537, 73

A.L.R.2d 1368, appeal after remand 97 N.W.2d 385, 7 Wis.2d 556.—Nuis 3(1), 59.

Wis. 1956. Any act or obstruction which unnecessarily incommodes or impedes the lawful use of a highway by the public is a "nuisance".—Walley v. Patake, 74 N.W.2d 130, 271 Wis. 530.—High 154; Nuis 63.

Wis. 1954. A "nuisance" rests on the degree of danger arising even with exercise of utmost care and to constitute a nuisance the wrongfulness must be in the acts themselves rather than in failure to use the requisite degree of care in doing them, which presents a question of "negligence".—Bell v. Gray-Robinson Const. Co., 62 N.W.2d 390, 265 Wis. 652.—Neglig 1172; Nuis 1.

Wis. 1954. "Nuisance" consists in violation of an absolute duty, whereas "negligence" consists in failure to use the degree of care required in the particular circumstances or violation of a relative duty.—Bell v. Gray-Robinson Const. Co., 62 N.W.2d 390, 265 Wis. 652.—Neglig 250; Nuis 1.

Wis. 1954. Cause of action against construction company for loss of mink as a result of noisy operation of defendant's power shovel without a muffler alongside highway near mink ranch during whelping season after rancher had notified operator of shovel of imminent danger to mink was based upon "negligence" rather than "nuisance".—Bell v. Gray-Robinson Const. Co., 62 N.W.2d 390, 265 Wis. 652.—Anim 44; Nuis 3(3).

Wis. 1949. Any business, which necessarily and constantly impregnates large volumes of atmosphere with disagreeable, unwholesome, or offensive matter to such extent as to impair substantially the comfort or enjoyment of occupants of adjacent properties, is a "nuisance".—Dolata v. Berthelet Fuel & Supply Co., 36 N.W.2d 97, 254 Wis. 194, 8 A.L.R.2d 413.—Nuis 3(3).

Wis. 1947. Lot owners who obstruct or interfere with a road or sidewalk in such a way as to create a defective and dangerous condition are guilty of maintaining a "nuisance".—Holl v. City of Merrill, 28 N.W.2d 363, 251 Wis. 203.—Mun Corp 692; Nuis 63.

Wis. 1943. Finding that destruction of fish resulting from diversion of water from navigable stream was small and insignificant in value as compared to expense of providing better protection for the fish was equivalent to finding that the small destruction of fish caused by dam was not a "nuisance". St.1941, § 31.25.—State ex rel. Priegel v. Northern States Power Co., 8 N.W.2d 350, 242 Wis. 345.—Nav Wat 22(5).

Wis. 1943. Statutory declaration that any violation of statute relating to dams in navigable streams is a "nuisance" does not make it so necessarily, since legislature cannot arbitrarily declare that a nuisance which in fact is not so. St.1941, § 31.25.—State ex rel. Priegel v. Northern States Power Co., 8 N.W.2d 350, 242 Wis. 345.—Nuis 61.

Wis. 1942. A city is not liable as for a "nuisance" for failure to discharge a duty imposed upon

it to maintain the streets in a reasonably safe condition for travel as required by statute, since extent of city's liability in that regard is fixed by the statute. St.1941, § 81.15.—Lindemeyer v. City of Milwaukee, 6 N.W.2d 653, 241 Wis. 637.—Mun Corp 755(1); Nuis 63.

Wis. 1942. The projection of water stop box above sidewalk, a distance of 2½ inches which did not amount to an "insufficiency or want of repairs" within statute making city liable for damage sustained because of insufficiency or want of repairs of sidewalk, did not amount to a "nuisance" so as to render city liable under common law for injuries to pedestrian who stumbled over the box. St.1941, § 81.15.—Lindemeyer v. City of Milwaukee, 6 N.W.2d 653, 241 Wis. 637.—Mun Corp 777; Nuis 63.

Wis. 1942. Where the playing of baseball on field maintained by city rendered sidewalk adjacent to the field dangerous to pedestrian because baseballs were frequently batted over six-foot fence close to sidewalk, maintenance of the field by the city constituted a "nuisance," and city was liable for injuries sustained by a pedestrian who was struck in the eye by a batted baseball which caromed off the top of the fence.—Robb v. City of Milwaukee, 6 N.W.2d 222, 241 Wis. 432.—Mun Corp 851.

Wis. 1942. The existence of a "nuisance" is dependent upon physical injury to property or occupant thereof resulting from a use and a municipality's interest is aroused only when the injury is substantial, the facts are weighty and important and the public interest is affected.—City of Milwaukee v. Milbrew, Inc., 3 N.W.2d 386, 240 Wis. 527, 141 A.L.R. 277.—Mun Corp 605; Nuis 59, 62.

Wis. 1942. Evidence that some one was annoyed by what to him was a disagreeable smell is not in and of itself a "nuisance" so as to warrant a prosecution under ordinance prohibiting as a public nuisance commercial enterprises emitting offensive odors.—City of Milwaukee v. Milbrew, Inc., 3 N.W.2d 386, 240 Wis. 527, 141 A.L.R. 277.—Mun Corp 640; Nuis 92.

Wis. 1942. A factory from which emanated the odor of dry yeast located in a manufacturing zone did not constitute a "nuisance" arising from the operation of a specific business or the commission of a specific act condemned as such by statute nor was it a "nuisance per se" within the common law.—City of Milwaukee v. Milbrew, Inc., 3 N.W.2d 386, 240 Wis. 527, 141 A.L.R. 277.—Mun Corp 606; Nuis 61.

Wis. 1940. Where location of village's sewage disposal plant was so close to plaintiffs' dwelling as to bring it within area in which odors from plant normally, frequently, and regardless of unusual weather conditions, produced an extreme degree of contamination of the air, the plant constituted a "nuisance" as to plaintiffs.—Hasslinger v. Village of Hartland, 290 N.W. 647, 234 Wis. 201.—Mun Corp 831(1).

Wis. 1940. The location of an otherwise lawful business may determine its character as a "nuisance".—Hasslinger v. Village of Hartland, 290 N.W. 647, 234 Wis. 201.—Nuis 3(1).

Wis. 1940. Any business, though in itself lawful, which necessarily impregnates large volumes of the atmosphere with disagreeable, unwholesome, or offensive matter, may become a "nuisance" to those occupying adjacent property, in case it is so near and the atmosphere is contaminated to such an extent as to substantially impair the comfort or enjoyment of such adjacent occupants.—Hasslinger v. Village of Hartland, 290 N.W. 647, 234 Wis. 201.—Nuis 3(3).

Wis. 1940. Where traveler stepped down from a 17-inch curb and her foot came in contact with the top of a water main shut-off box which caused her to fall, that some 30 years previously shut-off box was placed so as to rise about 1½ inches above surrounding surface did not constitute the street or the shut-off box a "nuisance," as regards municipality's liability for injuries sustained by the traveler, but city's liability was controlled by statute regarding injuries to travelers due to defects. St.1937, § 81.15.—Padley v. Village of Lodi, 290 N.W. 136, 233 Wis. 661.—Mun Corp 776.

Wis. 1939. A city did not create or maintain "nuisance" in permitting children's slide, removed from its supporting framework and left on ground with bottom side up by city park employees, to be right side up at later hour on same day, nor in failing to keep watch so as to prevent it from being turned right side up, but such employees were at worst only guilty of negligence, which did not render city liable for resulting injury to child using slide, as city performed governmental function in maintaining park.—Grinde v. City of Watertown, 288 N.W. 196, 232 Wis. 551.—Mun Corp 734, 736.

Wis. 1930. Garage and oil station to be erected and business to be carried on therein in purely residential section held to constitute "nuisance."—Ballstadt v. Pagel, 232 N.W. 862, 202 Wis. 484.—Autos 367.

Wis. 1921. A gun is not a "nuisance," under St. 1919, § 29.03, and cannot be seized by a conservation warden under section 29.05, unless at or about the time of the taking it is being used by the owner or possessor thereof in actual and unlawful hunting; and a gun of a person who had started out on a trip without a license to hunt wolves, but had abandoned the trip by reason of a breakdown of automobile and was returning home through the game country, was not a nuisance, although it was not knocked down, and was lying on a blanket unloaded.—Hatton v. Fosnot, 185 N.W. 178, 175 Wis. 343.

Wis. 1916. A hotel used as an assignation house is a "nuisance."—State v. Grefig, 159 N.W. 560, 164 Wis. 74.

Wis.App. 2001. "Nuisance" is a material and unreasonable impairment of the right of enjoyment or the individual's right to the reasonable use of his or her property or the impairment of its value.—Anhalt v. Cities and Villages Mut. Ins. Co., 637 N.W.2d 422, 249 Wis.2d 62, 2001 WI App 271,

review denied 653 N.W.2d 889, 257 Wis.2d 117, 2002 WI 121.—Nuis 1.

Wis.App. 2001. “Nuisance” and negligence are different kinds of torts, and thus to constitute a nuisance, the wrongfulness must have been in the acts themselves, whereas negligence is based on the failure to use the requisite degree of care doing them.—*Anhalt v. Cities and Villages Mut. Ins. Co.*, 637 N.W.2d 422, 249 Wis.2d 62, 2001 WI App 271, review denied 653 N.W.2d 889, 257 Wis.2d 117, 2002 WI 121.—Neglig 200, 202; Nuis 1.

Wis.App. 2001. A “nuisance” is an unreasonable use of property that interferes substantially with the health or safety of another or others.—*Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, 632 N.W.2d 59, 246 Wis.2d 933, 2001 WI App 148, review granted 635 N.W.2d 781, 247 Wis.2d 1031, 2001 WI 117, affirmed 646 N.W.2d 777, 254 Wis.2d 77, 2002 WI 80.—Nuis 1.

Wis.App. 1996. “Nuisance” is wrong which may arise from unreasonable or unlawful use by person of his own property; it is unreasonable activity or use of property that interferes substantially with comfortable enjoyment of life, health, or safety of another or others.—*Bauder v. Delavan-Darien School Dist.*, 558 N.W.2d 881, 207 Wis.2d 310.—Nuis 1.

Wis.App. 1995. Electric cooperative did not maintain “nuisance” on dairy farmers’ property for purposes of farmers’ action against cooperative, seeking recovery for damage to their dairy herd allegedly caused by stray electrical voltage; as users of instrumentality they invited onto their land, and had in many ways benefited from over the years, farmers could not be heard to claim that instrumentality had illegally invaded their property. Restatement (Second) of Torts § 822.—*Vogel v. Grant-Lafayette Elec. Co-op.*, 536 N.W.2d 140, 195 Wis.2d 198, review granted 540 N.W.2d 200, reversed 548 N.W.2d 829, 201 Wis.2d 416.—Nuis 3(1).

Wis.App. 1995. Private “nuisance” is invasion of person’s interest in private use or enjoyment of land.—*Vogel v. Grant-Lafayette Elec. Co-op.*, 536 N.W.2d 140, 195 Wis.2d 198, review granted 540 N.W.2d 200, reversed 548 N.W.2d 829, 201 Wis.2d 416.—Nuis 1.

Wyo. 1996. Electric utility’s uses of easement across owners’ land for electric transmission and telephone lines did not constitute “nuisance,” despite contention as to whether electromagnetic fields (EMF) related to transmission line were inherently harmful and unreasonably interfered with use and value of land, where utility had valid easement for transmission line for electrification and telephone purposes, scope of easement had not been exceeded, and uses for which easement was being put were not unreasonable, unwarranted, or unlawful.—*Edgcomb v. Lower Valley Power and Light, Inc.*, 922 P.2d 850.—Nuis 3(2).

Wyo. 1976. “Nuisance” is defined as being a class of wrong which arises from an unreasonable, unwarranted, or unlawful use by person of his own property, working an obstruction or injury to the

right of another.—*Hein v. Lee*, 549 P.2d 286.—Nuis 1.

Wyo. 1960. A “nuisance” is a class of wrongs which arises from an unreasonable, unwarranted, or unlawful use by a person of his own property, working an obstruction or injury to right of another.—*Lore v. Town of Douglas*, 355 P.2d 367.—Nuis 1.

Wyo. 1936. Ordinance declaring uninvited visitation of private residences by solicitors, peddlers, hawkers, itinerant merchants, and transient vendors of merchandise a nuisance, punishable as a misdemeanor, ought not to be held invalid because it may have erroneously applied term “nuisance” to the forbidden conduct if the ordinance was a legitimate exercise of the power of the town to prevent disturbances. W.C.S.1945, § 29-430, subd. 12.—*Town of Green River v. Bunger*, 58 P.2d 456, 50 Wyo. 52, appeal dismissed 57 S.Ct. 510, 300 U.S. 638, 81 L.Ed. 854, rehearing denied 57 S.Ct. 752, 300 U.S. 688, 81 L.Ed. 889.—Hawk & P 2; Nuis 60.

## NUISANCE ARISING OUT OF NEGLIGENCE

N.Y. 1939. If no license was issued by city to contractor engaged in constructing building, to extend a compressed air pipe across a sidewalk, then the obstruction resulting in injury to pedestrian was an “absolute nuisance,” whereas if a permit had been issued by the city, but the privilege to obstruct the sidewalk was exercised in an improper manner, then the resulting nuisance was a “nuisance arising out of negligence.”—*Delaney v. Philhern Realty Holding Corporation*, 21 N.E.2d 507, 280 N.Y. 461.—Mun Corp 809(2).

## NUISANCE AT LAW

Ark. 1943. A “nuisance at law” or a “nuisance per se” is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings.—*Eddy v. Thornton*, 170 S.W.2d 995, 205 Ark. 843.

Ark. 1936. Filling station is not “nuisance per se,” and erection and operation of proposed station within city business district across street from church at distance of 100 feet would not be enjoined unless operated so as to become nuisance in fact. A “nuisance at law” or a “nuisance per se” is an act, occupation, or structure which is a nuisance at all times and under all circumstances, regardless of location or surroundings.—*Clark v. Hunt*, 95 S.W.2d 558, 192 Ark. 865.

Ga.App. 1947. A “nuisance at law” or “nuisance per se” is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings. Code, §§ 72-101, 72-102, 72-104.—*Gatewood v. Hansford*, 44 S.E.2d 126, 75 Ga.App. 567.—Nuis 1.

Ga.App. 1941. A “nuisance at law” or “nuisance per se” is an act, occupation or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings. Code, §§ 72-101, 72-102, 72-104.—Asphalt

## NUISANCE IN FACT

Products Co. v. Marable, 16 S.E.2d 771, 65 Ga.App. 877.—Nuis 1.

Ind.App. 2002. “Nuisance per se” or “nuisance at law” is that which is a nuisance in itself, and which, therefore, cannot be so conducted or maintained as to be lawfully carried on or permitted to exist. West’s A.I.C. 34-19-1-1.—Hopper v. Colonial Motel Properties, Inc., 762 N.E.2d 181, transfer denied 774 N.E.2d 519.—Nuis 1.

La. 1971. “Nuisance at law” or nuisance per se is an act, occupation, or structure which is nuisance at all times and under any circumstances, regardless of location or surroundings.—Robichaux v. Huppenbauer, 245 So.2d 385, 258 La. 139.—Nuis 1.

La. 1952. A “nuisance at law” or “nuisance per se” is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings.—Frederick v. Brown Funeral Homes, Inc., 62 So.2d 100, 222 La. 57, 39 A.L.R.2d 986.—Nuis 1.

La.App. 3 Cir. 1984. Operation of community home for five mentally retarded adults and two live-in houseparents did not constitute a “nuisance per se” or a “nuisance at law,” since a community home for mentally retarded individuals was specifically authorized by the legislature. LSA-R.S. 28:380 et seq.—Vienna Bend Subdivision Homeowners Ass’n v. Manning, 459 So.2d 1345.—Nuis 6.

Mich. 1959. A “nuisance at law” or “nuisance per se” is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings, as distinguished from a “nuisance in fact” or “nuisance per accidens”, which is that which becomes a nuisance by reason of circumstances and surroundings.—Bluemer v. Saginaw Central Oil & Gas Service, Inc., 97 N.W.2d 90, 356 Mich. 399.—Nuis 1.

Mich.App. 1982. A “nuisance at law” is an act, occupation or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings.—Radloff v. State, 323 N.W.2d 541, 116 Mich.App. 745, case remanded 330 N.W.2d 692, 417 Mich. 894, on remand 356 N.W.2d 31, 136 Mich.App. 457, appeal denied.—Nuis 3(1).

Mich.App. 1975. A “nuisance at law” or “nuisance per se” is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings.—Marshall v. Consumers Power Co., 237 N.W.2d 266, 65 Mich.App. 237, 82 A.L.R.3d 729.—Nuis 1.

N.M. 1994. “Nuisance per se,” or “nuisance at law” is activity or structure that is by its very nature a nuisance.—State ex rel. Village of Los Ranchos de Albuquerque v. City of Albuquerque, 889 P.2d 185, 119 N.M. 150, rehearing denied.—Nuis 1.

Ohio App. 9 Dist. 1940. A “nuisance at law” is an act, occupation, or structure which is a nuisance at all times and under any circumstances while a “nuisance in fact” is a nuisance becoming so by reason of circumstances.—Shoemaker v. City of

Barberton, 44 N.E.2d 477, 36 Ohio Law Abs. 539.—Nuis 1.

Tex.Civ.App.—Fort Worth 1917. “Nuisance at law” is act, thing, or omission, or use of property in and of itself a nuisance, permissible under no circumstances; “nuisance in fact” is one which becomes nuisance by reason of circumstances.—Shamburger v. Scheururer, 198 S.W. 1069.—Nuis 59.

Tex.Civ.App.—Fort Worth 1917. A “nuisance per se,” or a “nuisance at law,” is an act, thing, or omission, or use of property which in and of itself is a nuisance, and hence not permissible or excusable under any circumstances; but a “nuisance per accidens,” or a “nuisance in fact,” is one which becomes a nuisance by reason of circumstances and surroundings.—Shamburger v. Scheururer, 198 S.W. 1069.

### NUISANCE DEPENDENT ON NEGLIGENCE

Ohio Ct.Cl. 1998. “Qualified nuisance,” or “nuisance dependent on negligence,” consists of act lawfully but so negligently or carelessly done as to create potential and unreasonable risk of harm, which in due course results in injury to another.—Pope v. Ohio Dept. of Transp., 698 N.E.2d 536, 91 Ohio Misc.2d 230.—Nuis 1.

### NUISANCE DEPENDENT UPON NEGLIGENCE

Ohio 1948. As distinguished from absolute nuisance, a “qualified nuisance” or “nuisance dependent upon negligence” consists of anything lawfully but so negligently or carelessly done or permitted as to create a potential and unreasonable risk of harm, which, in due course, results in injury to another.—Wall v. City of Cincinnati, 83 N.E.2d 389, 150 Ohio St. 411, 38 O.O. 289.—Nuis 7.

Ohio Ct.Cl. 1989. “Qualified nuisance” or “nuisance dependent upon negligence” consists of act lawfully but so negligently or carelessly done as to create potential and unreasonable risk of harm which results in injury to another.—Blair v. Ohio Dept. of Rehab. & Corr., 582 N.E.2d 673, 61 Ohio Misc.2d 649.—Nuis 1.

### NUISANCE EXCEPTION

Mich.App. 1995. In order to establish claim that falls within “nuisance exception” to governmental immunity, plaintiff has to prove existence of “trespass-nuisance” or nuisance per se.—Fox v. Ogemaw County, 528 N.W.2d 210, 208 Mich.App. 697, appeal denied 541 N.W.2d 267, 450 Mich. 898.—Mun Corp 736.

### NUISANCE IN FACT

C.A.10 (N.M.) 1950. Where unexploded artillery shells left on target range of United States in isolated area, were not inherently dangerous, but become dangerous only when fuses were unscrewed or some unusual force was applied, there was no “nuisance per se”, and evidence in action against the United States for death of boy killed in explosion sustained finding that there was no “nuisance in fact”, and the rule of strict or absolute liability

was not applicable. 28 U.S.C.A. § 1346.—Denney v. U.S., 185 F.2d 108.—Explos 8; Nuis 3(6).

C.A.10 (N.M.) 1950. A “nuisance per se” is an act, occupation, or structure which is a nuisance at all times and under any circumstances regardless of location of surroundings, while a “nuisance in fact” is an act, occupation, or structure not a nuisance per se, but one which may become a nuisance by reason of circumstances, location, or surroundings.—Denney v. U.S., 185 F.2d 108.—Nuis 1.

E.D.Mich. 2001. Under Michigan law, a “nuisance in fact” is a nuisance by reason of circumstances and surroundings.—Olden v. LaFarge Corp., 203 F.R.D. 254.—Nuis 1.

Idaho 1950. A “nuisance in fact” is that which is not a nuisance inherently or per se, but may become one because of surrounding circumstances or manner in which business is conducted.—Rowe v. City of Pocatello, 218 P.2d 695, 70 Idaho 343.—Nuis 1.

Ind.App. 3 Dist. 1995. “Nuisance in fact” is not nuisance of itself, but becomes nuisance in manner in which it is operated. West’s A.I.C. 34-1-52-1.—Sand Creek Partners, L.P. v. Finch, 647 N.E.2d 1149.—Nuis 59.

Iowa 1942. Noxious gases and odors which spread over plaintiff’s land from city’s sewage disposal plant on abutting land, constituted actionable “nuisance”, which was not a “nuisance per se” but a “nuisance in fact” or “per accidens”.—Ryan v. City of Emmetsburg, 4 N.W.2d 435, 232 Iowa 600.—Mun Corp 736.

Kan. 1973. A “nuisance per se” is an act, instrument, or structure which is a nuisance at all times and under any circumstances, while a “nuisance per accidens” or “nuisance in fact” is an act, instrument or structure which becomes a nuisance by reason of surrounding circumstances.—Vickridge First & Second Addition Homeowners Ass’n, Inc. v. Catholic Diocese of Wichita, 510 P.2d 1296, 212 Kan. 348.—Nuis 1.

La. 1971. “Nuisance in fact” or per accidens are those which become nuisances by reason of circumstances or surroundings.—Robichaux v. Huppenbauer, 245 So.2d 385, 258 La. 139.—Nuis 1.

La. 1952. A “nuisance in fact” or “nuisance per accidens” is an act, occupation or structure which becomes a nuisance by reason of circumstances and surroundings.—Frederick v. Brown Funeral Homes, Inc., 62 So.2d 100, 222 La. 57, 39 A.L.R.2d 986.—Nuis 1.

La. 1947. A “nuisance per se” is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings, while a “nuisance in fact” is one which becomes a nuisance by reason of circumstances and surroundings.—Borgne mouth Realty Co. v. Gulf Soap Corp., 31 So.2d 488, 212 La. 57.—Nuis 1.

La. 1910. A “nuisance” is anything which inconveniences, annoys, or produces inconvenience or damage. A “nuisance per se” is one which is

always a nuisance in certain localities. A “nuisance in fact” is one which becomes a nuisance by reason of circumstances and surroundings.—City of New Orleans v. Lenfant, 52 So. 575, 126 La. 455, 29 L.R.A.N.S. 642.—Nuis 1.

La.App. 2 Cir. 1962. A “nuisance per se” is an act, occupation or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings and the difference between such nuisance and a “nuisance in fact” lies in the proof, not in the remedy.—Wright v. DeFatta, 142 So.2d 489, affirmed 152 So.2d 10, 244 La. 251.—Nuis 1.

La.App. 2 Cir. 1955. A “nuisance per se” is an act, occupation or structure which is nuisance at all times and under any circumstances, regardless of location or surroundings, while a “nuisance in fact” is one which becomes a nuisance by reason of facts, circumstances and surroundings.—Traylor v. Colvin, 84 So.2d 286.—Nuis 1.

La.App. 2 Cir. 1951. A “nuisance in fact” is one which becomes a nuisance by reason of circumstances and surroundings.—Robertson v. Shipp, 50 So.2d 699.—Nuis 1.

La.App. 2 Cir. 1939. A “nuisance per se” is one which is always a nuisance in certain localities, whereas a “nuisance in fact” is one which becomes a nuisance by reason of circumstances and surroundings.—Talbot v. Stiles, 189 So. 469.—Nuis 1.

La.App. 3 Cir. 1984. Operation of community home for five mentally retarded adults and two live-in houseparents did not constitute a “nuisance per accidens” or a “nuisance in fact,” since only evidence adduced was the unfounded fears of some subdivision residents who expressed their concern for the safety of their wives and children, and next-door neighbor testified that outward appearance of house had improved since community home commenced operation.—Vienna Bend Subdivision Homeowners Ass’n v. Manning, 459 So.2d 1345.—Nuis 1.

La.App. 3 Cir. 1970. A “nuisance per se” is an act, occupation or structure which is a nuisance at all times and under any circumstances, regardless of its location or surroundings, such as a bawdy house operated in violation of law; a “nuisance in fact” is one which becomes a nuisance by reason of particular circumstances and surroundings.—Ritchey v. Lake Charles Dredging & Towing Co., 230 So.2d 346, application denied 233 So.2d 252, 255 La. 816.—Nuis 3(1).

La.App. 4 Cir. 1970. A “nuisance in fact” is one which becomes a nuisance by reason of particular circumstances. LSA-C.C. arts. 666-669.—Robichaux v. Huppenbauer, 231 So.2d 626, writ issued 235 So.2d 94, 256 La. 64, remanded 245 So.2d 385, 258 La. 139.—Nuis 1.

La.App. 5 Cir. 1985. A “nuisance in fact” is one that becomes a nuisance by reasons of facts, circumstances, and its surroundings.—Rodrigue v. Copeland, 465 So.2d 67, writ granted 466 So.2d 1294, reversed 475 So.2d 1071, transfer granted 479 So.2d 356, issued Klein v. Copeland, 479 So.2d 911,

vacated 482 So.2d 613, order Stayed 479 So.2d 912, certiorari denied 106 S.Ct. 1262, 475 U.S. 1046, 89 L.Ed.2d 572.—Nuis 1.

Md. 1954. A “nuisance in fact” is an act, occupation, or structure, not a nuisance per se, but one which becomes a nuisance by reason of the circumstances, location, or surroundings.—Adams v. Commissioners of Town of Trappe, 102 A.2d 830, 204 Md. 165.—Nuis 1.

Mich. 1978. From an evidentiary point of view, nuisances fall into two distinct categories: “nuisance per se,” which once established by proof becomes a nuisance as a matter of law, and “nuisance in fact,” where circumstances and surroundings present questions of fact which trier of fact may determine create a nuisance as a matter of fact; when used in conjunction with each other, legal terms nuisance per se and nuisance in fact relate only to nature of proof required and to whether a nuisance is created as a matter of law or as a matter of fact.—Gerzeski v. State, 268 N.W.2d 525, 403 Mich. 149.—Nuis 1.

Mich. 1959. A “nuisance at law” or “nuisance per se” is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings, as distinguished from a “nuisance in fact” or “nuisance per accidens”, which is that which becomes a nuisance by reason of circumstances and surroundings.—Bluemer v. Saginaw Central Oil & Gas Service, Inc., 97 N.W.2d 90, 356 Mich. 399.—Nuis 1.

Mich.App. 1990. “Nuisance in fact” is a nuisance by reason of circumstances and surroundings, and an act may be found to be a nuisance in fact when its natural tendency is to create danger and inflict injury on person or property.—Wagner v. Regency Inn Corp., 463 N.W.2d 450, 186 Mich. App. 158, appeal denied.—Nuis 1.

Mich.App. 1989. Unlike “nuisance in fact,” “nuisance per se” is not predicated on want of care, but is unreasonable by its very nature.—Taylor v. City of Detroit, 452 N.W.2d 826, 182 Mich.App. 583, appeal denied.—Nuis 1.

Mich.App. 1988. “Nuisance in fact” has natural tendency to create danger and inflict injury to persons or property and is actionable by reason of circumstances and surroundings.—Guinan v. Truscott, 423 N.W.2d 48, 167 Mich.App. 520.—Nuis 1.

Mich.App. 1985. A “nuisance in fact” is a nuisance by reason of circumstances and surroundings, and an act may be found to be a nuisance in fact where its natural tendency is to create danger and inflict injury on person or property.—Veeneman v. State, 373 N.W.2d 193, 143 Mich.App. 694, appeal granted, reversed Hadfield v. Oakland County Drain Com’r, 422 N.W.2d 205, 430 Mich. 139, rehearing denied.—Nuis 1.

Mich.App. 1983. “Nuisance in fact” is nuisance by reason of circumstances and surroundings, and an act may be found to be “nuisance in fact” where its natural tendency is to create danger and inflict injury to person or property; existence of “nuisance in fact” is question for trier of fact, which may or

may not find existence of nuisance from proof of act and its consequences.—Martin by Martin v. State, 341 N.W.2d 239, 129 Mich.App. 100, appeal denied 368 N.W.2d 226, 422 Mich. 891.—Nuis 1.

Mich.App. 1982. Where gravel pit lake was dangerous for use as swimming and diving site due to rawness of excavation which stripped away lateral support of embankment and because of instability of soil, and where State knew gravel pit was unsafe for public use but made no effort to discourage its use by public or to contour the embankment to make the area safe, gravel pit lake was a “nuisance in fact.”—Radloff v. State, 323 N.W.2d 541, 116 Mich.App. 745, case remanded 330 N.W.2d 692, 417 Mich. 894, on remand 356 N.W.2d 31, 136 Mich.App. 457, appeal denied.—Nuis 61.

Mich.App. 1979. A “nuisance in fact” is an act, occupation or structure which becomes a nuisance because of circumstances and surroundings; whether or not a particular thing is a nuisance in fact is to be resolved by trier of fact.—Ford v. City of Detroit, 283 N.W.2d 739, 91 Mich.App. 333.—Nuis 1, 53.

Mich.App. 1975. A “nuisance in fact” or “nuisance per accidens” is that which becomes a nuisance by reason of circumstances and surroundings.—Marshall v. Consumers Power Co., 237 N.W.2d 266, 65 Mich.App. 237, 82 A.L.R.3d 729.—Nuis 1.

N.M. 1994. “Nuisance in fact” is activity or structure that is not at all times and under any circumstance nuisance, but instead becomes a nuisance because of its location and the way the activity or structure is done or managed.—State ex rel. Village of Los Ranchos de Albuquerque v. City of Albuquerque, 889 P.2d 185, 119 N.M. 150, rehearing denied.—Nuis 1.

N.M. 1963. A “nuisance in fact” is an act, occupation, or structure which is not a nuisance per se, but which may become a nuisance by reason of circumstances, location, or surroundings.—Koeber v. Apex-Albuquerque Phoenix Exp., 380 P.2d 14, 72 N.M. 4, 2 A.L.R.3d 1368.—Nuis 1.

N.M.App. 1995. “Nuisance in fact” is distinguished from “nuisance per se” in that nuisance in fact may become nuisance by reason of its circumstances, location or surroundings, where as nuisance per se is always nuisance regardless of those factors.—Espinosa v. Roswell Tower, Inc., 910 P.2d 940, 121 N.M. 306, 1996-NMCA-006.—Nuis 1, 59.

Ohio App. 9 Dist. 1940. A “nuisance at law” is an act, occupation, or structure which is a nuisance at all times and under any circumstances while a “nuisance in fact” is a nuisance becoming so by reason of circumstances.—Shoemaker v. City of Barberton, 44 N.E.2d 477, 36 Ohio Law Abs. 539.—Nuis 1.

Ohio App. 9 Dist. 1940. A “nuisance in fact” within statute requiring city council to keep sidewalks free from nuisance is not dependent only on the injury done where a person comes into contact with a static street condition not a nuisance per se but care used to prevent the injury must be consid-

ered. Gen.Code, § 3714.—*Shoemaker v. City of Barberton*, 44 N.E.2d 477, 36 Ohio Law Abs. 539.—*Mun Corp* 763(1).

Okla. 1942. Drilling oil and gas well is not a “nuisance per se”, but, if property of another is substantially damaged as a result thereof, the latter may recover for a “nuisance in fact”, and legalized use of property becomes a “nuisance per accidens” if such use substantially damages the property of another. Okl.St.Ann. Const. art. 2 § 23.—*Phillips Petroleum Co. v. Vandergriff*, 122 P.2d 1020, 190 Okla. 280, 1942 OK 94.—Nuis 3(1), 5.

Tex.App.—Houston [1 Dist.] 1994. “Nuisance per se” is act, occupation, or structure that is nuisance at all times, under any circumstances, and in any location, while “nuisance in fact” is act, occupation, or structure that becomes nuisance by reason of its circumstances or surroundings.—*Marianatha Temple, Inc. v. Enterprise Products Co.*, 893 S.W.2d 92, rehearing denied, and writ denied.—Nuis 4.

Tex.App.—Beaumont 1994. “Nuisance in fact” is fact situation or determination of actual nuisance which depends on facts of each particular case.—*Deep East Texas Regional Mental Health and Mental Retardation Services v. Kinnear*, 877 S.W.2d 550, rehearing overruled.—Nuis 1.

Tex.App.—Houston [14 Dist.] 2001. A “nuisance in fact” is a condition that is a nuisance because of its particular surroundings.—*GTE Mobilnet of South Texas Ltd. Partnership v. Pascouet*, 61 S.W.3d 599, rehearing overruled, and rehearing overruled, and review denied, and rehearing of petition for review denied.—Nuis 1.

Tex.App.—Houston [14 Dist.] 2001. Noises and light from cellular telephone tower and associated equipment building constituted a “nuisance in fact.”—*GTE Mobilnet of South Texas Ltd. Partnership v. Pascouet*, 61 S.W.3d 599, rehearing overruled, and rehearing overruled, and review denied, and rehearing of petition for review denied.—Nuis 3(1), 3(3).

Tex.Civ.App.—Fort Worth 1917. “Nuisance at law” is act, thing, or omission, or use of property in and of itself a nuisance, permissible under no circumstances; “nuisance in fact” is one which becomes nuisance by reason of circumstances.—*Shamburger v. Scheurrer*, 198 S.W. 1069.—Nuis 59.

Tex.Civ.App.—Fort Worth 1917. A “nuisance per se,” or a “nuisance at law,” is an act, thing, or omission, or use of property which in and of itself is a nuisance, and hence not permissible or excusable under any circumstances; but a “nuisance per accidens,” or a “nuisance in fact,” is one which becomes a nuisance by reason of circumstances and surroundings.—*Shamburger v. Scheurrer*, 198 S.W. 1069.

Tex.Civ.App.—Dallas 1952. A livery stable or riding stable ordinarily is not a “nuisance per se,” but its manner of operation may make it a “nuisance in fact”.—*City of Dallas v. Halbert*, 246 S.W.2d 686, ref. n.r.e.—Nuis 3(11).

## NUISANCE PER ACCIDENS

C.C.A.4 (S.C.) 1929. In “nuisance per accidens,” wrong to individual is not merged in public wrong, but will support private action for damages.—*Sullivan v. American Mfg. Co. of Massachusetts*, 33 F.2d 690.—Nuis 72.

D.Kan. 1984. “Nuisance per accidens” or nuisance in fact is act, instrument or structure which becomes nuisance by reason of surrounding circumstances.—*Miller v. Cudahy Co.*, 592 F.Supp. 976.—Nuis 1.

M.D.N.C. 1999. In order to establish a “nuisance per accidens” under North Carolina law, a plaintiff must show: (1) improper or unreasonable use of defendant’s property; (2) which caused a substantial interference with plaintiff’s use and enjoyment of his property.—*Hoffman v. Vulcan Materials Co.*, 91 F.Supp.2d 881.—Nuis 1.

M.D.N.C. 1997. Under North Carolina law, private nuisance can be “nuisance per accidens,” or nuisance in fact, which is so by reason of its location, manner, construction, maintenance or operation.—*Rudd v. Electrolux Corp.*, 982 F.Supp. 355.—Nuis 1.

Ark. 1955. “Nuisance Per Accidens,” is an instrumentality which in its nature is not a nuisance but is such by virtue of its surroundings, the manner in which it is conducted or managed, or other circumstances.—*Thiel v. Cernin*, 276 S.W.2d 677, 224 Ark. 854.

Del.Super. 1975. A “nuisance per accidens” involves some lawful act, business, or instrumentality which becomes a nuisance due to its circumstances or location or manner in which it is operated or performed.—*Hylton v. Shaffer’s Market, Inc.*, 343 A.2d 627.—Nuis 5.

Ga. 1962. A “nuisance per accidens” is a nuisance by reason of circumstances and surroundings.—*Griffith v. Newman*, 123 S.E.2d 723, 217 Ga. 533, 2 A.L.R.3d 956.—Nuis 1.

Ga. 1946. Petition alleging that defendants operated in residential and business section of city a plant for manufacture of material for hog and chicken feed from entrails of fowls and animals, and that noxious odors, gases, and vapors were emitted from plant and caused great discomfort and damage to persons in their residences and places of business, set forth cause of action against defendants to enjoin them from maintaining a “nuisance per accidens”. Code §§ 72–101, 72–102.—*Poultryland, Inc. v. Anderson*, 37 S.E.2d 785, 200 Ga. 549.—Nuis 3(5), 32.

Ga. 1940. Equity will not enjoin as a “nuisance per se” an act, occupation, or structure which is not a nuisance at all times or under all circumstances regardless of location or surroundings, nor will it enjoin as a “nuisance per accidens” an act, business, occupation, or structure which, not being a nuisance per se, does not become a nuisance by reason of the particular circumstances of its operation or the location and surroundings.—*Asphalt*

## NUISANCE PER ACCIDENTS

Products Co. v. Beard, 7 S.E.2d 172, 189 Ga. 610.—Nuis 23(1).

Ga. 1940. The operation of an asphalt manufacturing and cement mixing plant is not a "nuisance per se," nor does it become a "nuisance per accidens" if it is conducted in a manufacturing section of a city merely because it is operated by coal or some fuel discharging obnoxious smoke and cinders or releases dust or is accompanied by loud rattling noises during the day and night and is within 200 feet of a residence, where it is not shown that such operation is in a residence neighborhood, or that the manner of operation is unusual or unnecessary and avoidable.—Asphalt Products Co. v. Beard, 7 S.E.2d 172, 189 Ga. 610.—Nuis 3(5).

Ga. 1938. A normally lawful business or pursuit which is not a "nuisance per se" may become a "nuisance per accidens" by improper manner of operation or improper connected acts, and in that event equity will enjoin only the improper part or acts constituting the nuisance.—Warren Co. v. Dickson, 195 S.E. 568, 185 Ga. 481.—Nuis 5, 35.

Ga. 1938. The playing of baseball games and incidental pursuits may become a "nuisance per accidens" where there is indecent, disorderly, or improper conduct of players or spectators, or where, in residential community, there is accompanying noise which is excessive and unreasonable or which recurs at unusual and unreasonable hours of the night, so as to prevent the sleep of ordinary, normal, reasonable persons of the neighborhood.—Warren Co. v. Dickson, 195 S.E. 568, 185 Ga. 481.—Nuis 3(9).

Ga.App. 1941. Equity will not enjoin, as a "nuisance per accidens," an act, business, occupation or structure which is not a nuisance per se and does not become a nuisance by reason of particular circumstances of operation or location and surroundings, as by some improper manner of operation or improper connected acts. Code, §§ 72-101, 72-102, 72-104.—Asphalt Products Co. v. Marable, 16 S.E.2d 771, 65 Ga.App. 877.—Nuis 1, 23(1).

Ga.App. 1941. Operation of an asphalt-manufacturing and cement-mixing plant is not a "nuisance per se" and does not become a "nuisance per accidens" in a manufacturing section of a city merely because discharging obnoxious smoke and cinders, releasing dust or accompanied by loud rattling noises, though within 200 feet of a residence, where it is not shown that such operation is in a residence neighborhood or is unusual. Code, §§ 72-101, 72-102, 72-104.—Asphalt Products Co. v. Marable, 16 S.E.2d 771, 65 Ga.App. 877.—Nuis 3(5).

Idaho 1939. In action to restrain use of school property for night baseball by lessee, evidence showed that use of the property constituted a legal "nuisance per accidens" consisting principally of the flooding of plaintiffs' homes with excessive light, creation of excessive noise, trespass of balls and people, and parking of automobiles in such manner as to greatly hinder ingress to and egress from plaintiffs' property.—Hansen v. Independent School Dist. No. 1 in Nez Perce County, 98 P.2d 959, 61 Idaho 109.—Nuis 33.

Ind.App. 2002. A "nuisance per accidens," or one in fact, becomes a nuisance by virtue of the circumstances surrounding the use. West's A.I.C. 34-19-1-1.—Hopper v. Colonial Motel Properties, Inc., 762 N.E.2d 181, transfer denied 774 N.E.2d 519.—Nuis 1.

Ind.App. 1 Dist. 1992. Otherwise lawful use may become "nuisance per accidens" by virtue of circumstances surrounding the use.—Wernke v. Halas, 600 N.E.2d 117.—Nuis 5.

Iowa 1984. If radiation leaking from computer constituted a nuisance, it was a "nuisance per accidens," or nuisance in fact, a lawful activity conducted in such a manner as to be a nuisance.—Page County Appliance Center, Inc. v. Honeywell, Inc., 347 N.W.2d 171, 45 A.L.R.4th 1191.—Nuis 5.

Kan. 1973. A "nuisance per se" is an act, instrument, or structure which is a nuisance at all times and under any circumstances, while a "nuisance per accidens" or "nuisance in fact" is an act, instrument or structure which becomes a nuisance by reason of surrounding circumstances.—Vickridge First & Second Addition Homeowners Ass'n, Inc. v. Catholic Diocese of Wichita, 510 P.2d 1296, 212 Kan. 348.—Nuis 1.

Kan. 1958. Nuisances fall into two categories, nuisance per se, and nuisance per accidens or nuisance in fact, and a "nuisance per se" is an act, occupation or structure which is a nuisance at all times and under any circumstances, while a "nuisance per accidens" is that which becomes a nuisance by reason of surrounding circumstances.—Dill v. Excel Packing Co., 331 P.2d 539, 183 Kan. 513.—Nuis 1.

Ky. 1946. A "nuisance" is either a "nuisance per se" which is not permitted under any conditions, or a "nuisance per accidens", which will not be enjoined until proved an offensive thing.—Board of Ed. of Louisville v. Klein, 197 S.W.2d 427, 303 Ky. 234.—Nuis 19.

La. 1952. A "nuisance in fact" or "nuisance per accidens" is an act, occupation or structure which becomes a nuisance by reason of circumstances and surroundings.—Frederick v. Brown Funeral Homes, Inc., 62 So.2d 100, 222 La. 57, 39 A.L.R.2d 986.—Nuis 1.

La.App. 3 Cir. 1984. Operation of community home for five mentally retarded adults and two live-in houseparents did not constitute a "nuisance per accidens" or a "nuisance in fact," since only evidence adduced was the unfounded fears of some subdivision residents who expressed their concern for the safety of their wives and children, and next-door neighbor testified that outward appearance of house had improved since community home commenced operation.—Vienna Bend Subdivision Homeowners Ass'n v. Manning, 459 So.2d 1345.—Nuis 1.

Mich. 1959. A "nuisance at law" or "nuisance per se" is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings, as distinguished from a "nuisance in fact" or "nuisance per

accidens", which is that which becomes a nuisance by reason of circumstances and surroundings.—*Bluemer v. Saginaw Central Oil & Gas Service, Inc.*, 97 N.W.2d 90, 356 Mich. 399.—Nuis 1.

Mich.App. 1975. A "nuisance in fact" or "nuisance per accidens" is that which becomes a nuisance by reason of circumstances and surroundings.—*Marshall v. Consumers Power Co.*, 237 N.W.2d 266, 65 Mich.App. 237, 82 A.L.R.3d 729.—Nuis 1.

Mich.App. 1966. Gun club itself did not constitute a "nuisance per accidens" which is a nuisance in light of surrounding circumstances, where community surrounding club was not highly developed, it was an area in which deer hunting was carried on in season, adjacent to gun club was Detroit house of correction, the property was swampy in nature and not suitable for development, zoning of area was agricultural and not residential and gun club was within contemplation of this zoning description.—*Oak Haven Trailer Court, Inc. v. Western Wayne County Conservation Ass'n*, 141 N.W.2d 645, 3 Mich.App. 83, affirmed *Smith v. Western Wayne County Conservation Ass'n*, 158 N.W.2d 463, 380 Mich. 526, 26 A.L.R.3d 647.—Nuis 3(9).

Mont. 1999. A "nuisance per accidens" or in fact is one which becomes a nuisance by virtue of circumstances and surroundings.—*Barnes v. City of Thompson Falls*, 979 P.2d 1275, 294 Mont. 76, 1999 MT 77.—Nuis 1.

N.J.Sup. 1941. The classification of "nuisance per se" and "nuisance per accidens" has reference to the proof and not the remedy, in that in the former right to relief is established by proof of the "mere act", while in the latter proof of "the act and its consequences" is necessary.—*Gainfort v. 229 Raritan Avenue Corp.*, 22 A.2d 893, 127 N.J.L. 409.—Nuis 1.

N.J.Super.Ch. 1956. A "nuisance per se" and a "nuisance per accidens" are distinguishable in that the former is established by proof of the mere act, while the latter requires proof of the act and its consequences.—*State ex rel. Board of Com'r's of North Bergen Tp. v. WOR-TV Tower*, 121 A.2d 764, 39 N.J.Super. 583.—Nuis 1.

N.C. 1965. A race track is not a nuisance per se but its operation may, under certain circumstances, be a "nuisance per accidens" or a nuisance in fact, as in a rural area.—*Hooks v. International Speedways, Inc.*, 140 S.E.2d 387, 263 N.C. 686.—Nuis 3(9).

N.C. 1955. Complaint alleging that defendant erected artificial pond and placed lame wild geese, food and bait in the area, with result that large numbers of wild geese were attracted and using the pond as a base, destroyed plaintiffs' crops on adjoining lands, was sufficient to state a cause of action for "nuisance per accidens".—*Andrews v. Andrews*, 88 S.E.2d 88, 242 N.C. 382.—Nuis 48.

Oklahoma. 1942. A gasoline filling station is not a "nuisance per se" but may become a "nuisance per accidens" by reason either of manner of construction or manner of operation.—*Bell v. Brockman*,

126 P.2d 78, 190 Okla. 583, 1942 OK 195.—Autos 395.

Oklahoma. 1942. The erection and operation in usual way of an automobile service station or other legitimate business enterprise outside of incorporated city or town on a state highway in an area which although unrestricted had theretofore been used for residential purposes did not constitute a "nuisance per accidens" which a court of equity would enjoin.—*Bell v. Brockman*, 126 P.2d 78, 190 Okla. 583, 1942 OK 195.—Autos 395.

Oklahoma. 1942. Drilling oil and gas well is not a "nuisance per se", but, if property of another is substantially damaged as a result thereof, the latter may recover for a "nuisance in fact", and legalized use of property becomes a "nuisance per accidens" if such use substantially damages the property of another. Okl.St.Ann. Const. art. 2 § 23.—*Phillips Petroleum Co. v. Vandegriff*, 122 P.2d 1020, 190 Okla. 280, 1942 OK 94.—Nuis 3(1), 5.

S.C. 1997. County's proposed improvement of street to put parking spaces along one side of street end was not "nuisance per accidens"; if nuisance did in fact develop, it would be result of those who used street and not by act of county.—*Brading v. County of Georgetown*, 490 S.E.2d 4, 327 S.C. 107, rehearing denied.—Counties 143.

S.C. 1962. A "nuisance per accidens" is an act, occupation, or structure which is not a nuisance per se but may become nuisance by reason of circumstances, location, or surroundings.—*Strong v. Winn-Dixie Stores, Inc.*, 125 S.E.2d 628, 240 S.C. 244.—Nuis 1.

S.C. 1915. A fertilizer mixing plant is not a "nuisance per se," that is, a nuisance anywhere and under all circumstances, but, if a nuisance at all, is a "nuisance per accidens," that is, by reason of its location and other circumstances, such as the community in which it is located or the manner in which it is constructed or conducted.—*Woods v. Rock Hill Fertilizer Co.*, 86 S.E. 817, 102 S.C. 442, Am. Ann. Cas. 1917D, 1149.

S.C.App. 1989. "Nuisance per accidens" is act, occupation, or structure which is not nuisance per se, but which may become nuisance by reason of circumstances, location, or surroundings.—*Home Sales, Inc. v. City of North Myrtle Beach*, 382 S.E.2d 463, 299 S.C. 70.—Nuis 1.

S.C.App. 1984. "Nuisance per accidens" is act, occupation or structure which is not nuisance per se, but which may become nuisance by reason of circumstances, location, or surroundings.—*Neal v. Darby*, 318 S.E.2d 18, 282 S.C. 277.—Nuis 1.

Tenn. 1966. The difference between a "nuisance per se" and a "nuisance per accidens" is that in the former, injury in some form is certain to be inflicted, while in the latter, the injury is uncertain or contingent until it actually occurs.—*State ex rel. Cunningham v. Feezell*, 400 S.W.2d 716, 218 Tenn. 17.—Nuis 1.

Tex.Civ.App.—Fort Worth 1917. A "nuisance per se," or a "nuisance at law," is an act, thing, or

**NUISANCE PER SE**

omission, or use of property which in and of itself is a nuisance, and hence not permissible or excusable under any circumstances; but a “nuisance per accidens,” or a “nuisance in fact,” is one which becomes a nuisance by reason of circumstances and surroundings.—*Shamburger v. Scheurrer*, 198 S.W. 1069.

**Tex.Civ.App.**—Austin 1944. City’s operation of sewage disposal plant did not give rise to a “nuisance per accidens”.—*City of Temple v. Mitchell*, 180 S.W.2d 959.

**NUISANCE PER ACCIDENTS, OR IN FACT**

**N.D.Iowa** 1972. Under Iowa law, a “nuisance per accidens, or in fact” arises where a lawful activity is conducted in such a manner as to be a nuisance. I.C.A. §§ 657.1, 657.2.—*Stockdale v. Agrico Chemical Co., Division of Continental Oil Co.*, 340 F.Supp. 244.—Nuis 5.

**NUISANCE PER SE**

**C.A.9 (Alaska)** 1954. An airport operated under normal conditions and with adequate supervision and controls is not a “nuisance per se”.—*Seltenreich v. Town of Fairbanks*, 14 Alaska 568, 211 F.2d 83, certiorari denied 15 Alaska 272, 75 S.Ct. 206, 348 U.S. 887, 99 L.Ed. 697.—Aviation 216; Nuis 3(2).

**C.A.7 (Ill.)** 1954. Under Illinois law, carnival or street fair located within village on state highway constituted on absolute “nuisance per se” in violation of statute defining public nuisance as the obstruction or encroachment upon public highway. S.H.A.Ill. ch. 38, § 466, subd. 5.—*Rueter v. Village of Versailles*, 213 F.2d 233.—High 153.

**C.A.10 (N.M.)** 1950. Where unexploded artillery shells left on target range of United States in isolated area, were not inherently dangerous, but became dangerous only when fuses were unscrewed or some unusual force was applied, there was no “nuisance per se”, and evidence in action against the United States for death of boy killed in explosion sustained finding that there was no “nuisance in fact”, and the rule of strict or absolute liability was not applicable. 28 U.S.C.A. § 1346.—Denney v. U.S., 185 F.2d 108.—Explos 8; Nuis 3(6).

**C.A.10 (N.M.)** 1950. A “nuisance per se” is an act, occupation, or structure which is a nuisance at all times and under any circumstances regardless of location of surroundings, while a “nuisance in fact” is an act, occupation, or structure not a nuisance per se, but one which may become a nuisance by reason of circumstances, location, or surroundings.—*Denney v. U.S.*, 185 F.2d 108.—Nuis 1.

**C.A.10 (N.M.)** 1950. Improper use of explosives is not under all circumstances a “nuisance per se”.—*Denney v. U.S.*, 185 F.2d 108.—Nuis 3(6).

**C.A.10 (N.M.)** 1950. Where highly explosive and inherently dangerous substances are kept or used in thickly populated areas or in proximity to homes and buildings, so as to make danger extreme and injury probable, such possession or use is a “nuisance per se”, and evidence in action posed for

damages or injuries resulting therefrom.—*Denney v. U.S.*, 185 F.2d 108.—Nuis 3(6).

**C.C.A.4 (S.C.)** 1929. “Nuisance per se” gives no right of action to individual, unless he shows special damage different in kind from that sustained by public generally.—*Sullivan v. American Mfg. Co. of Massachusetts*, 33 F.2d 690.—Nuis 72.

**D.Kan.** 1984. “Nuisance per se” is act, instrument or structure which is nuisance at all times and under any circumstances.—*Miller v. Cudahy Co.*, 592 F.Supp. 976.—Nuis 1.

**E.D.Mich.** 2001. Under Michigan law, a “nuisance per se” is an act, occupation, or structure which is a nuisance at all times and under any circumstances.—*Olden v. LaFarge Corp.*, 203 F.R.D. 254.—Nuis 1.

**E.D.Mo.** 1949. Booster station using gas engines on natural gas pipe line was not a “nuisance per se”, and could become a “nuisance” only if it were not operated in a fair and reasonable way with regard to rights of nearby landowners in use and enjoyment of their home.—*Boiler v. Texas Eastern Transmission Corp.*, 87 F.Supp. 603.—Nuis 3(5).

**D.Neb.** 1947. Smoke is not a “nuisance per se”, but smoke or smoke and soot constitute an actionable nuisance when they are emitted in unreasonable amounts in view of the surroundings and produce substantial injury to neighboring property or materially interfere with its use and enjoyment by persons of ordinary sensibilities.—*Kimball v. Thompson*, 70 F.Supp. 803, reversed 165 F.2d 677.—Nuis 3(3).

**M.D.N.C.** 1997. Under North Carolina law, private nuisances may sometimes be classified as “nuisance per se,” which is nuisance at law, meaning act, occupation, or structure which is nuisance at all times and under any circumstances, regardless of location or surroundings.—*Rudd v. Electrolux Corp.*, 982 F.Supp. 355.—Nuis 1.

**Ala.** 1989. “Nuisance per se” is act, occupation, or structure that is nuisance at all times and under any circumstances, regardless of location or surroundings.—*McCord v. Green*, 555 So.2d 743.—Nuis 1.

**Ala.** 1938. The operation of a gasoline filling station is a lawful business and is not a “nuisance per se” even in a residential district, but it may become such by chance, the location frequently becoming of controlling importance. Code 1923, § 9271.—*Milton v. Maples*, 179 So. 519, 235 Ala. 446.—Autos 395.

**Ala.** 1936. Operation of a gasoline filling station is a lawful business and not a “nuisance per se” even in a residential district, but it may become such by chance, the location frequently becoming of controlling importance.—*Maples v. Milton*, 168 So. 868, 232 Ala. 483.—Autos 395.

**Ala.** 1933. Filling station is not “nuisance per se” even in residential district, but may become such per accidens, and matter of location frequently becomes of controlling importance.—*Leary v. Adams*, 147 So. 391, 226 Ala. 472.

Ala. 1931. Gasoline filling station, even in residential district, is not "nuisance per se," but may become nuisance per accidens.—Fletcher v. Barnard, 133 So. 29, 222 Ala. 380.—Autos 395.

Ala. 1926. Complaint alleging erection of power company's dam impounding waters, and causing plaintiff to become sick and suffer physical pain and mental anguish, but containing no allegation that dam was unlawfully or wrongfully erected, did not state cause of action as for nuisance, notwithstanding Code 1923, § 1136, subsecs. 7 and 8, since dam is not "Nuisance per se," defined as act, occupation, or structure which is nuisance at all times and under any circumstances.—Wheeler v. River Falls Power Co., 111 So. 907, 215 Ala. 655.

Ariz. 1949. The use of leased premises to operate a common gambling house constituted a "nuisance per se" which court had duty to enjoin notwithstanding defendants could also be prosecuted for conducting the gambling house, and failure to enjoin the unlawful use was an abuse of discretion. A.C.A.1939, § 43-4603 (A.R.S. §§ 13-601, 13-602).—Heyne v. Loges, 205 P.2d 586, 68 Ariz. 310.—Nuis 65, 80.

Ariz. 1948. A "bookie" establishment, maintained in building for purpose of conducting betting on results of horse races, is a "common gaming house," and hence a "nuisance per se," against which injunction lies. Code 1939, §§ 43-4603, 73-1607a (A.R.S. §§ 13-601, 13-602).—State ex rel. Sullivan v. Phoenix Sav. Bank & Trust Co., 198 P.2d 1018, 68 Ariz. 42.—Nuis 65.

Ariz. 1948. The business of wrecking automobiles and salvaging the parts is not a "nuisance per se", although the conduct of such business may, in a particular instance, be held a nuisance, depending on the circumstances.—Kubby v. Hammond, 198 P.2d 134, 68 Ariz. 17.—Nuis 3(5).

Ariz. 1941. A pleading alleging facts showing operation and maintenance of gaming house alleges maintenance of "nuisance per se," and it is not necessary to allege or prove that maintenance of such nuisance interferes with comfortable enjoyment of life and property by public or any considerable portion thereof, as such facts are conclusively presumed from commission of act itself.—Engle v. Scott, 114 P.2d 236, 57 Ariz. 383.—Nuis 84.

Ark. 1953. A livery stable in a city or town is not a "nuisance per se". Ark. Stats. §§ 19-2303, 19-2304, 19-2401.—City of Springdale v. Chandler, 257 S.W.2d 934, 222 Ark. 167.—Nuis 3(11).

Ark. 1953. Keeping of cattle in a city is not a "nuisance per se". Ark. Stats. §§ 19-2303, 19-2304, 19-2401.—City of Springdale v. Chandler, 257 S.W.2d 934, 222 Ark. 167.—Nuis 3(10).

Ark. 1943. Defendants operating lumber yard in residential district of city would not be enjoined from erecting and operating a saw and planer mill on such property, since erection of such mill would not constitute a "nuisance per se".—Eddy v. Thornton, 170 S.W.2d 995, 205 Ark. 843.—Nuis 3(5).

Ark. 1943. A "nuisance at law" or a "nuisance per se" is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings.—Eddy v. Thornton, 170 S.W.2d 995, 205 Ark. 843.

Ark. 1942. It cannot be said that the building of a residence is a "nuisance per se" although the building may become one by its use.—Bennett v. City of Hope, 161 S.W.2d 186, 204 Ark. 147.—Nuis 61.

Ark. 1941. A cotton gin is not a "nuisance per se". See Words and Phrases, Permanent Edition, for all other definitions of "Nuisance Per Se".—Magness v. Sellers, 147 S.W.2d 1008, 201 Ark. 1047.—Nuis 3(5).

Ark. 1940. The erection of a tourist camp building, which is not a "nuisance per se", on lots owned by defendant, could not be enjoined by owners of neighboring lots on ground that tourist camp would be a nuisance, if erected, where building had not been erected when injunction was sought.—Moore v. Adams, 141 S.W.2d 46, 200 Ark. 810.—Nuis 23(1).

Ark. 1936. Filing station is not "nuisance per se," and erection and operation of proposed station within city business district across street from church at distance of 100 feet would not be enjoined unless operated so as to become nuisance in fact.—Clark v. Hunt, 95 S.W.2d 558, 192 Ark. 865.—Autos 395.

Ark. 1936. Filing station is not "nuisance per se," and erection and operation of proposed station within city business district across street from church at distance of 100 feet would not be enjoined unless operated so as to become nuisance in fact. A "nuisance at law" or a "nuisance per se" is an act, occupation, or structure which is a nuisance at all times and under all circumstances, regardless of location or surroundings.—Clark v. Hunt, 95 S.W.2d 558, 192 Ark. 865.

Ark. 1935. Drive-in filling station is not "nuisance per se," and erection of station would not be enjoined where evidence showed that station would not constitute a nuisance.—Moore v. Wallis, 86 S.W.2d 1111, 191 Ark. 551.—Autos 395.

Ark. 1935. Drive-in filling station is not "nuisance per se," and erection of station would not be enjoined where evidence showed that station would not constitute a nuisance. A "nuisance at law" or a "nuisance per se" is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings.—Moore v. Wallis, 86 S.W.2d 1111, 191 Ark. 551.

Ark. 1910. A "nuisance per se" is a nuisance in itself, and which cannot be so conducted as to be lawfully carried on or permitted to exist.—Cooper v. Whissen, 130 S.W. 703, 95 Ark. 545.—Nuis 3(1).

Cal. 1991. A responsible agency's ability to obtain abatement of a use of a parcel in violation of applicable zoning rules does not depend on a finding that the zoning violation constitutes a "nuisance

**NUISANCE PER SE**

per se.”—*IT Corp. v. Solano County Bd. of Supervisors*, 820 P.2d 1023, 2 Cal.Rptr.2d 513, 1 Cal.4th 81.—Zoning 763.

Cal. 1952. An airport is not a “nuisance per se” but it may become a nuisance either because of unsuitable location or improper operation or both. Gen.Laws, Act 151a, §§ 2(a, d), 17.—*Anderson v. Souza*, 243 P.2d 497, 38 Cal.2d 825.—Aviation 216; Nuis 3(1).

Cal. 1926. Hospital constructed and maintained for treatment of contagious and infectious diseases is not “nuisance per se.”—*Jardine v. City of Pasadena*, 248 P. 225, 199 Cal. 64, 48 A.L.R. 509.—Nuis 3(8).

Cal.App. 1 Dist. 1950. Except when justified by necessity or utility which causes it to be reasonable under circumstances and executed with all required care, blasting in populated surroundings which causes injury is considered tortious and open to injunction, mostly under designation of a “nuisance per se.”—*Alonso v. Hills*, 214 P.2d 50, 95 Cal.App.2d 778.—Nuis 3(6), 19.

Cal.App. 1 Dist. 1950. Blasting in remote places, where there is little danger of injury, is not considered a “nuisance per se” and is actionable only when negligence or tortious intent is alleged and proved.—*Alonso v. Hills*, 214 P.2d 50, 95 Cal.App.2d 778.—Nuis 3(6), 32.

Cal.App. 2 Dist. 1942. A complaint charging violation of Long Beach city ordinance prohibiting maintenance or possession of pin game or marble game states public offense, though possession or maintenance of such a device is not “nuisance per se,” and state statute does not denounce possession thereof as unlawful, for no question of “public nuisance” is involved. St.1921, p. 2075; Const. art. 11, §§ 6, 8, 11.—*Ex parte Lawrence*, 131 P.2d 27, 55 Cal.App.2d 491.—Mun Corp 594(6).

Cal.App. 2 Dist. 1942. The dissemination of racing news to bookmakers does not constitute a “nuisance per se” within meaning of statute providing that neither specific nor preventive relief can be granted to enforce a penal law, except in a case of nuisance. Civ.Code, § 3369.—*People v. Brophy*, 120 P.2d 946, 49 Cal.App.2d 15.—Nuis 80; Tel 472.1.

Cal.App. 2 Dist. 1940. Peacocks are not a “nuisance per se,” and hence complaint charging maintenance of peacocks on certain premises was insufficient to charge maintenance of a “nuisance” in absence of allegation of facts to support charge. West's Ann.Pen.Code, § 373a.—*Ex parte Cohn*, 98 P.2d 769, 37 Cal.App.2d 39.—Ind & Inf 63.

Cal.App. 3 Dist. 1996. Concept of a “nuisance per se” arises when a legislative body with appropriate jurisdiction, in the exercise of the police power, expressly declares a particular object or substance, activity, or circumstance, to be a nuisance; while determination of whether nuisance exists generally requires consideration and balancing of a variety of factors, where the law expressly declares something to be a nuisance, then no inquiry beyond its existence need be made and in this

sense its mere existence is said to be a nuisance per se. West's Ann.Cal.Civ.Code § 3479.—*Beck Development Co. v. Southern Pacific Transportation Co.*, 52 Cal.Rptr.2d 518, 44 Cal.App.4th 1160, review denied.—Nuis 6.

Cal.App. 3 Dist. 1996. To support a claim of “nuisance per se” the plaintiff must point to a statutory provision that declares the alleged contamination to be a nuisance regardless of the action or inaction of any public agency.—*Beck Development Co. v. Southern Pacific Transportation Co.*, 52 Cal.Rptr.2d 518, 44 Cal.App.4th 1160, review denied.—Nuis 6.

Cal.App. 4 Dist. 2000. Concept of a “nuisance per se” arises when a legislative body with appropriate jurisdiction, in the exercise of the police power, expressly declares a particular object or substance, activity, or circumstance to be a nuisance.—*Jones v. Union Pacific Railroad Co.*, 94 Cal.Rptr.2d 661, 79 Cal.App.4th 1053, rehearing denied.—Nuis 6.

Cal.Super. 1944. The mere possession of dogs or cats does not create a “nuisance per se”. Pen. Code, §§ 316, 370, 372, 372a, 373a, 374b, 375.—*People v. Cooper*, 149 P.2d 86, 64 Cal.App.2d Supp. 946.—Nuis 3(10).

Colo. 1948. Existence of a “nuisance per se” depends upon an act, occupation or structure which is a nuisance at all times and under all circumstances regardless of location or surroundings.—*Echave v. City of Grand Junction*, 193 P.2d 277, 118 Colo. 165.—Nuis 61.

Conn. 1942. A depression in sidewalk resulting from providing a driveway approach to abutting property did not constitute a “nuisance per se”.—*Beckwith v. Town of Stratford*, 29 A.2d 775, 129 Conn. 506.—Mun Corp 821(6).

Conn. 1942. A “nuisance per se” exists when there is a condition which would be a nuisance in any locality and under any circumstances.—*Beckwith v. Town of Stratford*, 29 A.2d 775, 129 Conn. 506.—Nuis 3(1).

Conn. 1942. A “nuisance per se” as regards use of land seldom occurs, since same conditions may constitute a nuisance in one locality or under certain circumstances, and not in another locality or under other circumstances.—*Beckwith v. Town of Stratford*, 29 A.2d 775, 129 Conn. 506.—Nuis 3(1).

Conn. 1942. Where abutting property owners placed wire netting over space between sidewalk and curb to protect grass seed, such condition did not constitute an obstruction which was a “nuisance per se” on ground that defendants committed a trespass so as to entitle pedestrian injured by tripping over netting to damages.—*Allen v. Mussen*, 26 A.2d 776, 129 Conn. 151.—Mun Corp 821(17).

Conn. 1939. A junkyard, while not a “nuisance per se,” may become such under certain circumstances, and in certain locations.—*Levine v. Board of Adjustment of City of New Britain*, 7 A.2d 222, 125 Conn. 478.—Nuis 61.

Conn. 1938. The mere possession or use of dynamite caps does not constitute a "nuisance per se" without regard to the manner of the use or keeping, but the question depends on the locality, the quantity of the dynamite caps and all surrounding circumstances. Gen.St.Supp. 1935, § 1008c.—Murphy v. Ossola, 199 A. 648, 124 Conn. 366.—Explos 8, 10.

Conn. 1937. Operation of fire truck upon public highway is not a "nuisance per se."—Brock-Hall Dairy Co. v. City of New Haven, 189 A. 182, 122 Conn. 321.—Autos 175(1).

Conn.Com.Pl. 1960. A swimming pool or recreational center is not a "nuisance per se".—Marco v. Swinnerton, 171 A.2d 418, 22 Conn.Sup. 335.—Nuis 3(9).

Del.Ch. 1942. An airport is not a "nuisance per se", but may become a nuisance because of unsuitable location or improper manner of construction or operation.—Vanderslice v. Shawn, 27 A.2d 87, 26 Del.Ch. 225.—Aviation 216; Nuis 3(1).

Fla. 1947. Operation of a night club does not constitute a "nuisance per se". F.S.A. § 64.11.—Federal Amusement Co. v. State ex rel. Tuppen, 32 So.2d 1, 159 Fla. 495.—Nuis 3(9).

Fla. 1947. City's municipal airport was not a "nuisance per se".—Brooks v. Patterson, 31 So.2d 472, 159 Fla. 263.—Aviation 216; Mun Corp 736.

Fla. 1940. One who uses his property in a lawful and proper manner is not guilty of a "nuisance" merely because particular use which he chooses to make of it may cause inconvenience or annoyance to a neighbor, and nothing which is legal in its erection can be a "nuisance per se."—City of Lakeland v. State ex rel. Harris, 197 So. 470, 143 Fla. 761.—Nuis 5.

Fla. 1940. A sewage disposal plant is not a "nuisance per se", but its location and manner of its operation determine whether it is a nuisance.—City of Lakeland v. State ex rel. Harris, 197 So. 470, 143 Fla. 761.—Mun Corp 837.

Ga. 1955. A filling station is not a "nuisance per se".—Hadden v. Pierce, 90 S.E.2d 405, 212 Ga. 45.—Autos 395.

Ga. 1952. A permanent obstruction which materially interferes with travel on a public road is a "nuisance per se."—Hardy v. Thomas, 69 S.E.2d 609, 208 Ga. 752.—High 153.

Ga. 1949. Those residing in district restricted to dwelling houses by city zoning ordinance, were not precluded from maintaining an injunction suit to restrain violation of ordinance, on ground that their sole remedy was either a petition to abate a public nuisance or a criminal prosecution under ordinance, where violation consisted of conversion of dwelling house into a three-family dwelling house, and penal provision in ordinance stated that it was to be cumulative of all other legal remedies for enforcement of ordinance, since three-family dwelling house was not a "nuisance per se", subject to abatement, and penal provision was not intended to be exclusive remedy for enforcement of ordinance.

nance.—Graham v. Phinizy, 51 S.E.2d 451, 204 Ga. 638.—Inj 89(3); Zoning 772.

Ga. 1946. While an airport is not a "nuisance per se", it might nevertheless become such from the manner or place of its construction or from the manner of its subsequent operation. Code, § 72-204.—Elder v. City of Winder, 40 S.E.2d 659, 201 Ga. 511.—Aviation 216; Nuis 3(1).

Ga. 1946. A "nuisance per se" is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings. Code, § 72-101.—Poultryland, Inc. v. Anderson, 37 S.E.2d 785, 200 Ga. 549.—Nuis 1.

Ga. 1946. The mere erection in city of a plant for manufacture of material for hog and chicken feed from entrails of fowls and animals was not without more a "nuisance per se." Code, § 72-101.—Poultryland, Inc. v. Anderson, 37 S.E.2d 785, 200 Ga. 549.—Nuis 3(5).

Ga. 1946. A "nuisance per se" is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings.—Rushing v. Thigpen, 37 S.E.2d 180, 200 Ga. 313.—Nuis 1.

Ga. 1946. Garages and filling stations in a residence neighborhood do not constitute a "nuisance per se".—Rushing v. Thigpen, 37 S.E.2d 180, 200 Ga. 313.—Autos 367, 395.

Ga. 1946. A petition seeking an injunction against construction of a filling station and garage in a residence neighborhood was properly dismissed since a garage or filling station in a residence neighborhood does not constitute a "nuisance per se".—Rushing v. Thigpen, 37 S.E.2d 180, 200 Ga. 313.—Autos 367, 395.

Ga. 1941. Any permanent structure in a public road which materially interferes with travel therein is a "nuisance per se".—Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur, 16 S.E.2d 753, 192 Ga. 817.

Ga. 1941. A steam laundry is not a "nuisance per se" which is defined as an act, occupation or structure which is a nuisance at all times and under any circumstances regardless of location or surroundings.—Washington Seminary v. Bass, 16 S.E.2d 565, 192 Ga. 808.—Nuis 3(5).

Ga. 1940. Equity will not enjoin as a "nuisance per se" an act, occupation, or structure which is not a nuisance at all times or under all circumstances regardless of location or surroundings, nor will it enjoin as a "nuisance per accidens" an act, business, occupation, or structure which, not being a nuisance per se, does not become a nuisance by reason of the particular circumstances of its operation or the location and surroundings.—Asphalt Products Co. v. Beard, 7 S.E.2d 172, 189 Ga. 610.—Nuis 23(1).

Ga. 1940. The operation of an asphalt manufacturing and cement mixing plant is not a "nuisance per se," nor does it become a "nuisance per accidens" if it is conducted in a manufacturing section

## NUISANCE PER SE

of a city merely because it is operated by coal or some fuel discharging obnoxious smoke and cinders or releases dust or is accompanied by loud rattling noises during the day and night and is within 200 feet of a residence, where it is not shown that such operation is in a residence neighborhood, or that the manner of operation is unusual or unnecessary and avoidable.—Asphalt Products Co. v. Beard, 7 S.E.2d 172, 189 Ga. 610.—Nuis 3(5).

Ga. 1939. Neither a filling station nor a garage for repairing and vulcanizing automobile tires is a "nuisance per se."—Wilson v. Evans Hotel Co., 4 S.E.2d 155, 188 Ga. 498, 124 A.L.R. 373.—Autos 367, 395.

Ga. 1939. A "nuisance per se" is an act, occupation, or structure which is a nuisance at all times and under all circumstances regardless of location or surroundings.—Wilson v. Evans Hotel Co., 4 S.E.2d 155, 188 Ga. 498, 124 A.L.R. 373.—Nuis 3(1).

Ga. 1939. The business of conducting an automobile garage, or supply station for automobiles, even in a residential district, is not a "nuisance per se," but on the contrary is a legitimate and necessary industry.—Wilson v. Evans Hotel Co., 4 S.E.2d 155, 188 Ga. 498, 124 A.L.R. 373.—Autos 367, 395.

Ga. 1939. Where petition contained allegations that defendants in operation of their filling station at night were conducting business with excessive, unreasonable, and unnecessary noises to injury of petitioners who owned a hotel and apartment house in neighborhood, trial court did not err in refusing to dismiss action on general demurrer, though operating filling station did not constitute a "nuisance per se," since petitioners were entitled to injunctive relief against unusual and unnecessary noises which were not necessarily incident to conduct of such business.—Wilson v. Evans Hotel Co., 4 S.E.2d 155, 188 Ga. 498, 124 A.L.R. 373.—Autos 395.

Ga. 1938. A normally lawful business or pursuit which is not a "nuisance per se" may become a "nuisance per accidens" by improper manner of operation or improper connected acts, and in that event equity will enjoin only the improper part or acts constituting the nuisance.—Warren Co. v. Dickson, 195 S.E. 568, 185 Ga. 481.—Nuis 5, 35.

Ga. 1938. The harmless playing of ordinary games of baseball or operation of park for such games in a lawful, decent, and orderly manner, accompanied only by usual cheers and noise of spectators, is not a "nuisance per se."—Warren Co. v. Dickson, 195 S.E. 568, 185 Ga. 481.—Nuis 3(9).

Ga. 1938. A gasoline filling station is not a "nuisance per se."—City of Hawkinsville v. Williams, 195 S.E. 162, 185 Ga. 396.—Autos 395.

Ga. 1934. Airport is not "nuisance per se," but may become such from manner of its construction or operation, although statute expressly authorizes establishment and operation of airport by municipality. Laws 1927, pp. 780-782, §§ 4, 4A, 4E; Civ.Code 1910, §§ 4454-4457.—Thrasher v. City of Atlanta, 173 S.E. 817, 178 Ga. 514, 99 A.L.R. 158.—Aviation 216; Nuis 3(1).

Ga. 1933. Sawmill is not "nuisance per se."—Wingate v. City of Doerun, 170 S.E. 226, 177 Ga. 373.—Nuis 3(5).

Ga. 1933. Cemetery is not "nuisance per se."—Hall v. Moffett, 170 S.E. 192, 177 Ga. 300.—Nuis 3(7).

Ga. 1932. "Nuisance per se" is act, occupation, or structure which is nuisance at all times or under any circumstances, regardless of location or surroundings.—Thomoson v. Sammon, 164 S.E. 45, 174 Ga. 751.—Nuis 1.

Ga. 1932. Livery stable is not "nuisance per se."—Thomoson v. Sammon, 164 S.E. 45, 174 Ga. 751.—Nuis 3(11).

Ga. 1928. Coal and ice business, including stable, *held* not "nuisance per se."—Barton v. Rogers, 144 S.E. 248, 166 Ga. 802.—Nuis 3(4).

Ga. 1915. A "nuisance per se" is an act which is a nuisance at all times and under any circumstances, regardless of location or surroundings.—Simpson v. Du Pont Powder Co., 85 S.E. 344, 143 Ga. 465, L.R.A. 1915E, 430.—Nuis 1.

Ga.App. 1950. Nothing that is lawful in its creation can be a "nuisance per se", though it may become a nuisance by reason of the manner in which it is kept.—Cannon v. City of Macon, 58 S.E.2d 563, 81 Ga.App. 310.—Nuis 5.

Ga.App. 1947. A "nuisance at law" or "nuisance per se" is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings. Code, §§ 72-101, 72-102, 72-104.—Gatewood v. Hansford, 44 S.E.2d 126, 75 Ga.App. 567.—Nuis 1.

Ga.App. 1947. The operation of an asphalt processing plant is not a "nuisance per se" but it may become a nuisance in fact or nuisance per accidens by reason of the circumstances or the location and surroundings. Code §§ 72-101, 72-102, 72-104.—Sam Finley, Inc. v. Russell, 42 S.E.2d 452, 75 Ga.App. 112.—Nuis 3(5).

Ga.App. 1941. A "nuisance at law" or "nuisance per se" is an act, occupation or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings. Code, §§ 72-101, 72-102, 72-104.—Asphalt Products Co. v. Marable, 16 S.E.2d 771, 65 Ga.App. 877.—Nuis 1.

Ga.App. 1941. Operation of an asphalt-manufacturing and cement-mixing plant is not a "nuisance per se" and does not become a "nuisance per accidens" in a manufacturing section of a city merely because discharging obnoxious smoke and cinders, releasing dust or accompanied by loud rattling noises, though within 200 feet of a residence, where it is not shown that such operation is in a residence neighborhood or is unusual. Code, §§ 72-101, 72-102, 72-104.—Asphalt Products Co. v. Marable, 16 S.E.2d 771, 65 Ga.App. 877.—Nuis 3(5).

Idaho 1950. A "nuisance per se" is that which is a nuisance at all times and under all circum-

stances.—*Rowe v. City of Pocatello*, 218 P.2d 695, 70 Idaho 343.—Nuis 1.

**Idaho 1941.** It is not every obstruction in a street or highway that constitutes a “nuisance per se” but the right of the public to the free and unobstructed use of street or highway is subject to reasonable and necessary limitations and to such incidental, temporary, or partial obstructions as manifest necessity may require. Code 1932, § 51–101.—*Rief v. Mountain States Telephone & Telegraph Co.*, 120 P.2d 823, 63 Idaho 418.—High 153; Mun Corp 776.

**Idaho 1941.** Anything which does not amount to a substantial obstruction of a street or an inherent interference with the free or comfortable enjoyment of life or property within meaning of statute is not a public “nuisance per se”. Code 1932, § 51–101.—*Rief v. Mountain States Telephone & Telegraph Co.*, 120 P.2d 823, 63 Idaho 418.—Mun Corp 703(1).

**Idaho 1941.** Where pedestrian walking on sidewalk in business district of city was struck by a screen door which opened outward immediately in front of him, the pedestrian could not recover for his injury from owner and tenant of building, since the maintenance and use of the screen door did not constitute a substantial “obstruction” and did not constitute a “nuisance per se”. Code 1932, § 51–101.—*Rief v. Mountain States Telephone & Telegraph Co.*, 120 P.2d 823, 63 Idaho 418.—Mun Corp 808(2).

**Ill. 1935.** Maintenance of gasoline filling station is not “nuisance per se.”—*People ex rel. Terp v. Washingtonian Home of Chicago*, 198 N.E. 721, 361 Ill. 522.—Autos 395.

**Ill.App. 3 Dist. 1956.** Operation of slaughterhouse, food locker, and meat market in section of village which was not closely built up, was not a “public nuisance” or a “nuisance per se”.—*Ward v. Iliopolis Food Lockers*, 132 N.E.2d 591, 9 Ill. App.2d 129.—Nuis 3(10), 61.

**Ind. 1943.** A general public hospital is not a “nuisance per se.”—*Board of Com’rs of Green County v. Usrey*, 46 N.E.2d 823, 221 Ind. 197.—Nuis 3(8).

**Ind. 1936.** Manufacture of artificial gas for public use is not a “nuisance per se,” but emission of noxious gases from gas plant, endangering health and damaging property of those in close proximity with plant, constitutes “private nuisance” for which damages may be recovered or injunctive relief granted. *Burns’ Ann.St.* §§ 2–505 to 2–507.—*Northern Indiana Public Service Co. v. W.J. & M.S. Vesey*, 200 N.E. 620, 210 Ind. 338.—Nuis 3(5).

**Ind. 1907.** The transmission of electricity at a high voltage over a right of way, being authorized by law, is not a “nuisance per se,” as it is well settled that a lawful business or erection is never a “nuisance per se.”—*Mull v. Indianapolis & C. Traction Co.*, 81 N.E. 657, 169 Ind. 214.

**Ind.App. 2002.** “Nuisance per se” or “nuisance at law” is that which is a nuisance in itself, and

which, therefore, cannot be so conducted or maintained as to be lawfully carried on or permitted to exist. West’s A.I.C. 34-19-1-1.—*Hopper v. Colonial Motel Properties, Inc.*, 762 N.E.2d 181, transfer denied 774 N.E.2d 519.—Nuis 1.

**Ind.App. 2 Div. 1968.** Where wooden fence was not within traveled portion of right-of-way of public street of town, and fence was not a permanent structure, it did not constitute a “nuisance per se” and it could not be abated by town.—*Town of Ogden Dunes v. Wildermuth*, 235 N.E.2d 73, 142 Ind.App. 379.—Mun Corp 671(5.1).

**Ind.App. 1951.** A municipal power plant is not a “nuisance per se”.—*Howard v. Robinette*, 99 N.E.2d 110, 122 Ind.App. 66, transfer denied 102 N.E.2d 630, 230 Ind. 199, motion to retax costs granted 109 N.E.2d 432, 123 Ind.App. 206.—Nuis 3(5).

**Ind.App. 1933.** Operation of funeral home and undertaking business is not “nuisance per se”.—*Albright v. Crim*, 185 N.E. 304, 97 Ind.App. 388.—Nuis 3(7).

**Ind.App. 1 Div. 1925.** Horse stable not “nuisance per se.”—*Thompson v. Elzy*, 148 N.E. 154, 83 Ind.App. 215.—Nuis 3(4).

**Ind.App. 2 Div. 1919.** Any excavation made in a street for private purposes is a “nuisance per se,” if made without the consent of the municipality, but if with such consent it does not become a nuisance until it renders the street dangerous, and the author is bound only to exercise ordinary care to maintain it in a safe condition.—*Bailey v. Columbia Grocery Co.*, 124 N.E. 784, 73 Ind.App. 58.

**Iowa 1970.** A “nuisance per se” is a structure or activity which is a nuisance at all times and under any circumstances, regardless of location or surroundings; proof of the act or the existence of the structure establishes the nuisance as a matter of law.—*Bader v. Iowa Metropolitan Sewer Co.*, 178 N.W.2d 305.—Nuis 1.

**Iowa 1942.** Noxious gases and odors which spread over plaintiff’s land from city’s sewage disposal plant on abutting land, constituted actionable “nuisance”, which was not a “nuisance per se” but a “nuisance in fact” or “per accidens”.—*Ryan v. City of Emmetsburg*, 4 N.W.2d 435, 232 Iowa 600.—Mun Corp 736.

**Iowa 1941.** The playing of baseball on school district’s playground is not a “nuisance per se”, and property owner must submit to the annoyance incident to living close to school playground properly used, and decree restraining school district from so conducting the games as to trespass upon property owner’s property and from throwing and batting balls upon the premises, and restraining students under the control and supervision of school district from retrieving any balls from property owner’s premises, was too stringent. Code 1939, § 12395.—*Ness v. Independent School Dist. of Sioux City*, 298 N.W. 855, 230 Iowa 771.—Schools 89.10.

**Iowa 1915.** Though hitching posts on a street are not a “nuisance per se,” when authorized by the

proper authorities, they may become a nuisance in fact, and, if so, no authority is conferred on the city to maintain them as such.—*Kent v. City of Harlan*, 152 N.W. 6, 170 Iowa 90.

Kan. 1973. A “nuisance per se” is an act, instrument, or structure which is a nuisance at all times and under any circumstances, while a “nuisance per accidens” or “nuisance in fact” is an act, instrument or structure which becomes a nuisance by reason of surrounding circumstances.—*Vickridge First & Second Addition Homeowners Ass’n, Inc. v. Catholic Diocese of Wichita*, 510 P.2d 1296, 212 Kan. 348.—Nuis 1.

Kan. 1958. Nuisances fall into two categories, nuisance per se, and nuisance per accidens or nuisance in fact, and a “nuisance per se” is an act, occupation or structure which is a nuisance at all times and under any circumstances, while a “nuisance per accidens” is that which becomes a nuisance by reason of surrounding circumstances.—*Dill v. Excel Packing Co.*, 331 P.2d 539, 183 Kan. 513.—Nuis 1.

Kan. 1947. A slaughter house is not a “nuisance per se,” but only “prima facie nuisance”—*Basham v. Eureka Locker & Cold Storage*, 187 P.2d 500, 164 Kan. 119.—Nuis 3(10).

Kan. 1941. That portion of a house situated on city street was an “encroachment” on the street, a “purpresture”, and a “nuisance per se”, notwithstanding that the house was built before the city was platted.—*City of Russell v. Russell County Bldg. & Loan Ass’n*, 118 P.2d 121, 154 Kan. 154.—Mun Corp 693.

Kan. 1940. Though a dance hall is not a “nuisance per se” it may become such when the din of its jazz orchestra, nickelodeon, and megaphone singing at unseasonable hours is so noisy that guests of a long-established hotel in the immediate vicinity are prevented from sleeping and in consequence the patronage of the hotel is substantially diminished.—*Asmann v. Masters*, 98 P.2d 419, 151 Kan. 281.—Nuis 3(9).

Kan. 1935. Erection and operation of grain elevator in district where like businesses are conducted does not constitute a “nuisance per se.”—*McMullen v. Jennings*, 41 P.2d 753, 141 Kan. 420.—Nuis 3(5).

Kan. 1906. A “nuisance per se” is an act, thing, or omission, or use of the property, which in and of itself is a nuisance, and hence is not permissible or excusable under any circumstances. A lawful business is not generally a “nuisance per se,” but may become so by being located in an inappropriate place, or being kept in an improper manner.—*Remsberg v. Iola Portland Cement Co.*, 84 P. 548, 73 Kan. 66.

Ky. 1946. A “nuisance” is either a “nuisance per se” which is not permitted under any conditions, or a “nuisance per accidens”, which will not be enjoined until proved an offensive thing.—*Board of Ed. of Louisville v. Klein*, 197 S.W.2d 427, 303 Ky. 234.—Nuis 19.

Ky. 1946. A football game is not a “nuisance per se” and must be considered a lawful activity if conducted in a reasonable manner.—*Board of Ed. of Louisville v. Klein*, 197 S.W.2d 427, 303 Ky. 234.—Nuis 3(9).

Ky. 1946. The operation of high school stadium for night high school football games was not a “nuisance per se”.—*Board of Ed. of Louisville v. Klein*, 197 S.W.2d 427, 303 Ky. 234.—Nuis 3(9).

Ky. 1946. A “nuisance per se” is an act which is a nuisance at all times and under any circumstances, regardless of location or surroundings, and is a nuisance in and of itself which cannot be so conducted as to be lawfully carried on or permitted to exist under any circumstances.—*Strader v. Com.*, 194 S.W.2d 368, 302 Ky. 330.—Nuis 59.

Ky. 1945. The operation of coal yard on property near where railroad company maintained its coal yard and railroad shop was not a “nuisance per se” which could be abated upon complaint of nearby property owners, and judgment restraining specific nuisances resulting from unnecessary noises and disseminating of dust because of failure to sprinkle coal was all the relief to which property owners were entitled.—*Strough v. Ideal Supplies Co.*, 187 S.W.2d 839, 300 Ky. 34.—Nuis 3(3).

Ky. 1944. Generally, no act, erection, or use of property, which is lawful or authorized by competent authority, such as business or occupation which is lawful in itself and, by care and precaution, can be conducted without danger or inconvenience to others, can be a “nuisance per se”, nor is property which may be, and ordinarily is, used for lawful purpose such a nuisance.—*Crain v. City of Louisville*, 182 S.W.2d 787, 298 Ky. 421.—Nuis 3(1).

Ky. 1939. A sound track or other motor vehicle is not a “nuisance per se” but only a “potential nuisance,” as respects right of city to regulate its use.—*Brachey v. Maupin*, 126 S.W.2d 881, 277 Ky. 467, 121 A.L.R. 969.—Autos 5(1).

Ky. 1935. Oil and gasoline storage plant adjacent to hotel building held not “nuisance per se.”—*Standard Oil Co. of Kentucky v. Bentley*, 84 S.W.2d 20, 260 Ky. 185.—Nuis 3(6).

Ky. 1930. Store building is not “nuisance per se,” but is lawful structure.—*Hamlin v. Durham*, 32 S.W.2d 413, 235 Ky. 842.—Nuis 3(2).

Ky. 1915. The living together of a man and woman unmarried, when generally known throughout the neighborhood, not only constitutes open and gross “lewdness,” which is a misdemeanor, but is a “nuisance per se,” because outraging public decency.—*Adams v. Commonwealth*, 171 S.W. 1006, 162 Ky. 76, L.R.A. 1916C,651.

La. 1952. A “nuisance at law” or “nuisance per se” is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings.—*Frederick v. Brown Funeral Homes, Inc.*, 62 So.2d 100, 222 La. 57, 39 A.L.R.2d 986.—Nuis 1.

La. 1952. Operation of a funeral home is a lawful enterprise and not a “nuisance per se”.—

Frederick v. Brown Funeral Homes, Inc., 62 So.2d 100, 222 La. 57, 39 A.L.R.2d 986.—Nuis 3(7).

La. 1947. A "nuisance per se" is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings, while a "nuisance in fact" is one which becomes a nuisance by reason of circumstances and surroundings.—Borgne mouth Realty Co. v. Gulf Soap Corp., 31 So.2d 488, 212 La. 57.—Nuis 1.

La. 1944. The construction of railroad and its operation in usual mode do not constitute "nuisance per se", but railroad construction or equipment may prove to be nuisance as matter of fact by reason of their surroundings or manner of operation.—McGee v. Yazoo & M. V. R. Co., 19 So.2d 21, 206 La. 121.—R R 222(2).

La. 1916. Though a municipality was authorized to enact ordinances to preserve the order and to provide and maintain the cleanliness and sanitary condition of the city, it could not enact ordinances forbidding the erection of livery stables within the residential portion of the city, for a livery stable is not a "nuisance per se," and may be kept clean and sanitary.—Patout Bros. v. City of New Iberia, 70 So. 616, 138 La. 697.

La. 1910. A "nuisance" is anything which inconveniences, annoys, or produces inconvenience or damage. A "nuisance per se" is one which is always a nuisance in certain localities. A "nuisance in fact" is one which becomes a nuisance by reason of circumstances and surroundings.—City of New Orleans v. Lenfant, 52 So. 575, 126 La. 455, 29 L.R.A.N.S. 642.—Nuis 1.

La.App. 1 Cir. 1971. Proposed garbage transfer facility was not a "nuisance per se" where it was not one which would be a nuisance at all times and under any circumstances regardless of its location or surroundings.—Olsen v. City of Baton Rouge, 247 So.2d 889, application denied 252 So.2d 454, 259 La. 755.—Nuis 3(1).

La.App. 1 Cir. 1947. The business of storing, selling, and handling liquified petroleum gas is not a "nuisance per se", but may be operated in such a way as to become a nuisance.—Galouye v. A. R. Blossman, 32 So.2d 90.—Nuis 3(6).

La.App. 2 Cir. 1962. A "nuisance per se" is an act, occupation or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings and the difference between such nuisance and a "nuisance in fact" lies in the proof, not in the remedy.—Wright v. DeFatta, 142 So.2d 489, affirmed 152 So.2d 10, 244 La. 251.—Nuis 1.

La.App. 2 Cir. 1961. A "nuisance per se" is an act, occupation or structure which is a nuisance at all times and under all circumstances regardless of location or surroundings.—Hutson v. Continental Oil Co., 136 So.2d 714.—Nuis 1.

La.App. 2 Cir. 1955. Operation of brooder house as well as operation of any other lawful business, lawfully located, is not "nuisance per se",

but by manner of its operation, it may become a nuisance.—Traylor v. Colvin, 84 So.2d 286.—Nuis 3(2), 3(10).

La.App. 2 Cir. 1955. A "nuisance per se" is an act, occupation or structure which is nuisance at all times and under any circumstances, regardless of location or surroundings, while a "nuisance in fact" is one which becomes a nuisance by reason of facts, circumstances and surroundings.—Traylor v. Colvin, 84 So.2d 286.—Nuis 1.

La.App. 2 Cir. 1945. The crowing of rooster in early hours of morning is not a "nuisance per se", nor a nuisance in fact, in absence of any unlawful or improper conduct of rooster's owner in handling or keeping it on his premises.—Myer v. Minard, 21 So.2d 72.—Nuis 3(3).

La.App. 2 Cir. 1939. A "nuisance per se" is one which is always a nuisance in certain localities, whereas a "nuisance in fact" is one which becomes a nuisance by reason of circumstances and surroundings.—Talbot v. Stiles, 189 So. 469.—Nuis 1.

La.App. 3 Cir. 1984. Operation of community home for five mentally retarded adults and two live-in houseparents did not constitute a "nuisance per se" or a "nuisance at law," since a community home for mentally retarded individuals was specifically authorized by the legislature. LSA-R.S. 28:380 et seq.—Vienna Bend Subdivision Home-owners Ass'n v. Manning, 459 So.2d 1345.—Nuis 6.

La.App. 3 Cir. 1970. A "nuisance per se" is an act, occupation or structure which is a nuisance at all times and under any circumstances, regardless of its location or surroundings, such as a bawdy house operated in violation of law; a "nuisance in fact" is one which becomes a nuisance by reason of particular circumstances and surroundings.—Ritchey v. Lake Charles Dredging & Towing Co., 230 So.2d 346, application denied 233 So.2d 252, 255 La. 816.—Nuis 3(1).

La.App. 4 Cir. 1970. A "nuisance per se" is an act, occupation, or structure which is a nuisance at all times and under any circumstances regardless of location or surrounding. LSA-C.C. arts. 666–669.—Robichaux v. Huppenbauer, 231 So.2d 626, writ issued 235 So.2d 94, 256 La. 64, remanded 245 So.2d 385, 258 La. 139.—Nuis 1.

La.App. 5 Cir. 1985. A "nuisance per se" is an act, occupation or structure which is a nuisance at all times under any circumstances.—Rodrigue v. Copeland, 465 So.2d 67, writ granted 466 So.2d 1294, reversed 475 So.2d 1071, transfer granted 479 So.2d 356, issued Klein v. Copeland, 479 So.2d 911, vacated 482 So.2d 613, order Stayed 479 So.2d 912, certiorari denied 106 S.Ct. 1262, 475 U.S. 1046, 89 L.Ed.2d 572.—Nuis 1.

La.App.Orleans 1952. Violation of zoning law is a "nuisance per se".—City of New Orleans v. Lafon, 61 So.2d 270.—Nuis 65.

Md. 1954. A "nuisance per se" is an act, occupation, or structure which is a nuisance at all times and under any circumstances regardless of location or surroundings.—Adams v. Commissioners of

Town of Trappe, 102 A.2d 830, 204 Md. 165.—Nuis 1.

Md. 1943. The construction by city and railway company of safety zones protected by lighted pylons did not constitute “nuisance per se” so as to render city liable for injuries to occupant of automobile which collided with unlighted pylon. Code Pub. Loc.Laws 1930, art. 4, § 747.—Green v. Mayor and City Council of Baltimore City, 30 A.2d 261, 181 Md. 372.—Autos 264.

Md. 1927. Laundry is not “nuisance per se.”—Spann v. Gaither, 136 A. 41, 152 Md. 1, 50 A.L.R. 620.—Mun Corp 605.

Mich. 1992. “Nuisance per se” is activity or condition which constitutes nuisance at all times and under all circumstances without regard to care with which it is conducted or maintained.—Li v. Feldt, 487 N.W.2d 127, 439 Mich. 457.—Nuis 3(1).

Mich. 1978. From an evidentiary point of view, nuisances fall into two distinct categories: “nuisance per se,” which once established by proof becomes a nuisance as a matter of law, and “nuisance in fact,” where circumstances and surroundings present questions of fact which trier of fact may determine create a nuisance as a matter of fact; when used in conjunction with each other, legal terms nuisance per se and nuisance in fact relate only to nature of proof required and to whether a nuisance is created as a matter of law or as a matter of fact.—Gerzeski v. State, 268 N.W.2d 525, 403 Mich. 149.—Nuis 1.

Mich. 1959. A “nuisance at law” or “nuisance per se” is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings, as distinguished from a “nuisance in fact” or “nuisance per accidens”, which is that which becomes a nuisance by reason of circumstances and surroundings.—Blumer v. Saginaw Central Oil & Gas Service, Inc., 97 N.W.2d 90, 356 Mich. 399.—Nuis 1.

Mich. 1943. The operation of a trailer park is not a “nuisance per se”. Pub.Acts 1939, No. 143, as amended by Pub.Acts 1941, No. 255.—Richards v. City of Pontiac, 9 N.W.2d 885, 305 Mich. 666.—Nuis 61.

Mich. 1942. Operation of a piggery, wherein garbage was scattered on land and caused stench, would be a “nuisance per se”.—Smith v. City of Ann Arbor, 6 N.W.2d 752, 303 Mich. 476.—Nuis 3(10).

Mich. 1931. Fuel dock is not “nuisance per se.”—McMorran v. Cleveland Cliffs Iron Co., 234 N.W. 163, 253 Mich. 65.—Nuis 3(5).

Mich. 1927. Garbage is nuisance; “nuisance per se.”—Trowbridge v. City of Lansing, 212 N.W. 73, 237 Mich. 402, 50 A.L.R. 1014.—Nuis 3(3).

Mich.App. 2001. Even assuming the existence of a nuisance per se exception to governmental immunity under the governmental tort liability act, a lamppost, pedestal, and electrical wires were not a “nuisance per se,” in pedestrian’s action against city alleging personal injuries from stepping on exposed

electrical wires from fallen lamppost; operation of outdoor lighting served important public purpose, pedestrian’s claim concerned care and maintenance of that lighting, and operation of an outdoor light, without regard to the care with which it was maintained, was not an intrinsically unreasonable or dangerous activity. M.C.L.A. § 691.1407.—Haaksma v. City of Grand Rapids, 634 N.W.2d 390, 247 Mich.App. 44, appeal denied 642 N.W.2d 680.—Mun Corp 736.

Mich.App. 2001. A “nuisance per se,” for purposes of exception to governmental immunity, is an activity or condition which constitutes a nuisance at all times and under all circumstances, without regard to the care with which it is conducted or maintained.—Haaksma v. City of Grand Rapids, 634 N.W.2d 390, 247 Mich.App. 44, appeal denied 642 N.W.2d 680.—Mun Corp 736.

Mich.App. 1997. “Nuisance per se” is an activity or condition which constitutes a nuisance at all times and under all circumstances, without regard to care with which it is conducted or maintained.—Palmer v. Western Michigan University, 568 N.W.2d 359, 224 Mich.App. 139, appeal denied 598 N.W.2d 348, 460 Mich. 869.—Nuis 1.

Mich.App. 1997. “Stop for pedestrians” sign placed by state university at intersection located on campus was not a “nuisance per se”; sign served beneficial public purpose by warning motorist that they must stop for crossing pedestrians, and became dangerous only when inattentive driver overlooked sign or noticed sign but chose to ignore it.—Palmer v. Western Michigan University, 568 N.W.2d 359, 224 Mich.App. 139, appeal denied 598 N.W.2d 348, 460 Mich. 869.—Autos 279.

Mich.App. 1995. Return of developer’s lakeshore property to its natural state, lacking artificial lake, as result of failure of dam maintained by county and county drain commissioner was not “intrinsically unreasonable,” or a condition that was dangerous at all times, and thus was not within “nuisance per se” exception to governmental immunity; nuisance claimed by developer was that, until dam was repaired and area was again artificially flooded, real estate could not be marketed and sold as lakeshore property. M.C.L.A. § 691.1407(1).—Fox v. Ogemaw County, 528 N.W.2d 210, 208 Mich. App. 697, appeal denied 541 N.W.2d 267, 450 Mich. 898.—Counties 141.

Mich.App. 1994. City-owned outdoor swimming pool was not “nuisance per se,” for purpose of exception to governmental immunity, because fence, gate, and pool did not constitute nuisance at all times and under all circumstances, regardless of location or surroundings.—Summers v. City of Detroit, 520 N.W.2d 356, 206 Mich.App. 46, appeal denied 535 N.W.2d 792, 449 Mich. 859, reconsideration denied 558 N.W.2d 724, 454 Mich. 852.—Mun Corp 851.

Mich.App. 1991. Bridge from which injured person had dived into pond did not constitute “nuisance per se,” for purpose of determining applicability of nuisance per se exception to governmental tort immunity, where bridge was open to

public, had no alleged defects, and was not designed to be part of swimming area below. M.C.L.A. § 691.1407.—*Dinger v. Department of Natural Resources*, 479 N.W.2d 353, 191 Mich.App. 630.—*Bridges* 37.

Mich.App. 1991. Grass-covered hole in ground on municipal park, into which claimant stepped, did not meet definition for “nuisance per se”; it was not an act, occupation or structure, nor was it a nuisance at all times and under all circumstances.—*Yerrick v. Village of Kent City*, 473 N.W.2d 774, 189 Mich.App. 627, application for leave to appeal held in abeyance 479 N.W.2d 666, vacated 489 N.W.2d 82, 440 Mich. 905.—Mun Corp 851.

Mich.App. 1990. A “nuisance per se” is an act, occupation, or structure which is a nuisance at all times and under any circumstances.—*Wagner v. Regency Inn Corp.*, 463 N.W.2d 450, 186 Mich.App. 158, appeal denied.—Nuis 1.

Mich.App. 1989. Electrical substation to which ten-year-old boy gained access through broken lattice work, and in which he was electrocuted, was not “nuisance per se,” even assuming that court were to recognize nuisance per se exception to public lighting agency’s governmental immunity. M.C.L.A. § 691.1401 et seq.—*Taylor v. City of Detroit*, 452 N.W.2d 826, 182 Mich.App. 583, appeal denied.—Mun Corp 736.

Mich.App. 1989. Unlike “nuisance in fact,” “nuisance per se” is not predicated on want of care, but is unreasonable by its very nature.—*Taylor v. City of Detroit*, 452 N.W.2d 826, 182 Mich.App. 583, appeal denied.—Nuis 1.

Mich.App. 1984. A “nuisance per se” is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surrounding.—*McKee by McKee v. Michigan Dept. of Transp.*, 349 N.W.2d 798, 132 Mich.App. 714.—Nuis 1.

Mich.App. 1983. “Nuisance per se” is act, occupation, or structure which is nuisance at all times and under any circumstances; existence of “nuisance per se” is established by proof of the act which created it and becomes nuisance as matter of law.—*Martin by Martin v. State*, 341 N.W.2d 239, 129 Mich.App. 100, appeal denied 368 N.W.2d 226, 422 Mich. 891.—Nuis 1.

Mich.App. 1979. A “nuisance per se” is an act, occupation or structure which is a nuisance at all times and under all circumstances; once the act has been proved, the court decides as a matter of law whether the act complained of constitutes a nuisance per se, and defendant’s liability at that point is established.—*Ford v. City of Detroit*, 283 N.W.2d 739, 91 Mich.App. 333.—Nuis 1.

Mich.App. 1975. A “nuisance at law” or “nuisance per se” is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings.—*Marshall v. Consumers Power Co.*, 237 N.W.2d 266, 65 Mich.App. 237, 82 A.L.R.3d 729.—Nuis 1.

Miss. 1943. As applied to grocery, ordinance of Town of McCool against keeping open after 11 p.m. was a deprivation of property rights without “due process of law” and unreasonable “restraint of a trade” which was not a “nuisance per se” nor “per accidens.”—*Town of McCool v. Blaine*, 11 So.2d 801, 194 Miss. 221.—Const Law 296(1); Mun Corp 625.

Miss. 1939. Issuance of mandamus commanding mayor and aldermen to enforce ordinance that created fire district was error, since a nonconforming building in the district would be a “nuisance per se,” for abatement of which equity afforded a complete remedy.—*Garraway v. State ex rel. Dale*, 185 So. 803, 184 Miss. 466.—Mand 3(9).

Mo. 1943. A bakery is not a “nuisance per se”, even though it may become a nuisance which should be restrained where it is not operated in a fair and reasonable way with regard to rights of adjoining property owners.—*Crutcher v. Taystee Bread Co.*, 174 S.W.2d 801.—Nuis 3(5).

Mo. 1943. The continuous maintenance and congestive use of a stock pen in a manufacturing and residential district at the crossing of two important highways in a growing city with resulting sounds, smells, filth, and vermin detrimental to the health of numerous surrounding inhabitants, was a “public nuisance” or even a “nuisance per se” subject to abatement.—*Potashnick Truck Service v. City of Sikeston*, 173 S.W.2d 96, 351 Mo. 505.—Nuis 62.

Mo.App. 1947. A brewery is not a “nuisance per se” but may become such where it is not operated in a fair and reasonable way with regard to the rights of adjoining property owners.—*Schott v. Appleton Brewery Co.*, 205 S.W.2d 917.—Nuis 3(5).

Mo.App. 1947. Generally an act or use of property which is lawful or authorized by competent authority, such as a business or occupation which is in itself lawful and can by care and precaution be conducted without danger or inconvenience to others, cannot be a “nuisance per se”.—*Schott v. Appleton Brewery Co.*, 205 S.W.2d 917.—Nuis 6.

Mo.App. 1942. The business of conducting a restaurant is not a “nuisance per se”, but only becomes a “nuisance” when conducted in such a manner as to become offensive to the health, morals, or comfort of those lawfully residing in close proximity to it, and in such a case it is always safer for the court to make its injunction only broad enough to prohibit a continuance of the business in such a manner or under such conditions as to annoy or be offensive, and thus leave the matter in such condition that the offending party may, if possible, remedy the defect.—*State ex rel. Wallach v. Oehler*, 159 S.W.2d 313.—Nuis 3(5), 37.

Mo.App. 1941. A cemetery is not a “nuisance per se”, but may become a nuisance as a matter of fact, depending upon its location and manner of use.—*Killian v. Brit Sholom Congregation*, 154 S.W.2d 387.—Nuis 3(7).

## NUISANCE PER SE

Mo.App. 1939. A person is liable for only actual negligence in performing or maintaining on his own premises a lawful act which may result in injury to another if not properly done or guarded, but is liable for all consequences of act which must in nature of things so result, whether negligent or not, and the one act can become a nuisance only because of negligent manner in which it is performed or maintained while the other is "nuisance per se."—Davis v. Cities Service Oil Co., 131 S.W.2d 865.—Nuis 7.

Mo.App. 1929. "Nuisance per se" is act, occupation, or structure which is nuisance at all times and under all circumstances.—Kays v. City of Versailles, 22 S.W.2d 182, 224 Mo.App. 178.—Nuis 1.

Mo.App. 1911. A "nuisance per se" is a nuisance in itself, and which cannot be so conducted as to be lawfully carried on or permitted to exist.—Sullivan Realty & Improvement Co. v. Crockett, 138 S.W. 924, 158 Mo.App. 573.—Nuis 3(1).

Mo.App. 1907. "Nuisances" are of three kinds, viz.: Per se, malum in se (that is naturally evil); malum prohibitum, because forbidden by law; and those which do not fall within the two definitions mentioned, but may be found in fact to be nuisances." Awnings constructed of wood, with roofs covered with metal, extending over and about 15 feet above a street, and attached to substantial brick buildings, the outer edge resting on posts in the sidewalk or curb, did not constitute a public "nuisance per se."—Brown v. Town of Carrollton, 99 S.W. 37, 122 Mo.App. 276.

Mont. 1999. A "nuisance per se" or at law is an inherently injurious act, occupation, or structure that is a nuisance at all times and under any circumstances, without regard to location or surroundings.—Barnes v. City of Thompson Falls, 979 P.2d 1275, 294 Mont. 76, 1999 MT 77.—Nuis 1.

Mont. 1934. Activities of railroad in construction, maintenance, and operation of railroad line under express statutory authority cannot constitute "nuisance per se" (Rev.Codes 1921, § 8645; Const. art. 15, § 5).—Cashin v. Northern Pac. Ry. Co., 28 P.2d 862, 96 Mont. 92.—R R 113(12).

Neb. 1948. The construction and maintenance of a rendering plant in a rural area is not a "nuisance per se" so as to entitle neighboring property owners to enjoin erection and maintenance without showing that under the circumstances a nuisance must necessarily result. R.S.1943, §§ 54–736 to 54–741.—Demont v. Abbas, 32 N.W.2d 737, 149 Neb. 765.—Nuis 3(10).

Nev. 1942. A "house of prostitution" is a "nuisance per se" and is so regarded wherever situated.—Kelley v. Clark County, 127 P.2d 221, 61 Nev. 293.

N.J.Err. & App. 1940. Peddling of merchandise is not a "nuisance per se" so as to justify municipality prohibiting peddling within city limits. N.J.S.A. 40:48-2.—N.J. Good Humor v. Board of Com'rs of Borough of Bradley Beach, 11 A.2d 113, 124 N.J.L. 162.—Hawk & P 1.

N.J.Err. & App. 1933. Bakery is not "nuisance per se."—Friedman v. Keil, 166 A. 194, 113 N.J.Eq. 37, 86 A.L.R. 995.—Nuis 3(5).

N.J.Super.A.D. 1962. Contractor's unloading of massive equipment, to be used in building generating plant for owner, from railroad cars was not "inherently dangerous" nor "nuisance per se", and owner could legally delegate such unloading to contractor without being liable for injuries to contractor's employees arising out of contractor's performance.—Marion v. Public Service Elec. & Gas Co., 178 A.2d 57, 72 N.J.Super. 146.—Mast & S 319.

N.J.Super.A.D. 1956. A "nuisance per se" is an act, occupation, or structure which is a nuisance at all times and under all circumstances, regardless of location or surroundings. R.S. 40:48-2, 4, N.J.S.A.—Priory v. Borough of Manasquan, 120 A.2d 625, 39 N.J.Super. 147.—Nuis 1.

N.J.Sup. 1948. Open and unlighted hole or ditch about two or three feet deep in or near middle of public street, being a "nuisance per se," general contractor and plumbing sub-contractor who authorized the digging of the hole were liable for injuries sustained by one who fell into the hole at night, regardless of whether the one who dug the hole was a servant or independent contractor.—May v. Hrinko, 59 A.2d 823, 137 N.J.L. 324.—Mast & S 319.

N.J.Sup. 1942. The construction of a grating flush with a sidewalk is not a "nuisance per se", but is a thing the adjacent owner may do subject to the right of free and safe passage, of the public over and along every part of the sidewalk.—Blais v. American Grocery Co., 29 A.2d 317, 129 N.J.L. 274.—Mun Corp 808(3).

N.J.Sup. 1941. The classification of "nuisance per se" and "nuisance per accidens" has reference to the proof and not the remedy, in that in the former right to relief is established by proof of the "mere act", while in the latter proof of "the act and its consequences" is necessary.—Gainfort v. 229 Raritan Avenue Corp., 22 A.2d 893, 127 N.J.L. 409.—Nuis 1.

N.J.Sup. 1936. Erection by contractor of crypt on land of Cathedral from step of which member of congregation fell and sustained injury held not proximate cause of injury so as to render contractor liable on ground that it constructed "nuisance," since construction of step was not "nuisance per se," but could only be made a nuisance by use through invitation by Cathedral, which invitation was proximate cause of injury.—Randolph v. Karko Smith Co., 190 A. 486, 15 N.J.Misc. 261.—Nuis 1.

N.J.Super.L. 1964. A "nuisance per se" is an act, occupation or structure which is a nuisance at all times and under all circumstances regardless of location or surroundings.—Scotch Plains Tp. v. Town of Westfield, 199 A.2d 673, 83 N.J.Super. 323.—Nuis 3(1).

N.J.Super.Ch. 1956. A "nuisance per se" and a "nuisance per accidens" are distinguishable in that the former is established by proof of the mere act,

while the latter requires proof of the act and its consequences.—*State ex rel. Board of Com'rs of North Bergen Tp. v. WOR-TV Tower*, 121 A.2d 764, 39 N.J.Super. 583.—Nuis 1.

N.J.Super.Ch. 1948. The maintenance of an airport pursuant to lawful authority does not constitute a "nuisance per se".—*Hyde v. Somerset Air Service*, 61 A.2d 645, 1 N.J.Super. 346.—Aviation 216; Nuis 6.

N.J.Ch. 1943. Ordinarily, the keeping of chickens is not a "nuisance per se".—*Vaszil v. Molnar*, 33 A.2d 743, 133 N.J.Eq. 577.—Nuis 3(10).

N.J.Ch. 1940. The operation of a quarry is not a "nuisance per se," although it may easily become one when carried on in a residential district.—*Benton v. Kernan*, 13 A.2d 825, 127 N.J.Eq. 434, modified 21 A.2d 755, 130 N.J.Eq. 193.

N.J.Ch. 1932. Maintenance of automobile gasoline service station and garage in apartment house zone within city held not to constitute "nuisance per se," precluding injunction to enforce zoning ordinance. *Comp.St.Supp.* § \*136-4200J(10).—*Town of Montclair v. Kip*, 160 A. 677, 110 N.J.Eq. 506.—Zoning 776.

N.J.Ch. 1932. Maintenance of automobile gasoline service station in apartment house zone within city held not to constitute "nuisance per se," precluding injunction to enforce zoning ordinance. *N.J.S.A. 40:55-47*.—*Town of Montclair v. Kip*, 160 A. 677, 110 N.J.Eq. 506.—Inj 102.

N.J.Ch. 1932. Maintenance of garage and gasoline service station in connection therewith in residence zone held not "nuisance per se," precluding injunction to enforce zoning ordinance.—*Dinkins v. Kip*, 160 A. 676, 110 N.J.Eq. 486.—Inj 102.

N.J.Ch. 1918. A public garage is not a "nuisance per se." Whether it is a nuisance in fact depends upon the manner in which it is kept and the business conducted.—*Bourgeois v. Miller*, 104 A. 383, 89 N.J.Eq. 285.

N.J.Ch. 1906. The arbitrary rule that the keeping of gunpowder, nitroglycerine, or other explosive substances in large quantities in the vicinity of a dwelling house or place of business is a "nuisance per se" has been modified, and the present rule is that the question whether they are a nuisance depends on the locality, the quantity, and the surrounding circumstances, and the method and manner of keeping and using. The owner of an automobile garage, licensed to store one barrel of gasoline in the building, which is a frame building and adjacent to other frame buildings, will be enjoined from introducing gasoline into the tanks of the automobile inside of the building, and from storing automobiles, with gasoline in the tanks, inside the building.—*O'Hara v. Nelson*, 63 A. 836, 71 N.J.Eq. 161.

N.J.Ch. 1906. The use of a steam traction engine and trailers in the streets of a city is not a public "nuisance per se".—*McCarter v. Ludlum Steel & Spring Co.*, 63 A. 761, 71 N.J.Eq. 330.

N.M. 1994. "Nuisance per se," or "nuisance at law" is activity or structure that is by its very nature a nuisance.—*State ex rel. Village of Los Ranchos de Albuquerque v. City of Albuquerque*, 889 P.2d 185, 119 N.M. 150, rehearing denied.—Nuis 1.

N.M. 1963. A "nuisance per se" is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings.—*Koeber v. Apex-Albuq Phoenix Exp.*, 380 P.2d 14, 72 N.M. 4, 2 A.L.R.3d 1368.—Nuis 1.

N.M.App. 1995. "Nuisance in fact" is distinguished from "nuisance per se" in that nuisance in fact may become nuisance by reason of its circumstances, location or surroundings, where as nuisance per se is always nuisance regardless of those factors.—*Espinosa v. Roswell Tower, Inc.*, 910 P.2d 940, 121 N.M. 306, 1996-NMCA-006.—Nuis 1, 59.

N.Y.Sup. 1980. In light of fact that defendants' trees, whose branches allegedly encroached on plaintiff's property and from which twigs, branches and buds were alleged to have constantly fallen onto such property, were not poisonous or noxious in their nature, the trees were not a "nuisance per se," in such a sense as to sustain an action for relief.—*Turner v. Coppola*, 424 N.Y.S.2d 864, 102 Misc.2d 1043, affirmed 434 N.Y.S.2d 563, 78 A.D.2d 781.—Nuis 3(1).

N.Y.Sup. 1943. A sawmill is not a "nuisance per se."—*Incorporated Village of North Hornell v. Rauber*, 40 N.Y.S.2d 938, 181 Misc. 546.—Nuis 61.

N.Y.Sup. 1941. Certain residents of Oceanside were not entitled to a permanent injunction restraining defendant from using her leased property as an insane asylum on ground that such use of property constituted a nuisance, where evidence showed only accidental, remote, or trifling occurrences not disclosing an actual nuisance, since an insane asylum is not a "nuisance per se".—*Pilling v. Davison*, 30 N.Y.S.2d 97, affirmed 35 N.Y.S.2d 163, 264 A.D. 737, appeal denied 36 N.Y.S.2d 240, 264 A.D. 781.—Nuis 3(8), 33.

N.Y.Sup. 1939. A bowling alley is not a "nuisance per se."—*Canfield v. Quayle*, 10 N.Y.S.2d 781, 170 Misc. 621.—Nuis 3(9).

N.Y.Sup. 1915. A hospital of gracious design, with modern equipment and a high personnel, erected for the care of crippled children, is not a "nuisance per se."—*Hall v. House of St. Giles the Cripple*, 154 N.Y.S. 96, 91 Misc. 122, affirmed 158 N.Y.S. 1117, 173 A.D. 948.

N.Y.Sp.Sess. 1940. Under provision of Sanitary Code making it duty of every owner of realty to keep the drainage thereof in such condition as shall not be a nuisance or be dangerous to life or health, the mere filling in of a ditch on private property did not constitute a "nuisance per se," since the Code makes existence of a nuisance, a factual question and a condition precedent to the establishment of guilt for violation of such provision of Code. Sanitary Code, § 183.—*People, on Complaint of Green, v. Willis*, 17 N.Y.S.2d 784, 173 Misc. 442.—Nuis 6, 61.

N.C. 1960. A minimum security prison is not a "nuisance per se". Const. art. 11, §§ 1, 4, 5.—*Pharr v. Garibaldi*, 115 S.E.2d 18, 252 N.C. 803.—Nuis 3(1).

N.C. 1953. A "nuisance per se" or at law is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings.—*Morgan v. High Penn Oil Co.*, 77 S.E.2d 682, 238 N.C. 185.—Nuis 1.

N.C. 1952. An elevated water tank is not a "nuisance per se".—*City of Raleigh v. Edwards*, 71 S.E.2d 396, 235 N.C. 671.—Nuis 3(1).

N.C. 1949. A fish-scrap factory is not a "nuisance per se," and its status is determined by its situation, environment, and manner of operation.—*Pake v. Morris*, 53 S.E.2d 300, 230 N.C. 424.—Nuis 3(1).

N.C. 1949. In action by landowners to enjoin rebuilding of a fish-scrap factory, instruction that mere fact that there was a fish-scrap plant in close proximity to plaintiff's home did not constitute a "nuisance per se", and that in order to be a nuisance it must work some substantial annoyance, material physical discomfort to plaintiffs, or injury to their health or property, was not error.—*Pake v. Morris*, 53 S.E.2d 300, 230 N.C. 424.—Nuis 34.

N.C. 1916. A factory for the production of commercial fertilizer and guano by the sulphuric acid process is not a "nuisance per se," but its character as a nuisance depends upon its situation, environment, and method of operation.—*Webb v. Virginia-Carolina Chemical Co.*, 87 S.E. 633, 170 N.C. 662.

N.C. 1907. The noises of locomotives, shifting of cars, smoke, offensive odors, loading and unloading of freight, and the like, occasioned by and incident to the use and conduct of a railroad freight and passenger terminal, and resulting in damages to the premises as a place of religious worship does not constitute an actionable nuisance, where the railroad company conducts its operations with reasonable care. Neither does the running of trains and shifting of cars on Sunday at the time of regular church services constitute a "nuisance per se," since under the express provisions of Revisal 1905, § 2613, a railroad company may operate its trains on Sunday. But, while this is true, it also remains true that a railroad so operated as to needlessly cause injury would be such a nuisance.—*Taylor v. Seaboard Air Line Ry.*, 59 S.E. 129, 145 N.C. 400, 122 Am.St.Rep. 455.

Ohio 1947. An "absolute nuisance" is also known as a "nuisance per se", whereas a "qualified nuisance" depends on negligence.—*Interstate Sash & Door Co. v. City of Cleveland*, 74 N.E.2d 239, 148 Ohio St. 325, 35 O.O. 314.—Nuis 1, 7.

Ohio 1947. An "absolute nuisance" or "nuisance per se", consists of either a culpable and intentional act resulting in harm, or an act involving culpable and unlawful conduct causing unintentional harm, or a nonculpable act resulting in accidental harm for which, because of the hazards involved, absolute liability attaches notwithstanding the absence of fault.—*Interstate Sash & Door Co. v. City*

of Cleveland

74 N.E.2d 239, 148 Ohio St. 325, 35 O.O. 314.—Nuis 1.

Ohio 1946. An "absolute nuisance", or "nuisance per se", consists of a culpable and intentional act resulting in harm, or an act involving culpable and unlawful conduct causing unintentional harm, or a nonculpable act resulting in accidental harm, for which because of hazards involved, absolute liability attaches notwithstanding absence of fault.—*Metzger v. Pennsylvania, O. & D. R. Co.*, 66 N.E.2d 203, 146 Ohio St. 406, 32 O.O. 450.—Nuis 1.

Ohio App. 4 Dist. 1993. Essence of characterizations of "absolute nuisance" and "nuisance per se" is that no matter how careful one is, some activities are inherently injurious and cannot be conducted without damaging someone else's property or rights; they are based upon either intentional conduct or abnormally dangerous conditions and, as such, rule of absolute liability applies.—*Brown v. Scioto Cty. Bd. of Commrs.*, 622 N.E.2d 1153, 87 Ohio App.3d 704.—Nuis 4.

Ohio App. 6 Dist. 1933. Properly constructed and adequately lighted safety zone is not "nuisance per se" nor unlawful obstruction of street. Gen. Code, § 3714.—*Ankenbrant v. City of Toledo*, 187 N.E. 82, 45 Ohio App. 400, 39 Ohio Law Rep. 76, 13 Ohio Law Abs. 454.—Autos 264.

Ohio App. 7 Dist. 1941. Blasting is not a "nuisance per se" but may become such when it is of such intensity as to damage property.—*Crino v. City of Campbell*, 41 N.E.2d 583, 68 Ohio App. 391, 23 O.O. 119.—Nuis 3(6).

Ohio App. 8 Dist. 1936. Coal yard is not "nuisance per se," and hence, although city may prevent coal yards from becoming nuisances in fact by reasonable regulations city cannot declare absolute prohibition of them within area zoned for commercial purposes under guise of police power.—*Wolarz v. Village of Cuyahoga Heights*, 4 N.E.2d 400, 53 Ohio App. 161, 5 O.O. 422, 21 Ohio Law Abs. 497.—Zoning 75, 76.

Ohio App. 9 Dist. 1938. Any permanent obstruction [or fault] thereof which materially impedes travel is a "nuisance per se".—*Stephens v. City of Akron*, 18 N.E.2d 830, 59 Ohio App. 526, 13 O.O. 271, 27 Ohio Law Abs. 240.

Ohio App. 10 Dist. 2001. An "absolute nuisance" or "nuisance per se" consists of either a culpable and intentional act resulting in harm, an act involving culpable and unlawful conduct causing unintentional harm, or a non-culpable act resulting in accidental harm, for which, because of the hazards involved, absolute liability attaches notwithstanding the absence of fault.—*State ex rel. R.T.G., Inc. v. State*, 753 N.E.2d 869, 141 Ohio App.3d 784, 2001-Ohio-4267, motion granted 751 N.E.2d 484, 92 Ohio St.3d 1447, reversed in part 780 N.E.2d 998, 98 Ohio St.3d 1, 2002-Ohio-6716, motion denied 783 N.E.2d 517, 98 Ohio St.3d 1457, 2003-Ohio-644.—Nuis 1.

Ohio App. 10 Dist. 1961. Operation of an animal or pet hospital within a municipality is not a "nuisance per se".—*City of Columbus v. Becher*,

184 N.E.2d 617, 115 Ohio App. 239, 20 O.O.2d 315, affirmed 180 N.E.2d 836, 173 Ohio St. 197, 19 O.O.2d 8.—Nuis 64.

Ohio Ct.Cl. 1998. “Absolute nuisance,” or “nuisance per se,” consists of either culpable and intentional act resulting in harm, or act involving culpable and unlawful conduct causing unintentional harm, or nonculpable act resulting in accidental harm, for which, because of hazards involved, absolute liability attaches, notwithstanding absence of fault.—*Pope v. Ohio Dept. of Transp.*, 698 N.E.2d 536, 91 Ohio Misc.2d 230.—Nuis 1.

Ohio Ct.Cl. 1997. “Absolute nuisance,” or “nuisance per se,” consists of either culpable and intentional act resulting in harm, or act involving culpable and unlawful conduct causing unintentional harm, or nonculpable act resulting in accidental harm, for which, because of hazards involved, absolute liability attaches notwithstanding absence of fault.—*Bays v. Kent State Univ.*, 684 N.E.2d 1328, 86 Ohio Misc.2d 69.—Nuis 1.

Okla. 1949. Operation of midget automobile race track in residential area was not a “nuisance per se”.—*Smilie v. Taft Stadium Bd. of Control*, 205 P.2d 301, 201 Okla. 303, 1949 OK 42.—Nuis 3(9).

Okla. 1942. A gasoline filling station is not a “nuisance per se” but may become a “nuisance per accidens” by reason either of manner of construction or manner of operation.—*Bell v. Brockman*, 126 P.2d 78, 190 Okla. 583, 1942 OK 195.—Autos 395.

Okla. 1942. Drilling oil and gas well is not a “nuisance per se”, but, if property of another is substantially damaged as a result thereof, the latter may recover for a “nuisance in fact”, and legalized use of property becomes a “nuisance per accidens” if such use substantially damages the property of another. *Okl.St.Ann. Const. art. 2 § 23*.—*Phillips Petroleum Co. v. Vandergriff*, 122 P.2d 1020, 190 Okla. 280, 1942 OK 94.—Nuis 3(1), 5.

Okla. 1941. The operation of a gasoline filling station in a city is a lawful business and not a “nuisance per se.”—*Magnolia Petroleum Co. v. City of Tonkawa*, 114 P.2d 474, 189 Okla. 125, 1941 OK 186.—Autos 395.

Okla. 1938. The keeping of horses in a residential district is not a “nuisance per se.” 50 Okl.St. Ann. § 1.—*Simons v. Fahnestock*, 78 P.2d 388, 182 Okla. 460, 1938 OK 264.—Nuis 3(10).

Okla. 1935. Drive-in filling station, operated in usual and proper manner for sale of gasoline, oil, and like commodities, is not “nuisance per se,” but may become a nuisance on account of its location and surroundings and improper manner in which it may be conducted.—*Weaver v. Bishop*, 52 P.2d 853, 174 Okla. 492, 1935 OK 1093.—Autos 395.

Okla. 1933. Any permanent structure in a public road which materially interferes with travel therein is a “nuisance per se.”—*State ex rel. King v. Friar*, 25 P.2d 620, 165 Okla. 145, 1933 OK 501.

Okla. 1928. An instrumentality that is a nuisance at all times and under all circumstances, irrespective of location and environment, is a “nuisance per se,” and although an undertaking establishment or funeral home is not a nuisance per se, it may become a nuisance when conducted in an exclusive residential district.—*Jordan v. Nesmith*, 269 P. 1096, 132 Okla. 226, 1928 OK 99.

Okla. 1926. Gasoline filling station is not “nuisance per se” and whether it is “nuisance” depends on its surroundings, management, or other circumstances.—*McPherson v. First Presbyterian Church of Woodward*, 248 P. 561, 120 Okla. 40, 1926 OK 214, 51 A.L.R. 1215.—Autos 395.

Okla. 1926. “Nuisance per se” is act constituting nuisance at all times, while “nuisance per accidens” is one becoming nuisance because of circumstances.—*McPherson v. First Presbyterian Church of Woodward*, 248 P. 561, 120 Okla. 40, 1926 OK 214, 51 A.L.R. 1215.—Nuis 3(1).

Okla. 1925. Petroleum refinery operated in careful manner does not constitute “nuisance per se,” where there were about 20 refineries in the immediate vicinity.—*Patterson v. Roxana Petroleum Co. of Oklahoma*, 234 P. 713, 109 Okla. 89, 1925 OK 224.—Nuis 3(5).

Okla. 1925. An instrumentality which is at all times and under all circumstances and irrespective of its location and environment a nuisance is a “nuisance per se,” but there are instrumentalities which in their nature are not nuisances, and whether a particular instrumentality constitutes a nuisance depends upon its surroundings, the manner in which they are conducted, or other circumstances.—*Patterson v. Roxana Petroleum Co. of Oklahoma*, 234 P. 713, 109 Okla. 89, 1925 OK 224.—Nuis 3(1).

Okla. 1919. A laundry is not a “nuisance per se,” but acting under the police and sanitary powers a city may regulate the establishment and operation of same.—*Walcher v. First Presbyterian Church of Norman, Okl.*, 184 P. 106, 76 Okla. 9, 1919 OK 255, 6 A.L.R. 1593.

Okla.Terr. 1906. Under Wilson’s Rev. & Ann. St.1903, c. 56, entitled “Nuisance”, §§ 1, 3, 8, 10, 50 Okl.St.Ann. §§ 1, 3, 8, 10, declaring that a nuisance consists in unlawfully doing any act or omitting to perform a duty, which act or omission annoys, injures, or endangers the comfort, health, or safety of others, and declaring that a public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, though the extent of the annoyance or damage inflicted on the individual may be unequal, etc., a slaughterhouse is not a “nuisance per se,” unless it appears from the evidence, independent of the manner in which it is being used and conducted, that its location, proximity, and relationship to the public make it so.—*Weaver v. Kuchler*, 87 P. 600, 17 Okla. 189, 1906 OK 71.

Okla.Crim.App. 1942. A house or place kept for purpose of enabling persons to place bets or wagers upon football games is a “common gambling

house", and a "nuisance per se", and those who conduct it are indictable under statute making every person who maintains or commits any public nuisance guilty of a misdemeanor. 31 Okl.St.Ann. § 1191.—Miller v. State, 123 P.2d 699, 74 Okla. Crim. 104.—Nuis 61.

Okla.Crim.App. 1941. A place where beer is legally sold is not a "nuisance per se" but may become a nuisance by manner in which it is conducted. 37 Okl.St.Ann. § 73; 50 Okl.St.Ann. §§ 1, 2.—King v. State, 109 P.2d 836, 71 Okla.Crim. 158.—Int Liq 143.

Or. 1946. Neither a meat processing plant nor a slaughterhouse is a "nuisance per se" nor, if properly conducted and in a proper locality, is it a nuisance in fact, but it may become a nuisance by reason of character of neighborhood in which it is situated.—Kramer v. Sweet, 169 P.2d 892, 179 Or. 324.—Nuis 3(10).

Or. 1934. Where condition of thing is such that it is offensive to morals of community and is incapable of being put to any lawful use by owner, it may be treated as "nuisance per se," and physical destruction is legitimate.—Enloe v. Lawson, 31 P.2d 171, 146 Or. 621.—Nuis 85.

Or. 1918. The admitted fact that a millrace occupies a portion of a highway longitudinally makes it a "nuisance per se," at common law, in the absence of any authority for its being there.—Town of Gaston v. Thompson, 174 P. 717, 89 Or. 412.

Or. 1915. A stable is not a "nuisance per se," and every property owner has the right to maintain one, even in a city, unless the condition of the particular stable, caused by defendant's negligence, is such as to render it a nuisance.—Porges v. Jacobs, 147 P. 396, 75 Or. 488.

Pa. 1959. A "nuisance per se" as relating to private persons, is an act or use of property of a continuing nature offensive to and legally injurious to the health and property, or both.—City of Erie v. Gulf Oil Corp., 150 A.2d 351, 395 Pa. 383.—Nuis 1.

Pa. 1951. An automobile tourist court in unrestricted and unzoned residential area in city was not a "nuisance per se" and its maintenance would not be restrained.—Menger v. Pass, 80 A.2d 702, 367 Pa. 432, 24 A.L.R.2d 562.—Nuis 3(1), 19.

Pa. 1940. A public gasoline filling station becomes a "nuisance per se" when conducted in a residential neighborhood.—Pennell v. Kennedy, 12 A.2d 54, 338 Pa. 285.—Autos 395.

Pa. 1937. Public gasoline filling station, while not a "nuisance per se," becomes a "nuisance" if conducted in residential neighborhood, from mere fact of operation.—Thomas v. Dougherty, 190 A. 886, 325 Pa. 525.—Autos 395.

Pa. 1934. Where coal under highway cannot be removed without disturbing surface, removal would be "nuisance per se."—Coyne v. John Gibbons Coal Co., 172 A. 653, 314 Pa. 502.—High 83.

Pa. 1932. Slight depressions in walks about premises in which water froze did not constitute

"nuisance per se" or hidden dangers, as regards liability of landlord out of possession to person entering premises and falling thereon.—Mitchell v. George A. Sinn, Inc., 161 A. 538, 308 Pa. 1.—Land & Ten 170(1).

Pa. 1931. Automobile service station is not "nuisance per se," but becomes nuisance when conducted in residential neighborhood.—Long v. Firestone Tire & Rubber Co., 154 A. 364, 303 Pa. 208.—Autos 367.

Pa. 1928. Business generally known to be injurious to health and to cause legal damage to property in certain localities is "nuisance per se." A given business constitutes "nuisance per se" when it is generally known to be injurious to health and to cause legal damage to property in certain localities and surroundings, regardless of how it may be carried on, and such pursuits in certain areas are prohibited.—Ladner v. Siegel, 142 A. 272, 293 Pa. 306.—Nuis 3(2).

Pa. 1928. Business generally known to be injurious to health and to cause legal damage to property in certain localities is "nuisance per se."—Ladner v. Siegel, 142 A. 272, 293 Pa. 306.—Nuis 3(2).

Pa. 1927. "Nuisance per se" is act or use of property of continuing nature offensive to, and legally injurious to, health and property. "Nuisance per se," as relating to private persons, is an act or use of property of a continuing nature, offensive to, and legally injurious to, his health and property, or both.—Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Sun Co., 138 A. 909, 290 Pa. 404, 55 A.L.R. 873.—Nuis 4.

Pa. 1927. To be "nuisance per se," business must be such that in particular locality, injury will result to property or discomfort to individual. To be "nuisance per se," as related to business, its inherent qualities or elements must be such that it must reasonably follow, in a particular locality or surrounding, that there will be an injury to property or a discomfort to individual, with resulting injury to property.—Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Sun Co., 138 A. 909, 290 Pa. 404, 55 A.L.R. 873.—Nuis 3(2).

Pa. 1927. Business become "nuisance per se" when generally known to be injurious to health and damaging to property, regardless of how carried on. A given business becomes in itself "nuisance per se" when it is generally known to be injurious to health, and a legal damage to property in certain localities and surroundings, regardless of how it may be carried on.—Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Sun Co., 138 A. 909, 290 Pa. 404, 55 A.L.R. 873.—Nuis 3(2).

Pa. 1927. To be "nuisance per se," business must be such that in particular locality, injury will result to property or discomfort to individual.—Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Sun Co., 138 A. 909, 290 Pa. 404, 55 A.L.R. 873.—Nuis 3(2).

Pa. 1927. Business becomes "nuisance per se" when generally known to be injurious to health and damaging to property, regardless of how carried

on.—Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Sun Co., 138 A. 909, 290 Pa. 404, 55 A.L.R. 873.—Nuis 3(2).

Pa. 1927. “Nuisance per se” is act or use of property of continuing nature offensive to, and legally injurious to, health and property.—Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Sun Co., 138 A. 909, 290 Pa. 404, 55 A.L.R. 873.—Nuis 3(12).

Pa. 1926. Public garage is not “nuisance per se.”—Unger v. Edgewood Garage, 134 A. 394, 287 Pa. 14.—Autos 367.

S.C. 1942. An undertaking establishment is not a “nuisance per se” and by some courts it is held that even when located in an exclusively residential district with the result, because of sentimental repugnance on the part of those who might reside near it, property values in the vicinity would depreciate, such establishment would not be enjoined. By what appears to be the weight of modern authority, however, it is held that the location of such a business in a residential district is sufficiently objectionable to make it a “nuisance.” Thus it has been stated: The inherent nature of an undertaking establishment is such that, if located in a residential district, it will inevitably create an atmosphere detrimental to the use and enjoyment of resident property, produce material annoyance, and inconvenience to the occupants of adjacent dwellings and render them physically uncomfortable and in the absence of strong showing of public necessity, its location in such a district should not be permitted over the protest of those who would be materially injured thereby.—Fraser v. Fred Parker Funeral Home, 21 S.E.2d 577, 201 S.C. 88.

S.C. 1942. A public dance hall is not a “nuisance per se”, but it may become a “public nuisance” by the manner in which it is conducted and by the conduct of the persons assembling in and around it, and whether it is a nuisance is a “question of fact”.—State v. Turner, 18 S.E.2d 372, 198 S.C. 487.—Nuis 61, 93.

S.C. 1942. Although music is not a “nuisance per se”, it may become a “public nuisance” whether it is vocal or instrumental, as for instance by reason of the noise it makes to the annoyance of the neighborhood, and also if its tendency is habitually to bring together in a vicinity or at a person’s residence or place of business large crowds of noisy, dissolute, and disorderly people.—State v. Turner, 18 S.E.2d 372, 198 S.C. 487.—Nuis 62.

S.C. 1915. A fertilizer mixing plant is not a “nuisance per se,” that is, a nuisance anywhere and under all circumstances, but, if a nuisance at all, is a nuisance “per accidens,” that is, by reason of its location and other circumstances.—Woods v. Rock Hill Fertilizer Co., 86 S.E. 817, 102 S.C. 442, Am. Ann.Cas. 1917D,1149.—Nuis 3(5).

S.C. 1915. A fertilizer mixing plant is not a “nuisance per se,” that is, a nuisance anywhere and under all circumstances, but, if a nuisance at all, is a “nuisance per accidens,” that is, by reason of its location and other circumstances, such as the com-

munity in which it is located or the manner in which it is constructed or conducted.—Woods v. Rock Hill Fertilizer Co., 86 S.E. 817, 102 S.C. 442, Am. Ann.Cas. 1917D,1149.

S.C.App. 1989. City street with parking privileges near beach was not “nuisance per se”; city did not open street as parking lot and complied with zoning ordinance; and opening of street did not constitute situation dangerous at all times and under all circumstances to life, health, or property.—Home Sales, Inc. v. City of North Myrtle Beach, 382 S.E.2d 463, 299 S.C. 70.—Mun Corp 736.

Tenn. 1966. The difference between a “nuisance per se” and a “nuisance per accidens” is that in the former, injury in some form is certain to be inflicted, while in the latter, the injury is uncertain or contingent until it actually occurs.—State ex rel. Cunningham v. Feezell, 400 S.W.2d 716, 218 Tenn. 17.—Nuis 1.

Tex.App.—Houston [1 Dist.] 1994. “Nuisance per se” is act, occupation, or structure that is nuisance at all times, under any circumstances, and in any location, while “nuisance in fact” is act, occupation, or structure that becomes nuisance by reason of its circumstances or surroundings.—Maranatha Temple, Inc. v. Enterprise Products Co., 893 S.W.2d 92, rehearing denied, and writ denied.—Nuis 4.

Tex.App.—Amarillo 1985. A “nuisance per se” is an act, occupation or structure that is a nuisance at all times, under any circumstances, and in any location.—City of Sundown v. Shewmake, 691 S.W.2d 57.—Nuis 1.

Tex.App.—Beaumont 1994. “Nuisance per se” is act, structure or occupation that is nuisance at all times and under any and all circumstances and at any location.—Deep East Texas Regional Mental Health and Mental Retardation Services v. Kinnear, 877 S.W.2d 550, rehearing overruled.—Nuis 1.

Tex.App.—Houston [14 Dist.] 2001. A “nuisance per se” is a nuisance at all times and locations.—GTE Mobilnet of South Texas Ltd. Partnership v. Pascoet, 61 S.W.3d 599, rehearing overruled, and rehearing overruled, and review denied, and rehearing of petition for review denied.—Nuis 1.

Tex.Civ.App.—Fort Worth 1955. A “nuisance per se” is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings, and acts which are denounced as illegal by law, when perpetration of them invades rights of others, are nuisances per se.—Parker v. City of Fort Worth, 281 S.W.2d 721.—Nuis 1.

Tex.Civ.App.—Fort Worth 1955. A “nuisance per se” is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings, and acts which are denounced as illegal by law, when perpetration of them invade rights of others, are nuisances per se.—Stoughton v. City of Fort Worth, 277 S.W.2d 150.—Nuis 1.

Tex.Civ.App.—Fort Worth 1936. Lessors and lessees of swimming pool held not liable for drowning of plaintiff's son when his leg was caught by suction of drainage pipe which extended above bottom of pool 18 inches and was about 8 inches in diameter and had no cap over it, since drainage pipe did not constitute a "nuisance" in that drainage was necessary to insure wholesome water for bathers and was not a "nuisance per se," in that danger of such injury existed only when pool was drained through open pipe.—Medlin v. Havener, 98 S.W.2d 863.—Theaters 6(9).

Tex.Civ.App.—Fort Worth 1933. Water improvement district's irrigation canal is not "nuisance per se."—Wichita County Water Improvement Dist. No. 1 v. Pearce, 59 S.W.2d 183.—Waters 260.

Tex.Civ.App.—Fort Worth 1920. The construction of numerous small cheap houses of second-hand lumber and of poorest workmanship, and crowded together on land adjoining expensive dwellings, will not be enjoined; such houses not constituting a "nuisance per se," even though unsightly and out of keeping with the residences on adjoining land, and even though they increase the danger of loss by fire, and increase the cost of insurance.—Worm v. Wood, 223 S.W. 1016.—Nuis 3(1).

Tex.Civ.App.—Fort Worth 1917. A "nuisance per se," or a "nuisance at law," is an act, thing, or omission, or use of property which in and of itself is a nuisance, and hence not permissible or excusable under any circumstances; but a "nuisance per accidens," or a "nuisance in fact," is one which becomes a nuisance by reason of circumstances and surroundings.—Shamburger v. Scheurrier, 198 S.W. 1069.

Tex.Civ.App.—Austin 1944. A city which possessed power to locate and operate a sewage disposal plant was performing a "governmental function" in so doing and was guilty of no wrong in locating or operating plant, and operation thereof did not give rise to a "nuisance per se" or "per accidens".—City of Temple v. Mitchell, 180 S.W.2d 959.—Mun Corp 733(1), 736.

Tex.Civ.App.—Austin 1943. Any permanent structure such as a fence, building or wall, placed in street or highway, is an obstruction and a "nuisance per se", if such obstruction renders street less commodious for public use.—Sitas v. City of San Angelo, 177 S.W.2d 85, affirmed 183 S.W.2d 417, 143 Tex. 154.—High 154; Mun Corp 693.

Tex.Civ.App.—Austin 1943. A barber sign attached to wall of hotel building and projecting 12 $\frac{1}{2}$  inches from wall of building over sidewalk at height of slightly less than 4 feet above surface of sidewalk constituted a "nuisance per se". Vernon's Ann. Civ.St. art. 1175, subds. 18, 24.—Sitas v. City of San Angelo, 177 S.W.2d 85, affirmed 183 S.W.2d 417, 143 Tex. 154.—Mun Corp 693.

Tex.Civ.App.—Austin 1936. Any permanent structure, such as fence, building, or wall, placed in street or highway, is obstruction and "nuisance per se," if such obstruction renders street less commo-

dious for public uses, notwithstanding space is left for passage of public, or if right of public to use street will in future be interfered with or impeded as to any part of street.—Joseph v. City of Austin, 101 S.W.2d 381, writ refused.—Mun Corp 693.

Tex.Civ.App.—Austin 1936. Stucco wall encroaching on street held "nuisance per se," which city could summarily remove from street both by virtue of its common-law power and its power as home-rule city. Vernon's Ann.St.Const. art. 11, § 5.—Joseph v. City of Austin, 101 S.W.2d 381, writ refused.—Mun Corp 696.

Tex.Civ.App.—Austin 1936. Stucco wall encroaching on street held "nuisance per se," summarily removable by city, notwithstanding wall did not obstruct or encroach on any existing or immediate use of street by public, and that wall was reasonably use of strip between curb and property line, and owner claimed that refusal to allow wall constituted discrimination as between himself and other abutting owners on same street.—Joseph v. City of Austin, 101 S.W.2d 381, writ refused.—Mun Corp 696.

Tex.Civ.App.—Austin 1914. To keep a single hog in a sparsely settled portion of a town far removed from other dwellings is not a "nuisance per se."—Dibrell v. City of Coleman, 172 S.W. 550, writ refused.

Tex.Civ.App.—San Antonio 1942. The operation and maintenance of a funeral home is a lawful business and is not a "nuisance per se".—O'Connor v. Ryan, 159 S.W.2d 531, writ refused.—Nuis 3(7), 5.

Tex.Civ.App.—Dallas 1952. A livery stable or riding stable ordinarily is not a "nuisance per se," but its manner of operation may make it a "nuisance in fact".—City of Dallas v. Halbert, 246 S.W.2d 686, ref. n.r.e.—Nuis 3(11).

Tex.Civ.App.—Amarillo 1927. Undertaking establishment is not "nuisance per se."—Blackburn v. Bishop, 299 S.W. 264, writ dismissed.—Nuis 3(7).

Tex.Civ.App.—El Paso 1941. A cemetery as such is not a "nuisance per se."—Faulk v. Buena Vista Burial Park Ass'n, 152 S.W.2d 891.—Nuis 61.

Tex.Civ.App.—Beaumont 1932. Dance hall held not "nuisance per se". Vernon's Ann.Civ.St. arts. 4664-4666, 5107; Vernon's Ann.P.C. art. 688.—Green v. State, 49 S.W.2d 519.—Nuis 61.

Tex.Civ.App.—Waco 1951. Obstruction of a public road is a "nuisance per se".—West v. Ellis County, 241 S.W.2d 344.—High 158.

Tex.Civ.App.—Waco 1931. Radio is not "nuisance per se."—Weber v. Mann, 42 S.W.2d 492.—Nuis 3(3).

Tex.Civ.App.—Eastland 1943. The operation of a pipe line is not a "nuisance per se".—Warren v. Premier Oil Refining Co. of Texas, 173 S.W.2d 287, writ refused w.o.m.—Nuis 3(1).

Tex.Civ.App.—Galveston 1949. A wooden building is not a public "nuisance per se", whether

located within or without a fire zone subsequently created, but a wooden building may become a nuisance by use to which it is put or its state of repair, and whether such building is a nuisance is a justiciable question which municipality may bring to issue in a court of competent jurisdiction.—*Lurie v. City of Houston*, 220 S.W.2d 320, reversed 224 S.W.2d 871, 148 Tex. 391, 14 A.L.R.2d 61.—Mun Corp 605, 623(4).

Tex.Civ.App.—Galveston 1915. A county jail is not a “nuisance per se,” nor does it necessarily become such by using it for the purpose for which it was built, though it may become such in the manner of its use, and the fact that crazy and intoxicated inmates of a former jail on the same site had on occasions so deported themselves as to cause annoyance to churchgoers, and had disturbed public worship in plaintiff’s church, situated about 100 feet away, was not proof that such conduct would be permitted in the future; but the county authorities, if not preventing insane inmates from disturbing religious worship, or if maintaining the jail so as to interfere with the comfort and enjoyment of the church, might be enjoined from maintaining a nuisance, though it would not be enough that the jail’s proximity would cause mental annoyance, tending to lessen the value of the church’s property.—*Baptist Church of Madisonville v. Webb*, 178 S.W. 689.

Tex.Civ.App. 1910. A public cemetery is not a “nuisance per se.”—*Sherman v. Crawford*, 127 S.W. 1075.

Utah 1945. A cellar vault, chute, or cellar opening in sidewalk, if made with municipal assent, express or implied, is not a “nuisance per se”, but may be a nuisance if not properly constructed or maintained for safety of the public. Utah Code, 1943, 15-8-11, 15-8-23.—*Salt Lake City v. Schubach*, United Pac. Ins. Co., Intervener, 159 P.2d 149, 108 Utah 266, 160 A.L.R. 809.—Mun Corp 808(8).

Utah 1933. Filling station is not “nuisance per se,” though it may be operated as to become public or private nuisance.—*Smith v. Barrett*, 20 P.2d 864, 81 Utah 522.—Autos 395.

Vt. 1940. A gasoline filling station is not “nuisance per se,” though erected in residential district.—*Chamberlin v. Hatch*, 15 A.2d 586, 111 Vt. 317.—Autos 395.

Va. 1975. Term “nuisance per se” is restricted in its use to such things as are nuisances at all times and under all circumstances.—*Flannery v. City of Norfolk*, 218 S.E.2d 730, 216 Va. 362, appeal dismissed 96 S.Ct. 1404, 424 U.S. 936, 47 L.Ed.2d 345.—Nuis 1.

Va. 1949. Manufacture of frozen custard and sale thereof in cones on residential property was not a “nuisance per se” within restrictive covenant and could not be enjoined until proposed manufacture and sale had become a reality and it was shown in fact to be noxious, or offensive, or in fact a nuisance or annoyance.—*Stokely v. Owens*, 52 S.E.2d 164, 189 Va. 248.—Covenants 52; Inj 62(1).

Va. 1940. An airport, landing field, or flying school is not a “nuisance per se”.—*Batcheller v. Com. ex rel. Rector and Visitors of University of Va.*, 10 S.E.2d 529, 176 Va. 109.—Aviation 216; Nuis 3(1).

Va. 1939. A gasoline filling or storing station is not a “nuisance per se.”—*Daniel v. Kosh*, 4 S.E.2d 381, 173 Va. 352.—Autos 395; Nuis 3(6).

Va. 1939. Where an alleged nuisance is not a “nuisance per se,” burden of proof is upon the plaintiff to show that a nuisance in fact exists.—*Daniel v. Kosh*, 4 S.E.2d 381, 173 Va. 352.—Nuis 33, 49(1).

Va. 1936. Erection of beer garden in Potomac river opposite town without permit of town in violation of penal ordinance of town was not “nuisance per se,” and hence could not be enjoined by town.—*Mears v. Colonial Beach*, 184 S.E. 175, 166 Va. 278.—Int Liq 261.

Wash. 1998. “Nuisance per se” is act, thing, omission, or use of property which of itself is nuisance, and hence is not permissible or excusable under any circumstance.—*Tiegs v. Watts*, 954 P.2d 877, 135 Wash.2d 1.—Nuis 1.

Wash. 1950. A “nuisance per se” is an act, thing, omission, or use of property, which in and of itself is a nuisance, and hence is not permissible or excusable under any circumstances.—*State ex rel. Bradford v. Stubblefield*, 220 P.2d 305, 36 Wash.2d 664, 17 A.L.R.2d 1258.—Nuis 1.

Wash. 1950. A lawful business is never a “nuisance per se”.—*State ex rel. Bradford v. Stubblefield*, 220 P.2d 305, 36 Wash.2d 664, 17 A.L.R.2d 1258.—Nuis 5.

Wash. 1950. A fat-rendering plant is not a “nuisance per se”. RCW 16.68.010–16.68.190.—*State ex rel. Bradford v. Stubblefield*, 220 P.2d 305, 36 Wash.2d 664, 17 A.L.R.2d 1258.—Nuis 3(1).

Wash. 1946. To engage in any form of business in defiance of laws regulating or prohibiting the business is a “nuisance per se” and a person so engaging therein may be enjoined from so doing by anyone suffering a special injury thereby. RCW 7.48.200; Const. art. 4, § 6.—*State v. Lew*, 172 P.2d 289, 25 Wash.2d 854.—Nuis 65, 72.

Wash. 1933. Skating rink is not “nuisance per se.”—*Manos v. City of Seattle*, 24 P.2d 91, 173 Wash. 662.—Nuis 3(9).

Wash. 1924. Selling automobiles on Sunday in violation of Rem.Comp.Stat. § 2494, making it a misdemeanor, is not a “nuisance per se,” selling at other times not being a nuisance; and hence is not a nuisance within sections 943, 9914, when not endangering comfort, repose, health, or safety, or offending decency.—*Motor Car Dealers’ Ass’n of Seattle v. Fred S. Haines Co.*, 222 P. 611, 128 Wash. 267, 36 A.L.R. 493.

Wash. 1916. A “nuisance per se” is an act, thing, omission, or use of property which in and of itself is a nuisance, and hence is not permissible under any circumstances, but a lawful business is

never a nuisance per se.—*Hardin v. Olympic Portland Cement Co.*, 154 P. 450, 89 Wash. 320.—Nuis 3(1).

Wash. 1910. An undertaking establishment is not a “nuisance per se.” The maintenance of an undertaking establishment in a building 3 or 4 feet from the residence of one of the plaintiffs and 35 feet from the residence of the other in a residence district of a city, though the mortician operating the same intended to occupy the upper stories of the building as a residence, constituted a nuisance where it was shown that noxious odors, gases, etc., were likely to permeate the houses of the plaintiffs therefrom, and that there was danger of infection and contagion from the proximity of the morgue, with the possibility of flies passing from one place to the other, etc.—*Densmore v. Evergreen Camp No. 147, Woodmen of the World*, 112 P. 255, 61 Wash. 230, 31 L.R.A.N.S. 608, Am. Ann. Cas. 1912B, 1206.

Wis. 1942. A factory from which emanated the odor of dry yeast located in a manufacturing zone did not constitute a “nuisance” arising from the operation of a specific business or the commission of a specific act condemned as such by statute nor was it a “nuisance per se” within the common law.—*City of Milwaukee v. Milbrew, Inc.*, 3 N.W.2d 386, 240 Wis. 527, 141 A.L.R. 277.—Mun Corp 606; Nuis 61.

Wis. 1942. The doctrine of “nuisance per se” is a limited one and as it is now applied a trade or manufacture becomes a nuisance only in relation to its surroundings.—*City of Milwaukee v. Milbrew, Inc.*, 3 N.W.2d 386, 240 Wis. 527, 141 A.L.R. 277.—Nuis 61.

Wis. 1942. A gasoline and oil filling station is not a “nuisance per se”, and whether a station is such a nuisance depends upon the facts of the case.—*State ex rel. City of Algoma v. Peterson*, 2 N.W.2d 253, 239 Wis. 599.—Autos 395; Nuis 3(11).

### NUISANCE PER SE, OR IN LAW

N.D.Iowa 1972. Under Iowa law, a “nuisance per se, or in law,” is an act which is a nuisance at all times and under all circumstances. I.C.A. §§ 657.1, 657.2.—*Stockdale v. Agrico Chemical Co., Division of Continental Oil Co.*, 340 F.Supp. 244.—Nuis 1.

### NUISANCES

C.A.1 (Mass.) 1985. “Nuisances” are types of damage, consisting of invasion of two quite unrelated kinds of interests, i.e., public and private, by conduct which is tortious because it falls into usual categories of tort liability.—*In re Charlesbank Laundry, Inc.*, 755 F.2d 200.—Nuis 1, 59.

Cal.App. 1 Dist. 1934. “Nuisances” may be public or private or both, the distinction lying not in number of persons thereby affected but in the special injury resulting to a particular individual.—*Biber v. O'Brien*, 32 P.2d 425, 138 Cal.App. 353.—Nuis 1, 59.

Conn. 1942. One class of “nuisances” includes nuisances which result from conduct which is in itself a violation of law, and as to such nuisances contributory negligence is not a defense.—*Beckwith v. Town of Stratford*, 29 A.2d 775, 129 Conn. 506.—Nuis 6, 43.

Conn. 1942. Shade trees are not “nuisances” in a highway, unless they interfere with or obstruct the public travel, or their removal is required for uses of the highway.—*Muratori v. Stiles & Reynolds Brick Co.*, 25 A.2d 58, 128 Conn. 674.—High 83.

Fla. 1942. The constitutional requirement of “due process of law” does not forbid a state summarily from forfeiting nets or other fishing appliances of small value which are used in illegal fishing since the state may declare them to be “nuisances”.—*Bruce v. Malloy*, 7 So.2d 123, 150 Fla. 157.—Const Law 278(6); Fish 16.

Fla. 1940. Under a general grant of power respecting “nuisances,” a municipal corporation may declare a thing to be a “nuisance” which is one in fact, but without express charter power, generally, the city cannot declare by ordinance that to be a “nuisance” which is not so in fact.—*City of Miami Beach v. Texas Co.*, 194 So. 368, 141 Fla. 616, 128 A.L.R. 350.—Mun Corp 605.

Ga. 1942. Such noises and dust as are created by necessary and proper operation of properly located city airport do not constitute “nuisances” although they result in injury and inconvenience to adjoining landowners. Code, § 11-202.—*Delta Air Corp. v. Kersey*, 20 S.E.2d 245, 193 Ga. 862, 140 A.L.R. 1352.—Aviation 216; Mun Corp 851.

Ga. 1940. The erection and operation of gasoline line filling stations are not “nuisances” merely because they are located in residential sections.—*Cooley v. Enzor*, 9 S.E.2d 277, 190 Ga. 290.—Autos 395.

Ga. 1939. The injuries and inconveniences to persons residing near filling station, such as noises, etc., which result ordinarily and from necessity in the conduct of the business of repairing automobiles, trucks, and tires, are not to be classed as “nuisances.”—*Wilson v. Evans Hotel Co.*, 4 S.E.2d 155, 188 Ga. 498, 124 A.L.R. 373.

Ill. 1915. The Dramshop Law, Smith-Hurd Stats. c. 43, § 189 note, declared to be “nuisances” all places where intoxicating liquors are sold in violation of law and any shift or device to evade the provisions of the act to be an illegal sale. The Local Option Law, in force July 1, 1907, S.H.A. ch. 43, § 177 note provided that any shift or device to evade the act, should be an illegal selling. A municipal ordinance declared that the distribution among the members of any club, by any means whatever, should be an illegal sale. Former licensed saloon keepers under the name of a “club,” sold lunches, soft drinks, cigars, etc., and, without any club organization or dues, purchased intoxicating liquors, stored them, and served them to members, etc., keeping no regular hours and paying no internal revenue tax. Held, that such acts were such a shift or device as to render the defendants guilty of

maintaining nuisances.—*City of Decatur v. Schlick*, 109 N.E. 737, 269 Ill. 181.

Ill. 1903. "Nuisances" may be thus classified: First, those which in their nature are nuisances per se, or so denounced by the common law or by statute; second, those which in their nature are not nuisances, but may become so by reason of their locality, surroundings, or the manner in which they may be conducted; third, those which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds.—*City of Carthage v. Munsell*, 67 N.E. 831, 203 Ill. 474.

Iowa 1940. The city of Sioux City had authority to interfere with public travel by installing parking meters on streets, and such meters would not be deemed "nuisances" unlawfully obstructing use of the streets. Acts 47th Gen. Assem. c. 134, § 267, and § 527, repealing Code 1935, §§ 4992, 4997 (I.C.A. §§ 321.174 note, 321.236).—*Brodkey v. Sioux City*, 291 N.W. 171, 229 Iowa 1291, rehearing denied, modified 296 N.W. 352, 229 Iowa 1291.—Autos 7.

Iowa 1939. Public playgrounds and athletic fields are not *per se* "nuisances" though they may be so conducted as to become "nuisances."—*Casteel v. Town of Afton*, 287 N.W. 245, 227 Iowa 61.—Nuis 3(9).

Iowa 1939. A person who lives in a city, town or village must submit himself to consequences of occupations which may be carried on in his immediate neighborhood which are necessary for trade and commerce and also for the enjoyment of property and benefit of inhabitants of the place, and matters which, although in themselves annoying, are in their nature ordinary incidents of city or village life, cannot be complained of as "nuisances."—*Casteel v. Town of Afton*, 287 N.W. 245, 227 Iowa 61.—Nuis 5.

Iowa 1939. Obstructions to travel, consisting of closing an alley and locating a fence extending 12 or 15 feet into the right of way of a public street approximately 66 feet wide, were "nuisances" in the absence of valid ordinances authorizing such obstructions. Code 1935, §§ 5938, 5945; § 12396, subd. 5.—*Pederson v. Town of Radcliffe*, 284 N.W. 145, 226 Iowa 166.—Mun Corp 692.

Iowa 1908. A creamery discharged its waste on the land of another, and thereby increased the flow of water on the land, and interfered with the proper cultivation thereof. Noisome odors arose from the waste, but these were not noticeable until one got near the point of discharge, and there was no evidence that any one suffered therefrom. Held, that the waste was not a nuisance within Code, § 5078, defining "nuisances."—*Ruthven v. Farmers' Co-op. Creamery Co.*, 118 N.W. 915, 140 Iowa 570.

Kan. 1937. That loan company charging usurious interest did not conduct its business in as offensive a manner as might have been done did not prevent its open and persistent violation of usury statutes from constituting a "nuisance," which state was authorized to enjoin. Gen.St.1935, 41-101

et seq. The repeated, continuous, and persistent violations of the statutes are what makes them "nuisances."—*State ex rel. Beck v. Basham*, 70 P.2d 24, 146 Kan. 181.

Ky. 1950. "Nuisances" are that class of wrongs arising from the unreasonable, unwarrantable, or unlawful use by a person of his own property and producing such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage.—*City of Somerset v. Sears, 233 S.W.2d 530, 313 Ky. 784*.—Nuis 1.

Ky. 1941. Commercial and industrial activities lawful in themselves may become "nuisances", if so offensive to the senses as to render enjoyment of life and property uncomfortable, though skill and care have been exercised and most improved methods and appliances employed to prevent such result.—*Kentucky & West Virginia Power Co. v. Anderson*, 156 S.W.2d 857, 288 Ky. 501.—Nuis 3(1).

Ky. 1908. Noxious gases arising from the carrying on of lawful occupations are not "nuisances" in all situations, but may become such by reason of the trade being carried on in improper localities, or by reason of the gases being negligently suffered to escape.—*Long v. Louisville & N.R. Co.*, 107 S.W. 203, 128 Ky. 26, 32 Ky.L.Rptr. 774, 13 L.R.A.N.S. 1063, 16 Am. Ann. Cas. 673.

La. 1939. Junk yards are not necessarily "nuisances," and individuals have a constitutional right to use their private property for junk yards as long as such use does not offend public morals or jeopardize public health and safety.—*City of New Orleans v. Southern Auto Wreckers*, 192 So. 523, 193 La. 895.—Const Law 278.2(1); Nuis 3(1).

Md. 1917. Bowling alleys and moving picture theaters may become "nuisances" in certain places, when they create a disturbance to the serious annoyance and physical discomfort of persons of ordinary sensibilities living in the neighborhood.—*Hamilton Corp. v. Julian*, 101 A. 558, 130 Md. 597, 7 A.L.R. 746.

Mich. 1944. Properly operated trailer camps are not to be classed as "nuisances." Pub. Acts 1939, No. 143, as amended.—*Pringle v. Shevnock*, 14 N.W.2d 827, 309 Mich. 179.—Nuis 3(1).

Mo.App. 1955. Statute giving board of aldermen of city of fourth class power to pass ordinances for the prevention of "nuisances", does not empower city to declare a slaughterhouse a "nuisance" by its ordinance, since a slaughterhouse is not a "nuisance" *per se*. Section 79.370 RSMo 1949, V.A.M.S.—*State ex rel. Jack Frost Abattoirs, Inc. v. Steinbach*, 274 S.W.2d 588.—Mun Corp 605.

Nev. 1942. The alleged keeping of bawdy houses within 400 yards of church was a nuisance, for the abatement of which the county commissioners were authorized to institute proceedings, notwithstanding that statute making it unlawful to keep bawdy house within such distance of church did not declare such keeping to be a nuisance, since bawdy houses are "nuisances" in any event. Comp.Laws,

§§ 2043, 10193.—*Kelley v. Clark County*, 127 P.2d 221, 61 Nev. 293.—Nuis 61.

N.J.Ch. 1935. Things merely disagreeable, which simply displease the eye, or offend the taste, or shock an oversensitive or fastidious nature, no matter how irritating or unpleasant, are not “nuisances.”—*Francisco v. Department of Institutions and Agencies*, 180 A. 843, 13 N.J.Misc. 663.—Nuis 3(1).

N.J.Ch. 1909. Noises which are not “nuisances” on a week day may be when made on a Sunday, if disturbing the quiet and rest which a citizen is entitled to have for his recuperation; and the fact that such noises are forbidden by the Sunday laws takes away any defense for making them, though they be but slight.—*McMillan v. Kuehnle*, 73 A. 1054, 76 N.J.Eq. 256, reversed 78 A. 185, 78 N.J.Eq. 251.

N.Y.A.D. 1 Dept. 1937. Provision in lease of building which was used for rooming house on the upper floors and for stores on the lower floor, requiring lessee to comply with all orders of city departments for correction of nuisances or other grievances in building, held not to render lessee liable for cost of complying with order of city department of buildings requiring erection of fire escapes accessible to every room on the upper floors, fire retarding of cellar ceiling and enclosure of cellar stairs with fireproof partitions, since matters ordered were structural alterations not contemplated by lease, and were not “nuisances” or other grievances.—*Sullivan v. New York United Realty Co.*, 293 N.Y.S. 957, 250 A.D. 286.—Land & Ten 152(3).

N.Y.Sup. 1970. Individually or collectively, either lack of hot water or an inordinate accumulation of garbage or lack of elevator service, whether self-service or manually controlled, are detrimental to health and, if continued, can be dangerous to human life, and such are “nuisances” within meaning of Administrative Code of City of New York. Administrative Code, § 564-15.0.—*Bozart Realty Corp. v. City of New York*, 316 N.Y.S.2d 709, 65 Misc.2d 55.—Land & Ten 170(0.5).

N.Y.Sup.App.Term 1905. A lease limiting the liability of the tenant respecting orders of a city department to those issued for the correction, prevention, and abatement of “nuisances” or “other grievances” does not render the tenant liable for the cost of a fire escape, as the words are to be taken in their natural and usual sense. The absence of a fire escape is not a “nuisance,” as that word is commonly used, and the more generic words “other grievances” do not extend the plaintiff’s liability so far as to render him liable for the cost of the fire escape.—*Kalman v. Cox*, 92 N.Y.S. 816, 46 Misc. 589.

Ohio 1911. The trees, grass, and flowers growing on park strips maintained by a municipality between the curbing and the sidewalk and proper barriers placed around them to protect them are not obstructions or “nuisances,” within the meaning of the statute requiring the city council to keep the streets of a municipality open, in repair, and free

from nuisance.—*Village of Barnesville v. Ward*, 96 N.E. 937, 9 Ohio Law Rep. 366, 85 Ohio St. 1, 40 L.R.A.N.S. 94, Am. Ann.Cas. 1912D, 1234.

Ohio App. 2 Dist. 1996. Normally, for purposes of exception from political subdivision’s immunity for failure to keep public roads free from nuisance, “nuisances” are obstructions or dangerous developments that are either subject to control of local authorities or of more permanent nature than accumulated rainwater. R.C. § 2744.02(B)(3).—*Feitshans v. Darke County, Ohio*, 686 N.E.2d 536, 116 Ohio App.3d 14.—Autos 262, 266.

Ohio App. 5 Dist. 1931. “Nuisances” in one’s dwelling are all acts done by another from without, which render life within house uncomfortable, whether it be infecting the air with noisome smells or with gases injurious to health.—*Graham & Wagner v. Ridge*, 179 N.E. 693, 41 Ohio App. 288, 11 Ohio Law Abs. 518.

Ohio App. 8 Dist. 1993. The wearing of the chip and seal berm and the lower level of the sloping gravel embankment beyond the berm on a highway were not “nuisances” that rendered highway unsafe for usual and ordinary course of travel and did not rebut public park system’s defense of sovereign immunity in negligence and survivor actions brought on behalf of motorcyclist who was killed when his cycle left roadway, where there was no evidence indicating that park system’s failure to alter level of gravel or replace worn section of berm was exercised with malicious purpose, in bad faith, or in wanton or reckless manner. R.C. §§ 2744.02(B), (B)(3), 2744.03, 2744.03(A)(3, 5).—*Valescu v. Cleveland Metroparks Sys.*, 630 N.E.2d 1, 90 Ohio App.3d 516.—Autos 258.

Oklahoma App. Div. 1 1995. District courts, not Oklahoma Corporation Commission, have jurisdiction to provide plaintiff with remedy, including damages, for injury from oil and gas saltwater contamination; saltwater contamination from oil and gas operations occurring from violations of Commission rules are referred to as “nuisances.”—*Union Texas Petroleum Corp. v. Jackson*, 909 P.2d 131, 1995 OK CIV APP 63, rehearing denied, and certiorari denied.—Mines 92.16, 125.

Or. 1948. “Nuisances” may consist of harm to human comfort, safety, or health by reason of maintenance by a defendant on his land of noxious or dangerous instrumentalities causing damage to plaintiff in respect to legally protected interests of plaintiff in his land, illegal or immoral practices, and acts outraging public decency, obstructions to streets, public ways, common rights, access to property and the like, and damage to land itself, as by flooding.—*Amphitheaters, Inc. v. Portland Meadows*, 198 P.2d 847, 184 Or. 336, 5 A.L.R.2d 690.—Nuis 1.

Or. 1943. Finding that ordinance ordering abatement as “nuisances” two concrete “apron approaches” to filling station instead of “ramp approach” as shown in application for permit was passed to promote public health, safety and welfare and that apron approaches seriously interfered with drainage of street and were unreasonable obstruc-

tions to public travel was sustained by the evidence.—McGowan v. City of Burns, 137 P.2d 994, 172 Or. 63.—Autos 395; Nuis 84.

Or. 1943. Two concrete apron approaches from street to filling station were “nuisances”. ORS 221.915.—McGowan v. City of Burns, 137 P.2d 994, 172 Or. 63.—Autos 395; Nuis 61.

Tex.Civ.App.—Dallas 1936. Betting on races of any kind under pari-mutuel scheme being “gaming,” places devoted to such betting are “nuisances” under statute. Vernon’s Ann.Civ.St. art. 4664.—Oak Downs v. Schmid, 95 S.W.2d 1040, reversed 97 S.W.2d 671, 128 Tex. 214.—Nuis 65.

Tex.Civ.App.—Waco 1939. Operation of lottery, consisting of “Buck” night at theater, is a species of “gaming” and included within “nuisances” which the state may suppress by injunction. Vernon’s Ann.Civ.St. art. 4667; Vernon’s Ann.P.C. art. 634; Vernon’s Ann.St.Const. art. 3, § 47.—Robb & Rowley United v. State, 127 S.W.2d 221.—Nuis 80.

W.Va. 1909. “Nuisances” always arise from unlawful acts. That which is lawful can never be a nuisance. Therefore, where the Legislature, by a proper act, authorizes that to be done which would otherwise be a nuisance, the act is made lawful and is not a nuisance so far as the public is concerned, unless the power given by the Legislature is exceeded. “There are two classes of nuisances, public and private. \* \* \* There is no difference between these two kinds of nuisances except as they affect the public or any certain individuals.” A legislative charter to a boom corporation to do work which, without the charter, would be a nuisance absolves it from liability by indictment or otherwise, but does not exempt it from action by an individual injured by its existence as a private nuisance.—Pickens v. Coal River Boom & Timber Co., 65 S.E. 865, 66 W.Va. 10, 24 L.R.A.N.S. 354.

#### NUISANCE SETTLEMENT

C.A.8 (S.D.) 1999. A “nuisance settlement” is not just one that is entered into after the usual economic calculation; rather, it is one that is accepted despite the fact that the case against the defendant is frivolous or groundless, solely in an effort to avoid the expense of litigation.—Tyler v. Corner Const. Corp., Inc., 167 F.3d 1202.—Compromise 2.

N.J.Super.L. 1996. No “special circumstances” existed which would render unjust an award of prevailing party attorney fees in favor of nonprofit corporation that represented the physically challenged by bringing suit against real estate developer and permitting official under federal and state architectural barrier laws, though agreement which corporation obtained on behalf of developer to make the remaining units of condominium complex accessible to the physically challenged entailed only a minimal expenditure on developer’s part and was allegedly offered by developer as so-called “nuisance settlement”; that settlement was not mere “nuisance settlement” could be seen in substantial relief that corporation obtained from standpoint of those that architectural barrier laws were intended

to benefit. Civil Rights Act of 1968, § 813(c)(2), as amended, 42 U.S.C.A. § 3613(c)(2); Americans with Disabilities Act of 1990, § 505, 42 U.S.C.A. § 12205; N.J.S.A. 10:5-27.1.—H.I.P. (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 676 A.2d 1166, 291 N.J.Super. 144.—Civil R 296.

#### NUISANCES IN FACT

Ga. 1946. “Nuisances in fact” or “nuisances per accidens” are those which become nuisances by reason of circumstances and surroundings. Code, § 72-101.—Poultryland, Inc. v. Anderson, 37 S.E.2d 785, 200 Ga. 549.—Nuis 1.

Ga.App. 1941. The larger class of nuisances may be termed “nuisances in fact” or “nuisances per accidens”, consisting of acts, occupations or structures which are not nuisances per se but may become nuisances by reason of the circumstances or the location and surroundings. Code, §§ 72-101, 72-102, 72-104.—Asphalt Products Co. v. Marable, 16 S.E.2d 771, 65 Ga.App. 877.—Nuis 1.

Mich.App. 1984. “Nuisances in fact” or per accidens are those which becomes nuisances by reasons of circumstances and surroundings, and an act may be found to be a nuisance as a matter of fact where the natural tendency of the action is to create danger and inflict injury on person or property.—McKee by McKee v. Michigan Dept. of Transp., 349 N.W.2d 798, 132 Mich.App. 714.—Nuis 1.

Mich.App. 1982. “Nuisances in fact” are those which become nuisances by reason of circumstances and surroundings, and an act may be found to be a nuisance as a matter of fact where natural tendency of the action is to create danger and inflict injury on person or property.—Radloff v. State, 323 N.W.2d 541, 116 Mich.App. 745, case remanded 330 N.W.2d 692, 417 Mich. 894, on remand 356 N.W.2d 31, 136 Mich.App. 457, appeal denied.—Nuis 3(1).

#### NUISANCES PER ACCIDENS

Ariz. 1941. There are two kinds of “public nuisance”, one of which is class of aggravated wrongs or injuries which affect morality of mankind, are in derogation of public morals and decency, and being malum in se, are nuisances, irrespective of their location and results, while the other is class of acts, exercise of occupations or trades, and use of property, which become nuisances by reason of their location or surroundings and are commonly referred to as “nuisances per accidens”. Code 1939, § 43-4603 (A.R.S. §§ 13-601, 13-602).—Engle v. Scott, 114 P.2d 236, 57 Ariz. 383.—Nuis 59.

Ga. 1946. “Nuisances in fact” or “nuisances per accidens” are those which become nuisances by reason of circumstances and surroundings. Code, § 72-101.—Poultryland, Inc. v. Anderson, 37 S.E.2d 785, 200 Ga. 549.—Nuis 1.

Ga.App. 1941. The larger class of nuisances may be termed “nuisances in fact” or “nuisances per accidens”, consisting of acts, occupations or structures which are not nuisances per se but may

become nuisances by reason of the circumstances or the location and surroundings. Code, §§ 72-101, 72-102, 72-104.—Asphalt Products Co. v. Marable, 16 S.E.2d 771, 65 Ga.App. 877.—Nuis 1.

N.C. 1953. “Nuisances per accidens” or in fact are those which become nuisances by reason of their location, or manner in which they are constructed maintained or operated.—Morgan v. High Penn Oil Co., 77 S.E.2d 682, 238 N.C. 185.—Nuis 1.

### NUISANCES PER SE

Ala. 1899. “Nuisances per se” have been defined to be such things as are nuisances at all times, under all circumstances, irrespective of location or surroundings, as things prejudicial to public morals, or dangerous to life, or injurious to public rights.—Hundley v. Harrison, 26 So. 294, 123 Ala. 292.

Idaho 1939. Baseball games are not “nuisances per se,” but become such under circumstances where they are conducted in such a manner as to greatly interfere with legitimate and necessary use and enjoyment of the property of others.—Hansen v. Independent School Dist. No. 1 in Nez Perce County, 98 P.2d 959, 61 Idaho 109.—Nuis 3(9).

Ill. 1913. Nuisances being susceptible of division into three classes: “Nuisances per se;” those which in their nature are not nuisances but may become so by reason of their locality or surroundings or the manner of their operation; and those which in their nature may be nuisances but as to which there may be honest differences of opinion in impartial minds—the power of a municipality, under its authority to declare what shall be a nuisance, is limited to the declaration of those things falling within the first and third classes and to those of the second class which are actually nuisances, and hence a municipality cannot under this power forbid the erection of ice houses or cooling plants within 400 feet of any church or school; such plants not being “nuisances per se.”—People ex rel. Lincoln Ice Co. v. City of Chicago, 102 N.E. 1039, 260 Ill. 150.

Ill. 1913. Nuisances being susceptible of division into three classes: “Nuisances per se;” those which in their nature are not nuisances but may become so by reason of their locality or surroundings or the manner of their operation; and those which in their nature may be nuisances but as to which there may be honest differences of opinion in impartial minds—the power of a municipality, under its authority to declare what shall be a nuisance, is limited to the declaration of those things falling within the first and third classes and to those of the second class which are actually nuisances, and hence a municipality cannot under this power forbid the erection of ice houses or cooling plants within 400 feet of any church or school; such plants not being “nuisances per se.”—People ex rel. Lincoln Ice Co. v. City of Chicago, 102 N.E. 1039, 260 Ill. 150.

Ill.App. 1 Dist. 1941. Gasoline filling stations are not “nuisances per se.”—Irving-Austin Bldg. Corp. v. Village Homebuilders, 37 N.E.2d 927, 312 Ill.App. 179.

Ind. 1937. Public garages are not “nuisances per se.”—Griffin v. Hubbell, 11 N.E.2d 136, 212 Ind. 684.—Autos 367.

Ind. 1937. Filling stations are not “nuisances per se.”—Griffin v. Hubbell, 11 N.E.2d 136, 212 Ind. 684.—Autos 395.

Ind.App. 1 Dist. 1992. House of prostitution and obstruction that encroaches on right-of-way of public highway are “nuisances per se.”—Wernke v. Halas, 600 N.E.2d 117.—High 87; Nuis 61.

Iowa 1948. Generally, stockyards are not “nuisances per se,” but may become nuisances because of manner in which they are conducted.—Funnell v. City of Clear Lake, 30 N.W.2d 722, 239 Iowa 135.—Nuis 3(10).

Iowa 1941. Playgrounds and athletic fields are not “nuisances per se” though like many other things they can be so conducted as to become nuisances, as in many other instances it is not so much the nature of the thing claimed to constitute a nuisance as the manner of its use or treatment.—Ness v. Independent School Dist. of Sioux City, 298 N.W. 855, 230 Iowa 771.

Iowa 1937. Filling stations not being “nuisances per se,” Supreme Court could not, in absence of any evidence, assume that filling station would be installed in such way in restricted residence district of city as to constitute nuisance in fact.—Scott v. City of Waterloo, 274 N.W. 897, 223 Iowa 1169.—App & E 909(6).

Ky. 1938. Properly constructed gasoline filling stations and gasoline storage tanks to be used in wholesale or retail sale or distribution of gasoline are not “nuisances per se.”—Glenmore Distilleries Co. v. Fiorella, 117 S.W.2d 173, 273 Ky. 549.—Autos 395; Nuis 3(6).

Md. 1946. Where Baltimore city department determined that electric light poles should be located in center of grass plot in highway, such poles were not “nuisances per se” so as to make electric company liable for injuries allegedly resulting, though poles had been knocked down in other accidents at same place. Code Pub. Loc.Laws, 1930, art. 4, § 6(26) (a-d, g, h, j, m), § 85A(2, 5).—East Coast Freight Lines v. Consolidated Gas, Elec. Light & Power Co. of Baltimore, 50 A.2d 246, 187 Md. 385.—Electricity 16(1).

N.J.Ch. 1947. Airports and airfields are not “nuisances per se.” N.J.S.A. 6:1-1 et seq.—Oechsle v. Ruhl, 54 A.2d 462, 140 N.J.Eq. 355.—Aviation 216; Nuis 3(1).

Okl. 1938. Though a “pig stand” and dance hall did not constitute “nuisances per se,” they might become nuisances by their manner of operation.—Sipe v. Dale, 80 P.2d 569, 183 Okla. 127, 1938 OK 377.—Nuis 3(1).

Okl. 1926. “Nuisances per se,” or in law, and “per accidens,” or in fact, are judicial refinements for the expedition of justice. The former is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings. The latter is an act, occu-

pation, or structure, not a nuisance per se, but which may become a nuisance by reason of the circumstances or location. Whether a public gasoline filling station be a nuisance depends upon its surroundings, the manner in which it is conducted or managed, or other circumstances. It may thus become a nuisance per accidens.—*McPherson v. First Presbyterian Church of Woodward*, 248 P. 561, 120 Okla. 40, 1926 OK 214, 51 A.L.R. 1215.

Pa. 1940. Proposed stores and theater in residential district which was not only located on fringe of commercial district but had already been invaded by some commercial activity would not affect the health or comfort of the residents of the district and would not constitute "nuisances per se" in a "closely settled suburban community", which phrase, as used in restrictive covenants of deed, referred to a thickly populated, predominantly residential district on outskirts of a large city, in which neighborhood stores and theaters are customarily found, and construction of the proposed stores and theater would, therefore, not be enjoined as violating the covenants.—*Todd v. Sablosky*, 15 A.2d 677, 339 Pa. 504, 132 A.L.R. 282.—Covenants 103(1).

S.C. 1940. Conducting church services in a disorderly and annoying manner belongs to that class of nuisances which are not "nuisances per se" but may become so by reason of their locality, surroundings, or method of conducting or management, and general ordinance may be passed to cover such situation.—*Morison v. Rawlinson*, 7 S.E.2d 635, 193 S.C. 25.—Mun Corp 605.

Tenn.Ct.App. 1950. "Absolute nuisances", or "nuisances per se", do not depend upon negligence, although negligence may exist, and the nuisance consists of the harmful effects or danger of the thing, such as noxious odors, loud noises, unauthorized obstructions in streets and highways, etc., which exist even though due care has been exercised in creation of the thing.—*Llewellyn v. City of Knoxville*, 232 S.W.2d 568, 33 Tenn.App. 632.—Nuis 1, 3(1), 3(3), 7.

Va. 1905. Dead domestic animals are not "nuisances per se," and cannot be made such by legislative declaration.—*City of Richmond v. Caruthers*, 50 S.E. 265, 103 Va. 774, 70 L.R.A. 1005.

Wis. 1942. "Nuisances per se" within the common law consist of those intangible injuries which affect the morality of mankind and are in derogation of public morals and public decency.—*City of Milwaukee v. Milbrew, Inc.*, 3 N.W.2d 386, 240 Wis. 527, 141 A.L.R. 277.—Nuis 61.

#### NUISANCE TO THE NEIGHBORHOOD

S.C.App. 1994. Tee box for golf course driving range approximately 75 to 100 feet away from house was not "nuisance to the neighborhood" prohibited by protective covenant, where closest homeowners were the only persons who voiced objection to tee box or use of surrounding area.—*LeFurgy v. Long Cove Club Owners Ass'n, Inc.*, 443 S.E.2d 577, 313 S.C. 555.—Covenants 51(1).

#### NULL

Cal.App. 4 Dist. 1967. "Null," as used in the section of the Revenue and Taxation Code which provides that on redemption a tax deed to the state becomes null, must be given its primary and literal meaning of having no legal or binding force or validity, of no efficacy, capable of being regarded as void, and amounting to nothing.—*Settlors Corp. v. City of San Diego*, 62 Cal.Rptr. 347, 254 Cal. App.2d 631.—Tax 725.

Vt. 1980. A voluntary or a fraudulent conveyance is valid between the parties, and as to the whole world, except those within the protection of fraudulent conveyance statute; thus the words "null" and "void" are construed to mean voidable only, so that such conveyances vest legal title in grantee, subject only to be divested by creditors of grantor, if they choose to impeach it. 9 V.S.A. § 2281.—*Becker v. Becker*, 416 A.2d 156, 138 Vt. 372.—Fraud Conv 172(1).

#### NULLA BONA

Ill. 1903. The words "not satisfied," upon the return of an execution, are not synonymous with "nulla bona."—*Merrick v. Carter*, 68 N.E. 750, 205 Ill. 73.

Mo. 1907. A return on an execution issued on a justice's judgment, reciting: "Executed the within writ in the county of Stoddard, state of Missouri, on the 2d day of May, 1893. No property found to levy this execution"—constituted a sufficient return of "nulla bona."—*Scharff v. McGaugh*, 103 S.W. 550, 205 Mo. 344.

Mo. 1901. "Nulla bona" has a well-defined meaning in law, signifying that the defendant in the execution has no goods which could be subjected to its satisfaction.—*Reed v. Lowe*, 63 S.W. 687, 163 Mo. 519, 85 Am.St.Rep. 578.

Mo. 1898. The return of "nulla bona" has a defined meaning in law, and signifies that the officer made strict and diligent search, but was unable to find any property of the defendant, liable to seizure under the writ, whereon to levy the same.—*Langford v. Few*, 47 S.W. 927, 146 Mo. 142, 69 Am.St.Rep. 606.

N.Y.A.D. 4 Dept. 1910. A return on an execution "nulla bona" is a return that the execution is uncollectible.—*Card v. Groesbeck*, 124 N.Y.S. 372, 140 A.D. 30, appeal granted 124 N.Y.S. 1112, 140 A.D. 916, reversed 97 N.E. 728, 204 N.Y. 301.—Execution 341.

S.C. 1962. "Nulla bona" signifies that defendant in execution has no goods which could be subjected to satisfaction of judgment.—*Walter J. Klein Co. v. Kneece*, 123 S.E.2d 870, 239 S.C. 478.—Execution 341.

#### NULL AND VOID

C.C.A.3 (N.J.) 1934. "Null and void" in contracts for purchase and sale of realty providing that on purchaser's default in payment of purchase price installments, contract shall be "null and void" and

payments made shall be retained by vendor, means voidable at the vendor's election and the condition may be insisted on or waived at his choice.—Burns Mtg. Co. v. Schwartz, 72 F.2d 991.

N.D.Ind. 1967. Words "null and void" in stock purchase contract providing that if defaulting buyer paid liquidated damages of \$20,000 contract would be null and void meant voidable at election of seller.—Fletcher v. U.S., 303 F.Supp. 583, affirmed and adopted 436 F.2d 413.—Damag 85.

Ala. 1915. A land sale contract providing that, on failure to pay past-due installments within three months, the money paid should go as rent, and the instrument be "null and void," held not to give the vendee an option to abandon the contract and defeat her unconditional promise to pay.—Jones v. Hert, 68 So. 259, 192 Ala. 111.—Ven & Pur 79.

Ala. 1907. The words "void," "void and of no effect," and "null and void," are used in statutes and legal documents in the sense of voidable merely—that is, capable of being avoided—and not as meaning that the act or transaction is absolutely a nullity, as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances. Code 1896, § 1286, provides that no certificate of incorporation shall issue when the corporate name assumed is that of a person or firm, unless there be joined thereto some name designating the business he carries on, followed by the word "company" or "corporation," and if any corporation shall fail to comply with this qualification its organization is void. Section 1282 provides that, when any corporation fails to comply with the requirements of the statute in its organization, the failure may be remedied by filing with the probate judge who issued the certificate of incorporation a statement setting forth the omission and supplying the same. Failure of a corporation to comply with the qualifications of section 1286, by inserting the word designating the business to be carried on, did not render its incorporation "void," but "voidable" only; such being the evident import of the two sections of Code 1896, which are pari materia.—State v. Colias, 43 So. 190, 150 Ala. 515.

Ark. 1900. "Null and void," as used in Sand. & H. Dig. § 6149, providing that articles of a railroad association should be null and void unless there should be filed in the office of the Secretary of State a preliminary survey of the road, etc., means voidable; that is, that in case of default the corporation may be dissolved through appropriate legal proceedings by the proper officers.—Brown v. Wyandotte & S.E.R. Co., 56 S.W. 862, 68 Ark. 134.

Ga. 1940. The phrase "null and void" within statute providing that deed creating trust shall be recorded where cestui que trust resides, within three months from execution, and if not so recorded it shall be null and void, should be construed as meaning "voidable" and only such persons as may have been injured by failure to record deed within time described should be heard to complain of such failure. Code 1933, § 108-114.—Metropolitan Life Ins. Co. v. Hall, 12 S.E.2d 53, 191 Ga. 294.—Trusts 23.

Ill. 1929. Certificate of convenience and necessity granted by Commerce Commission is mere permission, which expires if not exercised within two years (Public Utilities Act, § 55). Certificate of convenience and necessity granted by Commerce Commission is a mere permission to do a specified act within the two years fixed by Public Utilities Act, § 55 (Smith-Hurd Rev. St. 1927, c. 111 2/3, § 56), providing that unless exercised within two years authority conferred by certificate of convenience and necessity shall be null and void, and it must be exercised within time limited or not at all, and after that time expires license lapses and no revocation is needed to revoke it, as against contention that words "null and void" mean voidable at option of granting body.—Chicago Rys. Co. v. Commerce Commission, 167 N.E. 840, 336 Ill. 51, 67 A.L.R. 938.—Corp 394.

Ky. 1929. Preferential transfer in contemplation of insolvency, which under state law operates as assignment for creditors, held not "null and void" under Bankruptcy Act (Ky.St. §§ 1910, 1911; Bankr. Act § 67e, 11 U.S.C.A. § 107(e)).—Rivers-Yager Co.'s Trustee in Bankruptcy v. Lincoln Bank & Trust Co., 22 S.W.2d 256, 231 Ky. 767.—Bankr 2645.1.

Ky. 1929. Rule that word "void" in statute is sometimes read "voidable" is never applied to words "null and void."—Rivers-Yager Co.'s Trustee in Bankruptcy v. Lincoln Bank & Trust Co., 22 S.W.2d 256, 231 Ky. 767.—Statut 199.

Mass. 1941. An automobile dealer's "trust receipts" which were in substance chattel mortgages to secure purchase price of automobiles, for want of record, were "null and void" as security instruments under Massachusetts law as against creditors of dealer within Bankruptcy Act provision that all conveyances by debtor within four months prior to bankruptcy while insolvent which are null and void as against creditors, by laws of state in which property is situated shall be deemed null and void under provisions of act against creditors of such debtor if he be adjudged a bankrupt. G.L.(Ter.Ed.) c. 255, § 1; Bankr. Act § 67, sub. e, 11 U.S.C.A. § 107, sub. e.—Mason v. Wilde, 32 N.E.2d 615, 308 Mass. 268, certiorari denied 62 S.Ct. 74, 314 U.S. 638, 86 L.Ed. 512.—Bankr 2579.

Mass. 1938. The use of the words "null and void" in a conditional clause in a lease does not require the conclusion that a conditional limitation was intended.—Markey v. Smith, 16 N.E.2d 20, 301 Mass. 64, 118 A.L.R. 274.—Land & Ten 47.

Mo.App. 1919. Under a contract between the holder of note and mortgage and the purchaser of the property, providing for an extension of existing indebtedness on execution of certain interest and other notes by the purchaser, who agreed to assume the principal indebtedness, and that in event that any of the notes were not paid when due, the contract should be "null and void," and that the holder of the note might proceed to foreclose, default in the payment of the last interest note after the extension provided for had run did not void the contract and release the purchaser from liability for

the deficiency after foreclosure; the word "void" meaning "voidable" merely.—*Soeker v. Kerr*, 213 S.W. 867, 202 Mo.App. 22.—Mtg 282(1).

Ohio App. 9 Dist. 1993. Tractor trailer driver was properly found guilty of violating municipal ordinance for exceeding vehicle gross weight restrictions, even though driver possessed special hauling permit issued by state Department of Transportation (DOT), which permitted him to operate vehicle with gross weight in excess of statutory norms, since clause making permit "null and void" upon noncompliance with conditions of permit rendered permit void, rather than merely voidable, when driver violated conditions of permit by exceeding permissible axle weight. R.C. § 4513.34.—*State v. Evans*, 624 N.E.2d 263, 89 Ohio App.3d 294.—Autos 337.

Vt. 1907. Though a conveyance was, as between the parties, within the statute providing that all fraudulent conveyances shall be "null and void," the fraudulent grantee having conveyed the property to a third person, who was not made a party to a suit by creditors of the vendor to subject the land to their claims, he was not bound by a decree in favor of complainant.—*Tudor v. Tudor*, 67 A. 539, 80 Vt. 220, 130 Am.St.Rep. 977.—Fraud Conv 315(1).

W.Va. 1913. The words "null and void" in a contract for the sale and conveyance of land, providing that if the vendee defaulted the contract should be "null and void," held to render the contract voidable only at the vendor's election. Words and Phrases Perm. Ed. "null and void".—*Marshall v. Porter*, 80 S.E. 350, 73 W.Va. 258.—Ven & Pur 101.

### **NULLIFICATION**

Ga. 1986. Jury in criminal case possesses de facto power of "nullification," to acquit defendant regardless of strength of evidence against him.—*Cargill v. State*, 340 S.E.2d 891, 255 Ga. 616, certiorari denied 107 S.Ct. 1328, 479 U.S. 1101, 94 L.Ed.2d 180, rehearing denied 107 S.Ct. 1914, 481 U.S. 1024, 95 L.Ed.2d 519, denial of habeas corpus affirmed 120 F.3d 1366, rehearing and suggestion for rehearing denied 131 F.3d 157, certiorari denied 118 S.Ct. 1529, 523 U.S. 1080, 140 L.Ed.2d 680, rehearing denied 118 S.Ct. 1858, 523 U.S. 1145, 140 L.Ed.2d 1106.—Crim Law 731.

### **NULLIFICATION THEORY**

Ohio App. 9 Dist. 1994. Under "nullification theory" of products liability, manufacturer is liable for injuries caused by product's known dangers if manufacturer, through its advertised representations, unrealistically minimizes known dangers or implies that dangers do not exist.—*Gawloski v. Miller Brewing Co.*, 644 N.E.2d 731, 96 Ohio App.3d 160, dismissed, appeal not allowed 641 N.E.2d 1110, 71 Ohio St.3d 1411.—Prod Liab 7.

### **NUL IN LAW**

C.A.6 (Ohio) 1967. A man and a woman with a prior existing marriage who held themselves out as man and wife, and who expressed a present intent

on two occasions to effect common-law marriage, had a "de facto marriage" within the term "null in law" as used in Ohio statute providing that issue of parents whose marriage is null in law shall nevertheless be legitimate, and therefore a child born of such de facto marriage was "legitimate" for purpose of qualification for Social Security benefits, even though both parties knew of woman's prior existing marriage. R.C.Ohio, § 2105.18; Social Security Act, § 216(h) (2) (A), (3) (C) (ii) as amended 42 U.S.C.A. § 416(h) (2) (A), (3) (C) (ii).—*Wolf v. Gardner*, 386 F.2d 295, 15 Ohio Misc. 161, 43 O.O.2d 179.—Child 1; Social S 137.

Va. 1989. For purpose of former statute allowing children of marriage "null in law" to be declared legitimate, common-law marriages, although not recognized, are marriages "null in law." Code 1950, § 64-7 (Repealed).—*Murphy v. Holland*, 377 S.E.2d 363, 237 Va. 212.—Child 9.

### **NULLITY**

C.A.5 (La.) 1995. Under Louisiana law, agreement is "nullity" if it derogates from laws enacted for protection of public interest, violates rule of public order, or produces result prohibited by law or public policy. LSA-C.C. arts. 2030, 2031.—*Davis v. Parker*, 58 F.3d 183.—Contracts 103, 108(1).

S.D.Ind. 1946. A "nullity" means in law a void act or an act having no legal force or validity; invalid; null.—*Bowles v. Indianapolis Rys.*, 64 F.Supp. 865, affirmed 154 F.2d 218.

Cal. 1942. A court has inherent power apart from statute to correct its records by vacating a judgment which is void on its face for such judgment is a "nullity" and may be ignored. Code Civ.Proc. §§ 473, 663.—*Olivera v. Grace*, 122 P.2d 564, 19 Cal.2d 570, 140 A.L.R. 1328.—Judgm 346.

Cal.App. 6 Dist. 1999. Disputes regarding valuation are within the special competence of the board of equalization, and thus, the fact that tax assessor erroneously overvalues property which is otherwise subject to tax does not render the assessment a "nullity," so as to excuse taxpayer from requirement of exhaustion of administrative remedies; if any question of valuation exists, it would be irrelevant that plaintiff also challenges the assessment as arbitrary or void on constitutional grounds.—*Plaza Hollister Ltd. Partnership v. County of San Benito*, 84 Cal.Rptr.2d 715, 72 Cal.App.4th 1, rehearing denied, and review denied.—Tax 466, 543(2).

Kan. 1937. The word "void" in statute providing that, when instruments conveying mineral rights are not recorded within 90 days after execution, they shall become void if not listed for taxation, is used in its primary sense of "nullity". Gen.St.1935, 79-420.—*Shaffer v. Kansas Farmers Union Royalty Co.*, 69 P.2d 4, 146 Kan. 84, jurisdiction postponed 58 S.Ct. 50, appeal dismissed 58 S.Ct. 742, 303 U.S. 623, 82 L.Ed. 1086.—Mines 55(1).

**NULLITY DECREE**

Ala. 1941. A “nullity decree” annulling a marriage may be granted on a void marriage or on one subject to ratification.—*Hamlet v. Hamlet*, 4 So.2d 901, 242 Ala. 70.—Marriage 58(1).

**NULLITY DOCTRINE**

Mass.App.Ct. 2001. The “nullity doctrine” states that a complaint brought against a deceased person cannot be maintained because it is, in truth, brought against nobody.—*Cross’ v. Hewitt*, 754 N.E.2d 1075, 52 Mass.App.Ct. 538.—Parties 21.

Mass.App.Ct. 1998. “Nullity doctrine” states that complaint brought against deceased person cannot be maintained because it is, in truth, brought against nobody.—*White v. Helmuth*, 700 N.E.2d 300, 45 Mass.App.Ct. 634.—Parties 21.

**NULLITY OF MARRIAGE**

Neb. 2002. “Nullity of marriage” refers to the invalidity of a presumed or supposed marriage because it is void on its face or has been voided by court order.—*Manker v. Manker*, 644 N.W.2d 522, 263 Neb. 944.—Marriage 54.

**NULLITY SUIT**

Ill. 1901. A “nullity suit,” as the term is used in reference to a suit to annul a pretended marriage, has for its purpose a decree that a marriage that is void or voidable shall be judicially declared to be void. It differs from a “divorce suit,” which is for the purpose of dissolving a marriage which the parties thereto had legal capacity to contract.—*Pyott v. Pyott*, 61 N.E. 88, 191 Ill. 280.

**NULLIUS FILIUS**

Ky. 1941. Under common law, a child born out of wedlock was regarded as “nullius filius”, the son of no one, having no father and no mother, and existence of such a child was ignored.—*Hehr’s Adm’r v. Hehr*, 157 S.W.2d 111, 288 Ky. 580.—Child 1.

Mo. 1979. The common law was harsh, simple, and inflexible; an illegitimate child was “nullius filius” or “filius populi”; the child was the child of no one. (Per Simeone, Special Judge, with two Judges concurring and one Judge concurring in part.)—*Cobb v. State Sec. Ins. Co.*, 576 S.W.2d 726.—Child 1.

N.M. 1942. At common law, an illegitimate child, as regards inheritance, was “nullius filius,” a child of nobody, and could not inherit property.—*Gallup v. Bailey*, 129 P.2d 56, 46 N.M. 344, 142 A.L.R. 1441.—Child 85.

N.M. 1938. At common law, an illegitimate child, as regards inheritance, was “nullius filius,” a child of nobody, and could not inherit property.—*State v. Chavez*, 82 P.2d 900, 42 N.M. 569.—Child 85.

N.Y.Dom.Rel.Ct. 1940. Generally, except in specific respects provided by statute, a child born out of wedlock is still “nullius filius.”—Anonymous

v. Anonymous, 22 N.Y.S.2d 598, 174 Misc. 906.—Child 1.

**NILLIUS IN BONIS**

Ga.App. 1907. The dictum of Lord Coke that a “corpse” is “caro data veribus” (flesh given to the worms) and is “nullius in bonis” does not authorize the conclusion that those who are entitled to its possession for purposes of decent burial have no rights to and in it which the law recognizes and will protect.—*Medical College of Georgia v. Rushing*, 57 S.E. 1083, 1 Ga.App. 468.

**NILLI VENDEMUS, NILLI NEGABIMUS, AUT DIFFEREMUS RECTUM VEL JUSTITIAN**

Wash. 1941. “Nulli vendemus, nulli negabimus, aut differemus rectum vel justitian” means we neither sell nor deny, nor delay, to any person, equity or justice.—*State ex rel. Macri v. City of Bremereton*, 111 P.2d 612, 8 Wash.2d 93.

**NULLO EST ERRATUM**

Mass. 1943. A plea in “nullo est erratum” does not admit facts contained in an assignment of error not well pleaded.—*Silverton v. Com.*, 49 N.E.2d 439, 314 Mass. 52, 154 A.L.R. 1223.—App & E 749.

**NULL PLEA**

Miss. 1929. “Null plea” is one so void of substance that it cannot be cured by amendment.—*Dalton v. Rhodes Motor Co.*, 120 So. 821, 153 Miss. 51.—Plead 256.

**NULL POTESTATIVE CONDITION**

La.App. 4 Cir. 1979. Provision, which, in 1971, amended ten-year lease that was executed in 1963 and that provided for options to renew and which granted lessors the right to cancel and terminate lease on 60 days’ notice as of any date after December 1, 1976, was not a “null potestative condition.” LSA-C.C. arts. 2034, 2036.—*Seidenbach v. Canal-Galvez Frostop, Inc.*, 378 So.2d 199, writ denied 381 So.2d 1223.—Land & Ten 24(1).

**NULLUM TEMPUS**

N.J. 1991. Construction on student union building was “governmental function,” for purpose of determining whether Educational Facilities Authority (EFA) and Jersey City State College (JCSC) were entitled to protection against statutes of limitation afforded to state under doctrine of “nullum tempus” for action arising out of the construction; obligations of EFA are considered to be in proper public purposes of state, and when construction is complete, facilities built are leased to educational institution which repays EFA. N.J.S.A. 18A:72A-1; N.J.S.A. Const. Art. 8, § 2, par. 3.—*New Jersey Educational Facilities Authority v. Gruzen Partnership*, 592 A.2d 559, 125 N.J. 66.—Lim of Act 11(1), 11(4).

N.J. 1991. Effective December 31, 1991, doctrine of “nullum tempus,” which provides that statute of limitations does not run against sovereign, would be abrogated insofar as it applied to immuni-

ty of state or its agencies from application of statute of limitations in contractual matters.—New Jersey Educational Facilities Authority v. Gruzen Partnership, 592 A.2d 559, 125 N.J. 66.—Lim of Act 11(1).

Pa.Super. 1991. Under doctrine of “*nullum tempus*,” statutes of limitations do not apply to plaintiff Commonwealth unless statute specifically provides that it does.—School Dist. of Borough of Aliquippa v. Maryland Cas. Co., 587 A.2d 765, 402 Pa.Super. 569.—Lim of Act 11(1).

Pa.Cmwlth. 1992. When Commonwealth brings action for which statute of limitations has run it may invoke “*nullum tempus*,” under which statutes of limitations do not apply to plaintiff Commonwealth unless statute specifically so provides; rationale for doctrine is preservation of public rights, revenues, and property from injury and loss.—Altoona Area School Dist. v. Campbell, 618 A.2d 1129, 152 Pa.Cmwlth. 131, appeal denied 631 A.2d 1010, 535 Pa. 639.—Lim of Act 11(1).

**NULLUM TEMPUS OCCURRIT REGI**

C.A.3 (Pa.) 1993. Under doctrine of “*nullum tempus occurrit regi*,” under Pennsylvania law, statutes of limitations are not applicable to actions brought by the Commonwealth or its agencies unless statute expressly so provides.—City of Philadelphia v. Lead Industries Ass’n, Inc., 994 F.2d 112.—Lim of Act 11(1).

E.D.Pa. 2001. Under Pennsylvania’s doctrine of “*nullum tempus occurrit regi*,” which literally means “time does not run against the king,” statutes of limitations do not apply to the plaintiff Commonwealth unless the statute specifically so provides; since its adoption in this country, the rationale for the doctrine of *nullum tempus* has been the preservation of public rights, revenues and property from injury and loss.—Montgomery County v. MicroVote Corp., 152 F.Supp.2d 784, affirmed 320 F.3d 440.—Lim of Act 11(1).

Del.Supr. 1960. The rule expressed by early writers, “*nullum tempus occurrit regi*,” that the statute of limitations does not run against the sovereign applies to the states as well as to the United States.—Mayor and Council of Wilmington v. Dukes, 157 A.2d 789, 52 Del. 318, 2 Storey 318.—Lim of Act 11(1).

Pa.Cmwlth. 1992. “*Nullum tempus occurrit regi*” or “time does not run against the sovereign,” is common-law doctrine which makes statutes of limitations inapplicable to the sovereign as plaintiff.—Community College of Allegheny County v. Seibert, 601 A.2d 1348, 144 Pa.Cmwlth. 616, appeal granted 608 A.2d 32, 530 Pa. 658, affirmed 622 A.2d 285, 533 Pa. 314.—Lim of Act 11(1).

Tenn. 1995. Under common-law doctrine of “*nullum tempus occurrit regi*” (time does not run against the king), action brought by state may not be dismissed due to expiration of statute of limitations normally applicable to specific type of action.—Hamilton County Bd. of Educ. v. Asbestos-pray Corp., 909 S.W.2d 783, clarified on rehearing,

answer to certified question conformed to 73 F.3d 362.—Lim of Act 11(1).

**NULLUM TEMPUS OCCURRIT REGI**

D.N.J. 1995. Principal of “*nullum tempus occurrit regi*,” defined as “time does not run against the state,” is not always applicable to private actor.—New West Urban Renewal Co. v. Westinghouse Elec. Corp., 909 F.Supp. 219.—Lim of Act 11(0.5).

M.D.Pa. 1983. The doctrine of “*nullum tempus occurrit regi*,” time does not run against the king, provides that statutes of limitations do not apply to the state unless the statute specifically so provides.—U.S. v. Chiolo, 560 F.Supp. 279.—Lim of Act 11(1).

Ariz. 1938. “*Nullum tempus occurrit regi*” means that time does not run against the king, but the rule refers to the king in his official capacity as representing the sovereignty of the nation and not to the king as an individual.—City of Bisbee v. Cochise County, 78 P.2d 982, 52 Ariz. 1.

Ark. 1943. The maxim “*nullum tempus occurrit regi*” applies only to the sovereign itself and not to public corporations or other such governmental agencies to whom powers are delegated.—Hart v. Sternberg, 171 S.W.2d 475, 205 Ark. 929.—Lim of Act 11(1), 11(4).

Colo. 1996. Origin of governmental immunity from statutes of limitations is found in English common law rule of “*nullum tempus occurrit regi*,” or, time does not run against the king; under rule, statute of limitations has been held not to apply to actions brought by crown, unless there has been express provision including it.—Shootman v. Department of Transp., 926 P.2d 1200, rehearing denied.—Lim of Act 11(1).

D.C. 1989. Under common-law principle of “*nullum tempus occurrit regi*” (“no time runs against the sovereign”), the District of Columbia enjoys common-law “municipal immunity” from effects of statutes of limitations and repose when suing in its municipal capacity to vindicate public rights.—District of Columbia v. Owens-Corning Fiberglas Corp., 572 A.2d 394, certiorari denied 111 S.Ct. 213, 498 U.S. 880, 112 L.Ed.2d 173.—Lim of Act 11(3).

Ill.App. 4 Dist. 1940. The maxim “*nullum tempus occurrit regi*”, which means in effect that the doctrine of laches does not apply against a unit of government, such as a municipality, is restricted to public rights of the governmental agency, and does not apply to contract, or other nongovernmental rights.—Village of Hartford v. First Nat. Bank of Wood River, 30 N.E.2d 524, 307 Ill.App. 447.—Equity 85.

N.J.Super.A.D. 1993. “*Nullum tempus occurrit regi*” means that time does not run against the state.—Rutgers, State University of New Jersey v. Grad Partnership, 634 A.2d 1053, 269 N.J.Super. 142, certification denied 640 A.2d 851, 135 N.J. 470, certification denied 641 A.2d 1039, 136 N.J. 28.—Lim of Act 11(1).

N.J.Super.A.D. 1989. Doctrine of “nullum tempus occurrit regi” provides that the statute of limitations does not run against the sovereign; there is no time limit on the state’s ability to sue and assert its rights.—New Jersey Educational Facilities Authority v. Conditioning Co., 567 A.2d 1013, 237 N.J.Super. 310, certification granted 583 A.2d 325, 121 N.J. 629, affirmed in part, reversed in part 592 A.2d 559, 125 N.J. 66.—Lim of Act 11(1).

Ohio App. 4 Dist. 1966. The ancient maxim of “nullum tempus occurrit regi”, i.e., no time runs against the sovereign, prevails in Ohio, and this immunity is an attribute of sovereignty that can only be waived by express provision to that effect within the statute.—State v. Berry, 220 N.E.2d 671, 8 Ohio App.2d 72, 37 O.O.2d 82.—Lim of Act 11(1).

Oklahoma. 1940. The generally accepted doctrine is that the maxim “nullum tempus occurrit regi” is not restricted in its application to sovereign states or governments, but that its application extends to and includes public rights of all kinds, and that it applies to municipal corporations as trustees of the rights of the public, and protects from invasion and encroachment the property of the municipality which is held for and devoted to public use; no matter how lax the municipal authorities may have been in asserting the rights of the public.—Board of Com’rs of Oklahoma County v. Good Tp., Harper County, 107 P.2d 805, 188 Okla. 151, 1940 OK 450.

Pa. 1941. Statutes of Limitation do not apply to the Commonwealth because the maxim “nullum tempus occurrit regi” has been adopted as a matter of public policy.—In re Frey’s Estate, 21 A.2d 23, 342 Pa. 351.—Lim of Act 11(1).

Pa.Super. 1989. When Commonwealth brings action for which statute of limitations has run, it may invoke “nullum tempus occurrit regi,” under which statutes of limitation do not apply to Commonwealth unless statute specifically states that it does. 1 Pa.C.S.A. § 2310; 42 Pa.C.S.A. § 8522; Const. Art. 1, § 11.—Northampton County Area Community College v. Dow Chemical, U.S.A., 566 A.2d 591, 389 Pa.Super. 11, appeal granted 581 A.2d 573, 525 Pa. 647, affirmed 598 A.2d 1288, 528 Pa. 502.—Lim of Act 11(1).

Pa.Cmwlth. 1992. Under doctrine of “nullum tempus occurrit regi,” statutes of limitation do not apply to Commonwealth unless words of statute specifically provide that they do.—Smith v. Mognet, 618 A.2d 1215, 152 Pa.Cmwlth. 302.—Lim of Act 11(1).

Tenn.Ct.App. 1948. The general principle “nullum tempus occurrit regi,” which means that lapse of time does not bar the right of the sovereign, always operates except in the particular instances where the legislature has enacted a statute to the contrary.—Williams v. Cravens, 214 S.W.2d 57, 31 Tenn.App. 246.—Lim of Act 11(1).

Va. 2002. The reason for the rule “nullum tempus occurrit regi,” the sovereign is immune from the operations of statutes of limitations, is to be found in the great public policy of preserving the

public rights, revenues, and property from injury and loss, by the negligence of public officers.—Long, Long & Kellerman, P.C. v. Wheeler, 570 S.E.2d 822, 264 Va. 531.—Lim of Act 11(1).

Wyo. 1991. The rule of immunity from statute of limitations for the State finds its genesis in the common-law principle “nullum tempus occurrit regi,” or “time does not run against the king.”—Laramie County School Dist. No. One By and Through Brown v. Muir, 808 P.2d 797.—Lim of Act 11(1).

#### **NULLUM TEMPUS OCCURRIT REGI DOCTRINE**

S.D.N.Y. 2001. As a general matter, the “nullum tempus occurrit regi doctrine,” or time does not run against the king, typically applies where the government acts as a sovereign and seeks to vindicate public, not private, rights.—Williams v. Infra Commerc Anstalt, 131 F.Supp.2d 451.—Lim of Act 11(1).

#### **NULLUM TEMPUS OCCURRIT REIPUBLICAE**

Ala. 1939. In Covington county’s action against personal representative of deceased surety on official bond of county treasurer to recover money lost to county by alleged devistavit of treasurer, wherein personal representative pleaded statute of non-claim, county was not entitled to protection of maxim “nullum tempus occurrit reipublicae,” which means that no time runs against the commonwealth or state. Code 1923, § 5815, as amended by Gen. Acts 1931, p. 840.—Covington County v. O’Neal, 195 So. 234, 239 Ala. 322.—Lim of Act 11(2).

#### **NULLUM TEMPUS RULE**

C.A.6 (Mich.) 1996. “Nullum tempus rule,” or rule that sovereign is exempt from consequences of its laches and from operation of statutes of limitation, is federal common-law rule.—U.S. v. Peoples Household Furnishings, Inc., 75 F.3d 252, 1996 Fed.App. 41P, rehearing and suggestion for rehearing denied, certiorari denied Holland v. U.S., 117 S.Ct. 386, 519 U.S. 964, 136 L.Ed.2d 302.—Lim of Act 11(1); U.S. 133.

#### **NULLUS COMMODUM CAPERE POTEST DE INJURIA SUA PROPRIA**

S.D. 1932. “Nullus commodum capere potest de injuria sua propria” means no one can take advantage of his own wrong.—De Zotell v. Mutual Life Ins. Co. of New York, 245 N.W. 58, 60 S.D. 532.

#### **NULSANCE AT LAW**

Ark. 1935. Drive-in filling station is not “nuisance per se,” and erection of station would not be enjoined where evidence showed that station would not constitute a nuisance. A “nuisance at law” or a “nuisance per se” is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings.—Moore v. Wallis, 86 S.W.2d 1111, 191 Ark. 551.

**NUL TIEL CORPORATION**

Mo.App. 1914. A plea that plaintiff corporation is not a corporation either de jure or de facto, and consequently not entitled to sue, is not a plea of ultra vires, which assumes an incorporation either de jure or de facto and a misuse of or departure from a franchise, but is a plea of "nul tiel corporation."—Rialto Co. v. Miner, 166 S.W. 629, 183 Mo.App. 119.

**NUL TIEL RECORD**

Tex.Civ.App.—Amarillo 1926. Under Code practice, "general denial" to suit on judgment is equivalent to plea of "nul tiel record" at common law.—Smith v. Continental Supply Co., 283 S.W. 1082.

**NUMB**

Mich. 1896. The word "numb" means enfeebled in or destitute of the power of sensation and motion, and is held to be a term not limited to sensation, but including motion, so as to render competent the testimony of a witness as to whether a limb of another person seemed numb.—Will v. Village of Mendon, 66 N.W. 58, 108 Mich. 251.

**NUMBER**

Ala.App. 1912. Where the evidence was of a contradictory statement on "one" occasion the court properly refused an instruction that the jury should acquit defendant, if, from the evidence, they believed that he stated on a "number" of occasions he did not purchase the liquor from defendant, but from another.—Faulk v. State, 59 So. 225, 4 Ala. App. 177.—Crim Law 814(18).

N.Y.Sur. 1920. Will bequeathing to "S. and D." the two stockholders, who together with testator owned entire stock of corporation, "each, such a number of shares" of such corporation "of which I shall die possessed, which, with the total number of shares thereof they may then own or control, will vest them each with the ownership or control of an equal number of the then total outstanding capital stock," gave to each such a number of shares as would vest in each the ownership of an equal half of the total stock, and did not merely give to D., owning fewer shares than S. at testator's death such a number of shares as would make his holding equal to that of S. at time of testator's death; the word "total" meaning whole, not divided, entire, full, complete, the whole amount; the word "equal" meaning even, sameness of quantity or degree, the same; and the word "number" being synonymous with ratio, proportion, requiring it to be read as though written "equal half or part."—In re Merritt's Estate, 180 N.Y.S. 877.—Wills 525.

Or. 1915. In a contract stating that one contracting party had sold to the other "25,000 # 1913 of hops at 14 cents per pound," the character #, which ordinarily signifies "number" signified "pounds"; such character being the accepted and businesslike substitute for "pounds" when written as in this contract and following a numeral.—B. O. Schucking & Co. v. Young, 153 P. 803, 78 Or. 483.

Wash. 1903. The word "object," as used in a provision of a city charter that every ordinance shall contain but one object, expressed in the title, was not used in the sense of "number" or "variety"; nor was it intended to require a distinct legislative act for each particular matter legislated upon. It was intended to prevent the union in one act of diverse, incongruous, and disconnected matters having no relation to or connection with each other, but was not intended to prevent the lawmaking power from enacting under a general title provisions affecting a variety of matters, so long as there is a natural connection between the several matters and the object named in the title.—City of Seattle v. Barto, 71 P. 735, 31 Wash. 141.

**NUMBERED VESSEL**

Wash.App. Div. 2 1974. A "numbered vessel" is one that has been registered with the United States Coast Guard and assigned a number.—Matthews v. Richmond, 525 P.2d 810, 11 Wash.App. 703.—Ship 6.

**NUMBER GAME**

Ga.App. 1942. The operation of the lottery known as the "number game" is a "misdemeanor", and any person who aids another in the commission of the offense is guilty as a "principal".—Hodges v. State, 22 S.E.2d 611, 68 Ga.App. 229.—Crim Law 27; Lotteries 27.

Ga.App. 1941. In prosecution for operating a lottery known as the "number game" for the hazarding of money, accused's guilt was for jury.—Jones v. State, 13 S.E.2d 187, 64 Ga.App. 366.—Lotteries 30.

Ga.App. 1941. Evidence sustained conviction for operating a lottery game, known as the "number game".—Willis v. State, 13 S.E.2d 107, 64 Ga.App. 309.—Lotteries 29.

Ga.App. 1941. Whether accused was guilty of aiding and abetting others in commission of offense of operating a lottery known as the "number game" for hazarding of money was for jury.—Guthrie v. State, 13 S.E.2d 95, 64 Ga.App. 338.—Lotteries 30.

Ga.App. 1940. Evidence was sufficient to authorize a verdict that defendant was guilty of aiding and abetting the operations of a lottery, generally known as the "number game".—McCowan v. State, 11 S.E.2d 104, 63 Ga.App. 356.—Lotteries 29.

N.J.Sup. 1933. Statute punishing as disorderly person any one conducting number game held violative of Constitution prohibiting Legislature from changing penalty for conducting a lottery, since a number game is a 'lottery' and those participating therein must be indicted by grand jury and, if convicted, are guilty of high misdemeanor (Comp. St. Supp. §§ 59-2, 59-8s(2); 2 Comp. St. 1910, p. 1764, §§ 57-59; Const. art. 4, § 7, subd. 2). In "number game," the winner is determined by chance according to some scheme held out to the public by which the person who pays is to have something if certain numbers in a certain manner occur. A 'lottery' is a scheme for the distribution of

## NUMBER OF SHIPPERS

prizes by chance or a game of hazard in which small sums are ventured for the chance of obtaining a larger value, either in money or other valuables, or where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what the party who pays the money is to have for it, or whether he is to have anything.—Dombrowski v. State, 168 A. 722, 111 N.J.L. 546.—Lotteries 2.

### **NUMBER OF DAYS \* \* \* EMPLOYED**

N.M.App. 1988. Phrase “number of days \* \* \* employed,” for purposes of computing claimant’s average daily and weekly wages, means actual number of days claimant worked for employer before the accident, rather than number of days elapsed in between hiring date and accident. NMSA 1978, § 52-1-20, subd. B(3, 5).—Fahr v. Aaron McGuider Trucking, 755 P.2d 85, 107 N.M. 241.—Work Comp 812, 813.

### **NUMBER OF DAYS THE EMPLOYEE ACTUALLY WORKED**

La.App. 3 Cir. 1979. In computing average weekly wage for workmen’s compensation purposes, calculation should be made in whole days only, under statute providing that average weekly wage of employee employed on any basis other than hourly, monthly or annually, is computed by dividing gross earnings for 26-week period immediately preceding accident by number of days employee actually worked for employer, and multiplying resultant quotient by four; clause “number of days the employee actually worked” refers to calendar days, not fractional days. LSA-R.S. 23:1021(7)(d).—Tri-State Ins. Co. v. Mason, 369 So.2d 220.—Work Comp 813.

### **NUMBER OF DAYS THE WORKMAN (CLAIMANT) WAS ACTUALLY EMPLOYED**

N.J.Sup. 1941. Where claimant who was employed as a salesman did not go on road until a week after being employed and was injured during week while on road, the “number of days the workman (claimant) was actually employed”, within Compensation Act relating to calculation of daily wage, was properly determined on basis of number of days on which claimant was actually employed rather than on basis of date of hiring. N.J.S.A. 34:15-37.—Davidson v. Nathanson Furniture Stores, 20 A.2d 61, 126 N.J.L. 430.—Work Comp 817.

### **NUMBER OF DAYS THE WORKMAN WAS ACTUALLY EMPLOYED**

N.J.Sup. 1941. The words “number of days the workman was actually employed”, as used in Compensation Act provision that where, prior to accident, rate of wages is fixed by employee’s output, daily wage shall be calculated by dividing the number of days the workman was actually employed into total amount employee earned during preceding six months, or so much thereof as shall refer to employment by same employer, mean the number of days on which the workman was actually employed, and it is not the day of hiring that controls.

N.J.S.A. 34:15-37.—Davidson v. Nathanson Furniture Stores, 20 A.2d 61, 126 N.J.L. 430.—Work Comp 817.

N.J.Sup. 1940. The words “number of days the workman was actually employed” as used in the section of the compensation act providing that where prior to accident, rate of wages is fixed by employee’s output, daily wage shall be calculated by dividing the “number of days the workman was actually employed” into total amount employee earned during preceding six months, or so much thereof as shall refer to employment by the same employer, mean the number of days on which the employee did work, whether for a full day or only part of a day, and neither calendar days of 24 hours each, nor full working days of so many hours each. N.J.S.A. 34:15-37, 34:15-38.—Highway Freight Co. v. Workmen’s Compensation Bureau, 15 A.2d 272, 125 N.J.L. 168, affirmed 19 A.2d 459, 126 N.J.L. 367.—Work Comp 812.

### **NUMBER OF EMPLOYEES**

C.A.D.C. 1973. Term “number of employees” in regulation permitting contracting officer to waive or permit correction of minor informality or irregularity relates to a firm’s capacity and capabilities, a matter of “responsibility.”—Northeast Const. Co. v. Romney, 485 F.2d 752, 157 U.S.App.D.C. 381.—U.S 64.45(2).

### **NUMBER OF EMPLOYEES COVERED**

1st Cir.BAP (Mass.) 2000. Retired employees of debtor are not included within the meaning of the phrase “number of employees covered,” as used in bankruptcy statute limiting fourth-level priority claim for unpaid contributions to employee benefit plans based, among other things, upon “number of employees covered” by each such plan multiplied by \$4,300.00. Bankr.Code, 11 U.S.C.A. § 507(a)(4)(B)(i).—In re Crafts Precision Industries, Inc., 244 B.R. 178.—Bankr 2961.

### **NUMBER OF OCCURRENCES**

E.D.Mich. 1993. “Number of occurrences” for purposes of per occurrence limit of coverage under liability policy, is determined by reference to cause or causes of damage, rather than by reference to number of claims or settlements.—Associated Indem. Corp. v. Dow Chemical Co., 814 F.Supp. 613.—Insurance 2281(2).

### **NUMBER OF PERSONS**

Ohio App. 8 Dist. 1930. A “number of persons”, means not less than three.—Zmunt v. Lexa, 175 N.E. 458, 37 Ohio App. 479, 33 Ohio Law Rep. 165, 9 Ohio Law Abs. 700, affirmed 176 N.E. 82, 34 Ohio Law Rep. 293, 123 Ohio St. 510, 9 Ohio Law Abs. 541.

### **NUMBER OF SHIPPERS TO BE SERVED**

C.A.D.C. 1977. For purpose of the Interstate Commerce Act provision defining a “contract carrier by motor vehicle” as any person which engages in transportation of passengers or property in inter-

state or foreign commerce for compensation under continuing contracts with one "person" or a limited number of "persons," term "person" is conceptually distinct from the word "shipper" as used in phrase, found in separate section of the Act, "number of shippers to be served"; one corporate "person" could have numerous branches or warehouses and, therefore, multiple shippers. Interstate Commerce Act, §§ 1 et seq., 203(a)(15), 209, 49 U.S.C.A. §§ 1 et seq., 303(a)(15), 309.—Keller Trucking, Inc. v. U.S., 567 F.2d 147, 185 U.S.App.D.C. 280.—Autos 76.

**NUMBER OF WITHHOLDING EXEMPTIONS CLAIMED**

E.D.Pa. 1972. Phrase "number of withholding exemptions claimed" within statute governing withholding of taxes from an employee's wages means number claimed in a withholding exemption certificate. 26 U.S.C.A. (I.R.C.1954) §§ 3401(e), 3402(a, c), (f)(2).—U.S. v. Malinowski, 347 F.Supp. 347, affirmed 472 F.2d 850, certiorari denied 93 S.Ct. 2164, 411 U.S. 970, 36 L.Ed.2d 693.—Int Rev 4849.

**NUMBER ON A TRANSMISSION**

Mo. 1967. The "number on a transmission" is a distinguishing number of the manufacturer within statute making it unlawful to deface a motor number or other distinguishing number on any motor vehicle. Section 301.400 RSMo 1959, V.A.M.S.—State v. Friedman, 412 S.W.2d 171.—Autos 340.

**NUMBERS**

C.A.5 (Fla.) 1962. "Bolita" and "Cuba" are lotteries and are variants of the "numbers" game, the scheme of which is to create a fund made by payments of participants who purchase numbers, with fund being distributed to holders of winning number after share of promoter has been deducted; other variants are "Policy" and "New York Bond"; and differences are only in manner by which the winning number is determined.—Merritt v. C.I.R., 301 F.2d 484.—Lotteries 3.

C.A.3 (Pa.) 1966. "Numbers" or the numbers game is that game wherein the player wagers or plays that on a certain day a certain series of digits will appear or "come out" in a series such as the United States Treasury balance or parimutuel payoff totals of particular races at a certain racetrack for the day used as a reference, and though number of digits is fixed, usually at three, any player is free to select any number or quantity of numbers within the range of those digits, and designate amount of his wager upon each, and in such game neither number of players nor amount of money wagered nor total amount of payoffs can be predicted in any one day.—U.S. v. Baker, 364 F.2d 107, certiorari denied 387 U.S. 956, 385 U.S. 986, 17 L.Ed.2d 448.—Lotteries 3.

N.J.Super.A.D. 1967. Statute prohibiting possession of slips which pertain to business of lottery or lottery policy included possession of these materials pertaining to the business of "numbers" or "numbers" game, notwithstanding statutory phrase of whether the drawing had taken place or not.

N.J.S. 2A:121-3, subd. b, N.J.S.A.—State v. Gattling, 230 A.2d 157, 95 N.J.Super. 103, certification denied 232 A.2d 152, 50 N.J. 91.—Lotteries 20.

Ohio App. 9 Dist. 1952. The so-called "numbers" is a gambling system based upon a scheme for the distribution of money or property, in which a valuable consideration is paid on chance alone, with no admixture of skill.—State v. Curry, 109 N.E.2d 298, 92 Ohio App. 1, 49 O.O. 183.

**NUMBERS GAME**

App.D.C. 1936. Evidence held to establish that accused and codefendant engaged in conducting "numbers game," authorizing conviction for sale and possession of lottery tickets (D.C.Code 1929, T. 6, § 151).—Forte v. U.S., 83 F.2d 612, 65 App.D.C. 355, 105 A.L.R. 300.—Lotteries 29.

App.D.C. 1936. "Numbers game," wherein players merely guess that result of mathematical calculations based on prices paid at certain race track would be certain number, held "lottery," and not direct bet or wager on horse race (D.C.Code 1929, T. 6, § 151).—Forte v. U.S., 83 F.2d 612, 65 App.D.C. 355, 105 A.L.R. 300.—Lotteries 3.

App.D.C. 1936. Even if original slips used in "numbers game" which were turned over by seller to his backer were not "lottery tickets," duplicate slips which were handed over to player were since they were intended to insure to player chance of obtaining prize to be drawn in lottery (D.C.Code 1929, T. 6, § 151).—Forte v. U.S., 83 F.2d 612, 65 App.D.C. 355, 105 A.L.R. 300.—Lotteries 23.

App.D.C. 1936. Evidence that lunchroom operators were operating "numbers game" and that one of them sold and transferred to police officer a duplicate numbers slip in presence of accused, who then received original slip from seller, held to justify finding that accused was engaged in common criminal enterprise with lunchroom operators (D.C.Code 1929, T. 6, § 151).—Forte v. U.S., 83 F.2d 612, 65 App.D.C. 355, 105 A.L.R. 300.—Lotteries 29.

Conn. 1941. A "numbers game" or "betting on numbers" which is a game of chance in which player selects any number and makes a bet on that number and gives amount of bet and number to the "runner" who enters it on a pad, player receiving a copy, and whereby winning number is determined each day by computation based upon prices paid on parimutuel betting machine at a designated track for horse racing as published in a newspaper, the holder of winning number receiving through the number 600 times the amount of his bet, is in the nature of a "lottery" within purview of statute. Gen.St.1930, § 6337.—State v. Mola, 23 A.2d 126, 128 Conn. 407.—Lotteries 3.

Mont. 1950. The "numbers game," the players of which mark on tickets containing 80 squares numbered 1 to 80 and at close of which the operators select 20 numbers and the player of which wins if his ticket has marked upon it five or more of the numbers marked by operators, is banned as a "lottery," whether such game is called Chinese lottery,

"the Crown Game," "the Crown punchboard game," or any other name. R.C.M.1947, §§ 94-3001, 94-3003 to 94-3006, 94-3009, 94-3011.—State ex rel. Olsen v. Crown Cigar Store, 220 P.2d 1029, 124 Mont. 310.—Lotteries 3.

N.Y.A.D. 1 Dept. 1940. The operation of policy or "numbers game" was properly prosecuted as a felony under lottery section of statute as against contention that operation could be prosecuted only as a misdemeanor under policy section, since Legislature by making a misdemeanor of policy, originally included in crime of lottery, did not intend to repeal, alter, or amend original lottery section. Penal Law, §§ 974, 1370, 1372, 2500.—People v. Hines, 17 N.Y.S.2d 141, 258 A.D. 466, affirmed as modified 29 N.E.2d 483, 284 N.Y. 93.—Crim Law 27.

N.Y.A.D. 1 Dept. 1940. "Policy" is a species of "lottery" whereby the chance is determined by numbers; "numbers game" also being a lottery. Penal Law, § 1370.—People v. Hines, 17 N.Y.S.2d 141, 258 A.D. 466, affirmed as modified 29 N.E.2d 483, 284 N.Y. 93.—Lotteries 3.

N.Y.A.D. 1 Dept. 1940. A conviction of contriving, proposing, or drawing or assisting in a lottery was justified under evidence showing that accused's contribution to criminal purpose was protection from prosecution and punishment, and that the "numbers game" could not have been carried out without such protection. Penal Law, § 1372.—People v. Hines, 17 N.Y.S.2d 141, 258 A.D. 466, affirmed as modified 29 N.E.2d 483, 284 N.Y. 93.—Lotteries 29.

N.Y.A.D. 1 Dept. 1940. The prosecution for conspiracy to operate policy or "numbers game" was not barred by limitations because last overt act alleged was more than two years prior to filing of indictment, where indictment alleged continuance of conspiracy within period of limitation and overt acts were proven within such time. Penal Law, § 1372; Code Cr.Proc. §§ 142, 398.—People v. Hines, 17 N.Y.S.2d 141, 258 A.D. 466, affirmed as modified 29 N.E.2d 483, 284 N.Y. 93.—Crim Law 150.

N.Y.Co.Ct. 1959. The "numbers game", "policy" or "mutual race horse policy" is one form of a lottery. Penal Law, § 1372.—People v. Coppo, 183 N.Y.S.2d 313, 16 Misc.2d 879, affirmed 205 N.Y.S.2d 879, 11 A.D.2d 722.—Lotteries 3.

N.Y.Co.Ct. 1959. The "numbers game", "policy" or "mutual race horse policy" is a game of chance in which the player selects a number containing three digits, bets his money on that number or a combination thereof and writes the same on a policy slip which is given, together with the money, to a so-called collector who thereafter delivers it to a controller who delivers the slips to a policy bank where the winning number is determined by a computation based upon prices paid and results of horse races at a designated race track, and if a player has selected a winning number he is paid odds varying from 600 to 1 or less depending upon odds set by the bank, and such activity is a "lottery". Penal Law, § 1372.—People v. Coppo, 183

N.Y.S.2d 313, 16 Misc.2d 879, affirmed 205 N.Y.S.2d 879, 11 A.D.2d 722.—Lotteries 3.

Pa.Super. 1943. In prosecution for conducting lottery known as "numbers game", "slips" found on accused or obviously dropped by him were properly admitted. 18 P.S. § 4101 et seq.—Com. v. Mattera, 30 A.2d 168, 151 Pa.Super. 135.—Crim Law 404.50.

Pa.Super. 1943. Evidence sustained conviction of conducting a lottery known as "numbers game". 18 P.S. § 4101 et seq.—Com. v. Mattera, 30 A.2d 168, 151 Pa.Super. 135.—Lotteries 29.

Pa.Super. 1943. In prosecution for conducting lottery known as "numbers game", a policeman was properly permitted to testify as to operation of "numbers game" and "slips" used to indicate a "sale" one of which is delivered by "writer" or "salesman" to the "banker". 18 P.S. § 4101 et seq.—Com. v. Mattera, 30 A.2d 168, 151 Pa.Super. 135.—Lotteries 29.

Pa.Super. 1938. The "numbers game" is a form of "lottery." 18 P.S. § 4601.—Com. v. Zotter, 200 A. 264, 131 Pa.Super. 296.—Lotteries 3.

Va. 1951. In police precinct parlance, a "lottery" is known as "numbers game". Code 1950, § 18-301.—Roy v. Com., 62 S.E.2d 902, 191 Va. 722.—Lotteries 3.

## NUMBERS SLIP

Pa.Super. 1962. Any slip of paper used in an illegal lottery where winner is determined by selection of a number is a "numbers slip".—Com. v. LaCamera, 186 A.2d 63, 199 Pa.Super. 348, certiorari denied LaCamera v. Pennsylvania, 83 S.Ct. 1697, 374 U.S. 808, 10 L.Ed.2d 1032.—Lotteries 20.

## NUMBER 1

Cal.App. 1 Dist. 1923. Representation by seller of beet pulp that it was "number 1" and "first class" was representation that it was of good quality and in good condition, and was not of inferior quality, damaged, off grade, in bad condition, injurious, unsafe, or unfit for feeding purposes.—Pacific Feed Co. v. Kennel, 218 P. 274, 63 Cal.App. 108.—Sales 261(6).

## NUMBNESS

Mo. 1925. Allegation of "numbness" of leg held sufficient to let in proof of paralysis of that member.—Rosenzweig v. Wells, 273 S.W. 1071, 308 Mo. 617.—Damag 158(2).

## NUM-CHUCKS

Fla.App. 1 Dist. 1983. In delinquency proceeding, there was competent substantial evidence before trial court to support its conclusion that "num-chucks" concealed by juvenile in his shirt were "deadly weapons" prohibited by statute. West's F.S.A. § 790.01(1).—C.J.R. v. State, 429 So.2d 753, petition for review denied 440 So.2d 351.—Infants 176.

Fla.App. 3 Dist. 1986. "Nunchaku," also known as "num-chucks," a potentially lethal device which

originated from the martial arts, is a deadly weapon as, even though originally designed as farm tool used to separate chaff from grain, the instrument has no constructive social utility on the streets of urban Miami.—R.V. v. State, 497 So.2d 912, review denied 508 So.2d 15, review denied W.B. v. State, 508 So.2d 16.—Weap 4.

### NUMCHUKS

Vt. 1983. In prosecution for aggravated assault on a police officer with a deadly weapon, circumstantial evidence showing that defendant hit deputy sheriff on shoulder with a pair of "numchucks," a martial arts weapon consisting of two pieces of wood held together by a chain or cord, was sufficient to sustain conviction. 13 V.S.A. §§ 1024(a)(2), 1028.—State v. Lupien, 466 A.2d 1172, 143 Vt. 378.—Assault 92(1).

### NUMERICAL PREPONDERANCE

N.J. 1995. Under "numerical-preponderance-of-aggravating-and-mitigating factors test," which is part of frequency analysis used in proportionality review of death sentence, instant defendant's case is compared to other cases having same number of aggravating and mitigating factors; purpose of test is to overcome shortcomings of salient-factors test, particularly its small sample pools, but "numerical preponderance" test assumes that juries weigh each of aggravating and mitigating factors equally, thus, failing to account for qualitative nature of jury deliberations.—State v. DiFrisco, 662 A.2d 442, 142 N.J. 148, certiorari denied 116 S.Ct. 949, 516 U.S. 1129, 133 L.Ed.2d 873.—Sent & Pun 1788(6).

### NUMERICAL-PREPONDERANCE-OF-AGGRAVATING-AND-MITIGATING FACTORS TEST

N.J. 1995. Under "numerical-preponderance-of-aggravating-and-mitigating factors test," which is part of frequency analysis used in proportionality review of death sentence, instant defendant's case is compared to other cases having same number of aggravating and mitigating factors; purpose of test is to overcome shortcomings of salient-factors test, particularly its small sample pools, but "numerical preponderance" test assumes that juries weigh each of aggravating and mitigating factors equally, thus, failing to account for qualitative nature of jury deliberations.—State v. DiFrisco, 662 A.2d 442, 142 N.J. 148, certiorari denied 116 S.Ct. 949, 516 U.S. 1129, 133 L.Ed.2d 873.—Sent & Pun 1788(6).

### NUMEROSITY

S.D.Fla. 1979. In determining whether the "numerosity" requirement for certification of a class is satisfied, the number of members is but one factor to consider; "numerosity" is tied to impracticability of joinder under specific circumstances and, therefore, the judgment as to whether a given number of members is sufficient is not susceptible to hard and fast standards. Fed.Rules Civ.Proc. rules 23, 23(a), (a)(1), 28 U.S.C.A.—Fifth Moorings Condominium, Inc. v. Shere, 81 F.R.D. 712.—Fed Civ Proc 163.

N.D.Ill. 1998. "Numerosity" requirement for class certification was met, in action under the Fair

Debt Collection Practices Act (FDCPA) to recover on behalf of class of debtors to whom debt collection agency directed its allegedly misleading "form" collection letter, given agency's size and the frequency with which this same letter was mailed to debtors. Consumer Credit Protection Act, § 802 et seq., as amended, 15 U.S.C.A. § 1692 et seq.; Fed. Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.—Sledge v. Sands, 182 F.R.D. 255.—Fed Civ Proc 182.5.

N.D.Ill. 1994. Hemophiliacs seeking class certification in action against manufacturers of antihemophilic factor concentrate (AHF) and against hemophilia foundation, alleging that as result of using AHF they became infected with Human Immunodeficiency Virus (HIV), satisfied "numerosity" requirement of class actions rule, where as many as 10,000 hemophiliacs were alleged to have been infected with HIV, where members of putative class were alleged to be dispersed throughout fifty states, and where members' identities were for the most part unknown. Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.—Wadleigh v. Rhone-Poulenc Rorer, Inc., 157 F.R.D. 410, mandamus granted Matter of Rhone-Poulenc Rorer Inc., 51 F.3d 1293, rehearing and suggestion for rehearing denied, certiorari denied Grady v. Rhone-Poulenc Rorer Inc., 116 S.Ct. 184, 516 U.S. 867, 133 L.Ed.2d 122.—Fed Civ Proc 182.5.

N.D.Ill. 1993. Children of unmarried parents in Cook County satisfied "numerosity" requirement for class certification in suit challenging system which allegedly discriminated against them in resolution of child support, custody, and visitation disputes; class consisted of tens of thousands of children, although exact number was difficult to pinpoint. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.; U.S.C.A. Const.Amend. 14.—Gomez by Hernandez v. Comerford, 833 F.Supp. 702.—Fed Civ Proc 181.

N.D.Ill. 1993. Exact number or identity of class members need not be pleaded to satisfy "numerosity" requirement for class certification. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.—Gomez by Hernandez v. Comerford, 833 F.Supp. 702.—Fed Civ Proc 163.

M.D.La. 1982. "Numerosity" refers to degree of impracticality of joinder of all individual members of proposed class. Fed.Rules Civ.Proc. Rule 23(a)(1), 28 U.S.C.A.—Ledet v. Fischer, 548 F.Supp. 775.—Fed Civ Proc 163.

S.D.Ohio 1996. Plaintiffs satisfied "numerosity" requirement for purposes of their motion for certification of class in products liability action against manufacturer of allegedly defective pacemaker lead retention wires; parties agreed that about 25,000 people had pacemaker containing such lead implanted in United States. Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.—In re Telectronics Pacing Systems, Inc., 168 F.R.D. 203, on reconsideration 172 F.R.D. 271.—Fed Civ Proc 182.5.

Bkrtcy.S.D.N.Y. 1992. Fraud claim by two limited partners in partnership sold by Chapter 11 debtor did not satisfy "numerosity," "typical," and "fair and adequate protection" requirements for class

certification, thus warranting denial of certification; potential class consisted of 70 limited partners, only two partners had filed proofs of claim in case in over two years, and two partners failed to establish that other investors relied on alleged misrepresentations or that debtor made same false oral representations to other limited partners. Fed.Rules Civ.Proc.Rules 23, 23(a), 28 U.S.C.A.; Fed.Rules Bankr.Proc.Rules 7023, 9014, 11 U.S.C.A.—In re Thomson McKinnon Securities, Inc., 150 B.R. 98.—Bankr 2895.1.

Bkrcty.S.D.Ohio 1991. To satisfy “numerosity” requirement for class certification, it is not required that putative class be so numerous as to make joinder impossible, but only that joinder be impracticable. Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.—In re Cardinal Industries, Inc., 139 B.R. 703.—Fed Civ Proc 163.

Bkrcty.N.D.Tex. 2000. “Numerosity” requirement for certification of proposed class implicates the impracticability of joinder, but imposes no absolute limitation on how many or how few members are necessary. Fed.Rules Bankr.Proc.Rule 7023, 11 U.S.C.A.; Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.—In re FIRSTPLUS Financial, Inc., 248 B.R. 60.—Bankr 2159.1; Fed Civ Proc 163.

Md. 2000. Purpose of “numerosity” requirement for class action is to ensure that there is a need for class action; if joinder of actions is practicable, then class action device is unnecessary. Md. Rule 2-231(a)(1).—Philip Morris Inc. v. Angeletti, 752 A.2d 200, 358 Md. 689.—Parties 35.11.

Md. 2000. Plaintiffs need not state a number with specificity, to meet “numerosity” requirement for class action; a good faith estimate is ordinarily sufficient. Md.Rule 2-231(a)(1).—Philip Morris Inc. v. Angeletti, 752 A.2d 200, 358 Md. 689.—Parties 35.11.

Md. 2000. “Numerosity” requirement for class action was met, in mass tort tobacco lawsuit that also involved claims for breach of contract, violation of consumer protection law, and for medical monitoring, where litigation would have likely impacted the claims of potentially hundreds of thousands of Maryland residents. Code, Commercial Law, §§ 13-101 to 13-501; Md.Rule 2-231(a)(1).—Philip Morris Inc. v. Angeletti, 752 A.2d 200, 358 Md. 689.—Parties 35.69.

Pa.Super. 1992. When class is narrowly and precisely drawn and there are still so many potential class members that joinder is impracticable or impossible, class is sufficiently delineated to meet “numerosity” requirement, but when class definition is so poorly established that court cannot even discern who potential class members are, numerosity requirement has not been met. Rules Civ.Proc., Rule 1702, 42 Pa.C.S.A.—Weismer by Weismer v. Beech-Nut Nutrition Corp., 615 A.2d 428, 419 Pa.Super. 403.—Parties 35.11.

Pa.Cmwth. 2002. To satisfy the “numerosity” criterion for class certification, the class must be both numerous and identifiable; whether the class is sufficiently numerous is not dependent upon any

arbitrary limit, but upon the facts of each case. Rules Civ.Proc., Rule 1702(1), 42 Pa.C.S.A.—Dunn v. Allegheny County Property Assessment Appeals and Review, 794 A.2d 416.—Parties 35.11.

Pa.Cmwth. 2002. In determination of whether landowners could be certified as a class in action challenging across-the-board 2% tax assessment increase, class containing nearly 400,000 members was sufficiently numerous to meet “numerosity” requirement. Rules Civ.Proc., Rule 1702(1), 42 Pa.C.S.A.—Dunn v. Allegheny County Property Assessment Appeals and Review, 794 A.2d 416.—Parties 35.65.

Tex.App.—Waco 2000. Under first part of class action rule, putative class representatives must show: (1) “numerosity,” which means that class is so numerous that joinder of all members is impracticable, and which is not based on numbers alone, but includes such factors as judicial economy, nature of action, geographical location of class members, and likelihood that class members would be unable to prosecute individual lawsuits; (2) “commonality,” which means that there are questions of law or fact common to class, and which requires that some of the legal or factual questions be common to class, and that issues must be such that when they are answered for one member, they are resolved for all members; (3) “typicality,” which means that claims or defenses of class representatives are typical of claims or defenses of class, and which requires that named plaintiffs possess same interest and suffer same injury as rest of class, and that their claims must arise from same event or course of conduct giving rise to claims of other class members and must be based on same legal theory; and (4) “adequacy of representation,” which means that class representatives will fairly and adequately protect interests of class, and which requires that that named plaintiffs vigorously prosecute class claims through their attorneys, and there is absence of antagonism or conflict between named plaintiffs’ interests and interests of absent class members. Vernon’s Ann.Tex. Rules Civ.Proc., Rule 42(a).—State Industries, Inc. v. Fain, 38 S.W.3d 167, rehearing overruled, and review denied.—Parties 35.5.

## NUMEROUS

C.A.9 (Or.) 1991. Ten sincere complaints made against a motor fuel dealer within 18-month period were “numerous,” providing franchisor with grounds for revocation of franchise under Petroleum Marketing Practices Act, in light of testimony that average number of complaints in the marketing region involved was less than one per year. Petroleum Marketing Practices Act, § 102(b)(3)(B), 15 U.S.C.A. § 2802(b)(3)(B).—Early v. Texaco Refining and Marketing Inc., 951 F.2d 1059.—Trade Reg 873.5.

M.D.Fla. 1999. Plaintiff class, consisting of the approximately 1200 persons to whom state had mailed letters within the preceding year in attempt to collect debt for medical services, was sufficiently “numerous” to be certified in lawsuit under the Fair Debt Collection Practices Act (FDCPA).

Consumer Credit Protection Act, § 802 et seq., as amended, 15 U.S.C.A. § 1692 et seq.; Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.—Swanson v. Mid Am, Inc., 186 F.R.D. 665.—Fed Civ Proc 182.5.

S.D.N.Y. 1993. More than 20,000 investors allegedly harmed by material misrepresentations contained in defendants' proxy statement were sufficiently "numerous" to make joinder of all investors "impracticable," as required for class certification. Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.—Maywalt v. Parker & Parsley Petroleum Co., 147 F.R.D. 51.—Fed Civ Proc 187.

E.D.Pa. 1995. Proposed class consisting of all persons who had sold retail fuel oil, or who had sold, installed or serviced oil heating equipment in utility's service area, and who were thus injured by utility's alleged unlawful restraint of trade in residential heating fuel and equipment markets, was sufficiently "numerous" to be certified as class, given evidence that proposed class consisted of at least 150 members. Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.—Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co., 162 F.R.D. 471, reconsideration denied 162 F.R.D. 482.—Fed Civ Proc 181.5.

E.D.Tex. 1999. Central requirement, if class is to be deemed sufficiently "numerous" for certified as class, is that joinder of all prospective plaintiffs must be impractical. Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.—McClain v. Lufkin Industries, Inc., 187 F.R.D. 267.—Fed Civ Proc 163.

E.D.Tex. 1999. Plaintiff class with some 600 readily identifiable, potential members was sufficiently "numerous" to be certified as class, in suit challenging employment practices of defendant as allegedly having disparate impact on minorities, particularly since nature of claims was such that potential plaintiffs might resist being named in suit out of fear of possible retaliation. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981; Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.—McClain v. Lufkin Industries, Inc., 187 F.R.D. 267.—Fed Civ Proc 184.10.

W.D.Wis. 1999. When class is large, numbers alone may be dispositive of whether proposed class is sufficiently "numerous" to be certified. Fed. Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.—Borchering-Dittloff v. Transworld Systems, Inc., 185 F.R.D. 558.—Fed Civ Proc 163.

Bkrcty.S.D.Ala. 2001. Joinder does not have to be impossible, only very difficult, for class to be sufficiently "numerous" for it to be certified. Fed. Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.—In re Harris, 280 B.R. 876, appeal dismissed Chrysler Financial Corp. v. Powe, 312 F.3d 1241.—Bankr 2159.1.

Bkrcty.S.D.Ala. 2000. Joinder does not have to be impossible, only very difficult, for class to be sufficiently "numerous" for it to be certified. Fed. Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.—In re

Noletto, 281 B.R. 36, reconsideration granted in part 280 B.R. 868.—Bankr 2159.1.

Bkrcty.S.D.Ala. 2000. Joinder does not have to be impossible, only very difficult, for class to be sufficiently "numerous" for it to be certified. Fed. Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.—In re Sheffield, 281 B.R. 24, reconsideration denied 281 B.R. 330.—Bankr 2159.1.

Bkrcty.D.Del. 2002. Class may be sufficiently "numerous" for certification thereof, though joinder of all class members in single lawsuit would not be impossible, if joinder would be impractical, as being inefficient, costly, time-consuming and probably confusing. Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.—In re United Companies Financial Corp., 277 B.R. 596.—Bankr 2159.1.

Bkrcty.D.Del. 2002. Creditor class consisting of 1,503 members was sufficiently "numerous" to permit certification of class proof of claim. Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.—In re United Companies Financial Corp., 277 B.R. 596.—Bankr 2895.1.

Bkrcty.D.Del. 2002. Class may be sufficiently "numerous" for certification thereof, though joinder of all class members in single lawsuit would not be impossible, if joinder would be impractical, as inefficient, costly, time-consuming and probably confusing. Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.—In re United Companies Financial Corp., 276 B.R. 368.—Bankr 2159.1.

Bkrcty.D.Del. 2002. Creditor class consisting of 291 members was sufficiently "numerous" to permit certification of class proof of claim. Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.—In re United Companies Financial Corp., 276 B.R. 368.—Bankr 2895.1.

Bkrcty.S.D.Ohio 1989. Class is sufficiently "numerous" to render joinder "impracticable," within meaning of class specification requirements, where joinder is difficult or inconvenient but not necessarily impossible. Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.—In re Cardinal Industries, Inc., 105 B.R. 834, supplemented 109 B.R. 743.—Fed Civ Proc 163.

Bkrcty.E.D.Pa. 1987. Joinder need only be impracticable, not impossible, before class will be judged sufficiently "numerous" to be certified as such. Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.—In re Watts, 76 B.R. 390, affirmed 93 B.R. 350, reversed Watts v. Pennsylvania Housing Finance Co., 876 F.2d 1090.—Fed Civ Proc 163.

N.Y.Sup. 1899. "Many" is a word of very indefinite meaning, and, though it is defined to mean "numerous" and "multitudinous," it is also recognized as synonymous with "several," "sundry," "various," and "divers." It has also been defined as being of a certain number, large or small, and, as used in Code Civ.Proc. § 448, authorizing one person to sue for a number where the action is one of common or general interest to many persons, will be held to authorize a suit by one where only three persons are interested.—Hilton Bridge Const.

Co. v. Foster, 57 N.Y.S. 140, 26 Misc. 338, affirmed 59 N.Y.S. 1106, 42 A.D. 630.

N.Y.Crim.Ct. 1995. Allegations of information supported charge that defendant was “dismantler,” i.e., person engaged in business of acquiring motor vehicles for purpose of dismantling them for parts or reselling them as scrap, to whom requisite registration had not been issued; information alleged that deponent police officer observed defendant in possession of “numerous” motor vehicles at various stages of repair, as well as electric saws and “other tools commonly used for the purpose of dismantling motor vehicles,” that officer contended premises in question was motor vehicle repair shop bearing sign identifying it as business, and that officer was told by defendant that defendant was owner of business. McKinney’s Vehicle and Traffic Law § 415-a, subd. 1; McKinney’s CPL §§ 70.10, subds. 1, 2, 100.15, subd. 3, 100.40, subd. 1(c), 100.45, 170.30, subd. 1(a), 170.35, subd. 1(a).—People v. Malon, 633 N.Y.S.2d 697, 166 Misc.2d 423.—Autos 351.1.

N.C.App. 1979. There is no hard and fast formula for determining what is a “numerous” class; the number is not dependent upon any arbitrary limit but rather upon circumstances of each case. Rules of Civil Procedure, rule 23(a), G.S. § 1A-1.—English v. Holden Beach Realty Corp., 254 S.E.2d 223, 41 N.C.App. 1, review denied 257 S.E.2d 217, 297 N.C. 609.—Parties 35.11.

#### **NUMEROUS PARTY RULE**

Miss. 1946. Under “numerous party rule” suit could be maintained against trustee for heirs of deceased patentee from United States for reimbursement for taxes paid and money expended in purchasing land at tax sale without bringing in the heirs as parties defendant where there were approximately 1,500 such heirs many of whose names and addresses were unknown to plaintiff.—Floreen v. Saucier, 27 So.2d 557, 200 Miss. 428.—Trusts 257.

Miss. 1946. Under the “numerous party rule,” where persons interested in obtaining the relief sought are very numerous, one or more may sue on behalf of themselves and all others of the same class who may choose to come in, and generally where the persons whose joinder would be required under a strict application of general rule are very numerous, it is sufficient to bring before the court as parties on the record, enough fairly to represent every class of interests.—Floreen v. Saucier, 27 So.2d 557, 200 Miss. 428.—Equity 97.

#### **NUMISMATIC PROPERTY**

La.App. 4 Cir. 1975. Homeowner’s policy provision excluding coverage for more than \$100 on “numismatic property” was intended to limit coverage on property which is money or a form of money, and was not intended to apply to a collection of Mardi Gras souvenir doubloons.—Cotlar v. Gulf Ins. Co., 318 So.2d 923.—Insurance 2168.

#### **NUMORPHAN**

Or.App. 1970. “Numorphan” derived from thebaine, one of the constituent elements of opium, came within the statutory definition of opium. ORS 474.010(18).—State v. Livingston, 469 P.2d 632, 2 Or.App. 587.—Controlled Subs 9.

#### **NUN**

Ind.App. 1948. A “nun” may be designated as a woman of the Catholic religion who lives in a convent under vows of poverty, chastity, and obedience.—Board of Zoning Appeals of City of Indianapolis v. Wheaton, 76 N.E.2d 597, 118 Ind.App. 38.

#### **NUNCHAKU**

Fla.App. 3 Dist. 1986. “Nunchaku,” also known as “num-chucks,” a potentially lethal device which originated from the martial arts, is a deadly weapon as, even though originally designed as farm tool used to separate chaff from grain, the instrument has no constructive social utility on the streets of urban Miami.—R.V. v. State, 497 So.2d 912, review denied 508 So.2d 15, review denied W.B. v. State, 508 So.2d 16.—Weap 4.

#### **NUNC PRO TUNC**

C.A.D.C. 2002. “Nunc pro tunc,” which is a fancy phrase for backdating and is translated as “now for then,” is an ancient tool of equity designed to give retroactive effect to the order of a court.—Sierra Club v. Whitman, 285 F.3d 63, 350 U.S.App.D.C. 411, rehearing and rehearing denied.—Fed Civ Proc 928.

C.A.D.C. 1995. Order “nunc pro tunc” is equitable remedy traditionally used to apply court’s own order or judgment retroactively and is available in order to promote fairness to parties and as justice may require.—Ethyl Corp. v. Browner, 67 F.3d 941, 314 U.S.App.D.C. 247.—Fed Civ Proc 928, 2625.

C.A.D.C. 1987. A judgment entered “nunc pro tunc” is one given effect as of a date in the past; principle underlying entry of judgment or order nunc pro tunc is that of fairness to the parties, seeking to rectify any injustice suffered by them on account of judicial delay.—Weil v. Markowitz, 829 F.2d 166, 264 U.S.App.D.C. 381, appeal after remand 898 F.2d 198, 283 U.S.App.D.C. 184, certiorari denied 111 S.Ct. 68, 498 U.S. 821, 112 L.Ed.2d 42.—Fed Civ Proc 2625.

C.A.8 1965. Courts have inherent power to enter orders “nunc pro tunc” to show that a thing was done at one time which ought to have been shown at that time; it is an entry now for something previously done so that the record may actually speak the truth; it may not be used for the purpose of writing out a judgment previously entered by it affecting the rights of a party thereto.—Matthies v. Railroad Retirement Bd., 341 F.2d 243.—Courts 114.

C.A.10 (Kan.) 1954. The Latin phrase “nunc pro tunc”, with reference to an order, does not involve the equity jurisdiction of the court, but is

merely descriptive of the inherent power of the court to make its records speak the truth, and does not indicate existence of a power to enter an order to record that which was omitted to be done.—W. F. Sebel Co. v. Hessee, 214 F.2d 459.—Fed Civ Proc 2625.

C.A.5 (La.) 1978. Phrase “nunc pro tunc” translated literally means “now for then,” and, with respect to rendition of judgment or certificate that there is no just reason for delay quoted phrase signifies belated entry of document and that document will be given anterior effect. Fed.Rules Civ. Proc. rule 54(b), 28 U.S.C.A.—Kirtland v. J. Ray McDermott & Co., 568 F.2d 1166.—Fed Civ Proc 2625; Fed Cts 660.30.

C.A.4 (Md.) 1993. “Nunc pro tunc” means literally “now for then”; it is a procedure whereby determination previously made, but for some reason improperly entered or expressed may be corrected and entered as of original time when it should have been, or when there has been omission to enter it at all.—Maksymchuk v. Frank, 987 F.2d 1072.—Fed Civ Proc 2625.

C.A.1 (Mass.) 2000. Like many other concepts in the law wrongly assumed to have a fixed meaning, “nunc pro tunc” is a somewhat loose concept, like “jurisdiction” or “waiver,” used somewhat differently by different courts in different contexts; literally meaning “now for then,” it is typically used by courts to specify that an order entered at a later date should be given effect retroactive to an earlier date, that is, that it should be treated for legal purposes as if entered on the earlier date.—Fierro v. Reno, 217 F.3d 1, rehearing and suggestion for rehearing denied.—Fed Civ Proc 928.

C.A.9 (Or.) 2002. “Nunc pro tunc” means “now for then,” and when an order is signed nunc pro tunc as of a specified date, it means that a thing is now done which should have been done on the specified date.—Taylor v. Sawyer, 284 F.3d 1143, certiorari denied 123 S.Ct. 889.—Crim Law 632(3.1).

C.A.1 (R.I.) 1995. Chapter 11 trustee’s application for retroactive permission to employ professionals was properly designated “post facto application,” rather than “nunc pro tunc” application, since latter designation was unfaithful to accepted usage of term “nunc pro tunc” in connection with correction of court records. Bankr.Code, 11 U.S.C.A. § 327(a); Fed.Rules Bankr.Proc.Rule 2014(a), 11 U.S.C.A.—In re Jarvis, 53 F.3d 416.—Bankr 3157, 3173.

C.A.7 (Wis.) 1994. “Nunc pro tunc” authorization refers to situations in which court’s records do not accurately reflect its actions; when error comes to light, court corrects file to show what actually happened and such recension is available as matter of right and no judge would insist on “extraordinary” justification for conforming paper record to decisions actually taken.—Matter of Singson, 41 F.3d 316.—Courts 114.

C.C.A.2 1941. On appeal from order denying habeas corpus application for discharge of member

of Six Nations of Indians from United States Army, wherein record was filed late, time for filing record would be extended “nunc pro tunc” by Circuit Court of Appeals, in view of importance of the case.—Ex parte Green, 123 F.2d 862, certiorari denied Green v. McLaren, 62 S.Ct. 1035, 316 U.S. 668, 86 L.Ed. 1744.—Hab Corp 823.

C.C.A.8 (Mo.) 1943. Trial court, after expiration of term and of longest term of imprisonment imposed, is not authorized, without any minute, note, or record evidence of any kind, to extend term of imprisonment by amending judgment “nunc pro tunc” so that sentences should run consecutively.—Buie v. King, 137 F.2d 495.—Sent & Pun 2333.

C.C.A.6 (Tenn.) 1943. “Nunc pro tunc” order purporting to increase term of imprisonment after accused had begun serving sentence as originally pronounced was invalid as to the attempted increase.—Wilson v. Bell, 137 F.2d 716.—Sent & Pun 2282.

D.Del. 1947. A signing of an order “nunc pro tunc” as of a specified date means that that thing is now done which should have been then done.—Bowles v. Kent County Motor Co, 6 F.R.D. 515.—Fed Civ Proc 928.

S.D.Fla. 1995. A “nunc pro tunc,” that is, now for then, decree presupposes a decree allowed or ordered but not entered through inadvertence of the court, or a decree in a cause which is under advisement when the death of a party occurs.—Occidental Fire & Cas. Co. of North Carolina v. Great Plains Capital Corp., 912 F.Supp. 515.—Fed Civ Proc 928, 2625.

S.D.Fla. 1995. A “nunc pro tunc” order is a procedure by which a determination previously made, but for some reason improperly entered or expressed, may be corrected and entered as of the original time when it should have been, or when there has been omission to enter it at all.—Occidental Fire & Cas. Co. of North Carolina v. Great Plains Capital Corp., 912 F.Supp. 515.—Fed Civ Proc 928.

D.N.J. 1997. Act “nunc pro tunc” is entry made now of something actually previously done to have effect of former date, previously omitted through inadvertence or mistake.—U.S. v. Hotel Employees and Restaurant Employees, Intern. Union, 974 F.Supp. 411.—Fed Civ Proc 928.

E.D.S.C. 1964. “Nunc pro tunc” merely describes inherent power of court to make its records speak the truth, i. e., to record that which was actually done but was not recorded.—Simmons v. Atlantic Coast Line R. Co., 235 F.Supp. 325.—Courts 114.

Bkrtcy.E.D.Ark. 1996. Concept of “nunc pro tunc” applies only to record order never properly entered.—In re Junior Food Mart of Arkansas, Inc., 201 B.R. 522.—Fed Civ Proc 928.

Bkrtcy.E.D.Va. 1992. “Nunc pro tunc” is Latin phrase literally meaning “now for then,” and judgment entered nunc pro tunc is one given effect as

of past date.—*In re Springfield Furniture, Inc.*, 145 B.R. 520.—Fed Civ Proc 2625.

Ala. 1942. The pronouncement of judgment in open court when no memorandum is then made of it will not support entry “nunc pro tunc” at later term.—*Du Pree v. Hart*, 8 So.2d 183, 242 Ala. 690.—Judgm 273(2).

Ala.App. 1926. Object of judgment “nunc pro tunc” is not rendering of new judgment, but is one placing in proper form on record judgment previously rendered.—*Gardner v. State*, 108 So. 635, 21 Ala.App. 388.—Crim Law 994(4).

Ala.App. 1915. Amendment of a judgment “nunc pro tunc” is not a revivor of it, within Code 1907, § 4148, prohibiting issue of execution for the first time on a judgment more than a year after its rendition till it has been revived, since a “nunc pro tunc” entry is one made now of something that was actually previously done, and to have effect as of the former date, except against the rights of third persons, the same as if it had been then entered.—*State v. Ham*, 69 So. 253, 13 Ala.App. 648.

Ariz. 1937. The office of a “nunc pro tunc” entry is not to make an order now for then, but to enter now for then an order previously made.—*Wood’s Pharmacy v. Kenton*, 68 P.2d 705, 50 Ariz. 53.

Ark. 1981. “Nunc pro tunc” order cannot be utilized to make record show what ought to have been done, but was not done; its purpose is to make record reflect transaction which actually occurred, and which is not reflected by record because of mistake or inadvertence.—*Caskey v. Pickett*, 615 S.W.2d 359, 272 Ark. 521.—Motions 56(2).

Ark. 1945. The purpose and scope of a motion for order “nunc pro tunc” is not to retry the issues presented originally, but to make the record speak now what was done then.—*Wright v. Curry*, 187 S.W.2d 880, 208 Ark. 816.—Motions 56(2).

Ark. 1945. Where a judgment has been irregularly entered, or fails to contain all that is essential to it, or to express the true sentence of the court, in consequence of clerical errors or omissions, it may be completed by an order “nunc pro tunc.”—*Wright v. Curry*, 187 S.W.2d 880, 208 Ark. 816.—Judgm 326.

Ark. 1943. In equity, “nunc pro tunc” means literally “now for then”, and purpose is to make the record speak now what was actually done then, and is based on the power inherent in a court to make its records show at a later date what actually occurred originally.—*Bridwell v. Davis*, 175 S.W.2d 992, 206 Ark. 445.—Courts 114.

Ark. 1942. A “nunc pro tunc” order, based on parol testimony, cannot be sustained, unless evidence supporting it is clear, decisive, convincing, and unequivocal, and preponderance of testimony is insufficient.—*Stewart v. Wheeler*, 163 S.W.2d 316, 204 Ark. 535.—Motions 54.

Ark. 1940. “Nunc pro tunc” orders will not be made unless testimony is clear and decisive, and, when made, they must reflect only what has been

previously ordered and adjudged, and such orders may not be made to correct errors or omissions or to adjudge what should have been ordered but was not.—*Standley v. Whiteley*, 140 S.W.2d 699, 200 Ark. 1190.—Motions 56(2).

Cal. 1941. Where time within which judicial act must be done is jurisdictional, trial court cannot circumvent clear mandate of statute by filing an order “nunc pro tunc,” and in such circumstance it is immaterial whether default is that of the court or of the litigant.—*Whitley v. Superior Court in and for Los Angeles County*, 113 P.2d 449, 18 Cal.2d 75.—Motions 54.

Cal.App. 3 Dist. 1942. Where it came to attention of District Court of Appeal that appellant had died since argument and submission of the cause, judgment would be ordered filed “nunc pro tunc” as of date of the submission.—*Holman v. Stockton Savings & Loan Bank*, 122 P.2d 120, 49 Cal.App.2d 500.—App & E 1184.

Colo.App. 1977. Where marriage dissolution decree actually signed on December 11 “nunc pro tunc January 22, 1975” incorporated orders on property and maintenance which were not approved in final form until November, 1975, and which were, therefore, not in existence on the “nunc pro tunc” date, the “date of the decree” for purpose of statutory requirement that property and debts be valued as of the “date of the decree” was the date the decree was signed. C.R.S. ’73, 14-10-113(5).—*In re Marriage of Femmer*, 568 P.2d 81, 39 Colo. App. 277.—Divorce 253(3).

Fla. 1937. Generally an order “nunc pro tunc” is one by which the court does now what the court intended to do at the time the matter was originally acted upon but which at time was inadvertently omitted and may also be used to correct clerical errors and misprisions.—*Taylor v. Chapman*, 173 So. 143, 127 Fla. 401.—Motions 54.

Fla.App. 2 Dist. 2002. Purpose of a “nunc pro tunc” order is to correct the record to reflect a prior ruling made in fact but defectively recorded.—*Merritt v. Merritt*, 802 So.2d 1206.—Motions 54.

Fla.App. 4 Dist. 1975. “Nunc pro tunc” means “now for then” and when applied to entry of illegal order or judgment does not normally refer to a new or fresh decision, but relates to a ruling or action actually previously made or done but concerning which for some reason the record thereof is defective or omitted.—*Becker v. King*, 307 So.2d 855, certiorari denied 317 So.2d 76.—Judgm 273(3).

Fla.App. 5 Dist. 1984. An order entered “nunc pro tunc” means “now for then” and refers to a judicial act which memorializes a previously taken judicial act.—*Whack v. Seminole Memorial Hosp., Inc.*, 456 So.2d 561.—Motions 56(2).

Fla.App. 5 Dist. 1982. “Nunc pro tunc” means “now for then” and when applied to entry of a legal order or judgment it normally refers, not to a new or de novo decision, but to the judicial act previously taken, concerning which the record is absent or defective, and the later record-making act consti-

tutes but later evidence of the earlier effectual act.—*Briseno v. Perry*, 417 So.2d 813, petition for review denied 427 So.2d 736.—Crim Law 994(4).

Ga. 1942. Where judge failed to enter a judgment for costs against one convicted of murder, after the expiration of the term at which the judgment of conviction was entered, and even after an execution for the costs had issued, the judge could properly enter a “nunc pro tunc” order amending the former judgment so as to provide for the payment of costs. Code, §§ 27-2801, 110-311.—*Pound v. Faulkner*, 18 S.E.2d 749, 193 Ga. 413.—Costs 316.

Ga.App. 2001. The purpose of entering an order “nunc pro tunc” is to record some previously unrecorded action actually taken or judgment actually rendered.—*Andrew L. Parks, Inc. v. SunTrust Bank*, 545 S.E.2d 31, 248 Ga.App. 846, reconsideration denied, and certiorari denied.—Judgm 273(2); Motions 54.

Ga.App. 1994. “Nunc pro tunc” entry is used to record previously unrecorded action taken or judgment rendered, which is to take effect as of former date; it may not be used to correct decision, however erroneous, or to supply nonaction on part of court.—*Kendall v. Peach State Machinery, Inc.*, 451 S.E.2d 810, 215 Ga.App. 633.—Courts 114; Judgm 273(1).

Ga.App. 1963. “Nunc pro tunc” within statute authorizing entry or return to be made nunc pro tunc by court order in certain cases simply means that amendment is effective from date of original return. Code, § 24-2816.—*Aetna Cas. & Sur. Co. v. Sampley*, 134 S.E.2d 71, 108 Ga.App. 617.—Proc 164(4).

Ga.App. 1961. “Nunc pro tunc” entry signifies “now for then” and is granted to answer purposes of justice.—*Hunt v. Williams*, 122 S.E.2d 149, 104 Ga.App. 442.—Courts 114.

Ga.App. 1959. A “nunc pro tunc” entry is for the purpose of recording some action that was taken or judgment rendered previously to the making of the entry which is to take effect as of the former date, and such entry cannot be made to serve the officer of correcting a decision, however erroneous, or to supply nonaction by the court.—*Cowart v. Charles R. Hartsfield, Inc.*, 108 S.E.2d 206, 99 Ga.App. 338.—Judgm 273(1).

Idaho App. 1986. The phrase “nunc pro tunc” when used in a judgment, signifies relation back to a designated date, indicating that judgment will be given anterior effect.—*Ward v. Lupinacci*, 720 P.2d 223, 111 Idaho 40.—Judgm 273(1).

Ill. 1991. “Nunc pro tunc” order is designed to allow record to reflect that which was already done previously but which was omitted from the record.—*People v. Adams*, 163 Ill.Dec. 483, 581 N.E.2d 637, 144 Ill.2d 381.—Crim Law 994(4).

Ill. 1951. A “nunc pro tunc” order is an entry now for something previously done, made to make record speak now what was actually done then, and is a device to supply an omission to enter of record,

an order actually made, but omitted from record by the clerk.—*In re Bird’s Estate*, 102 N.E.2d 329, 410 Ill. 390.—Judgm 273(1).

Ill. 1951. The function of the “nunc pro tunc” order is not to create something in the record, or supply an omission to make an order, but only an omission in the record of the order.—*In re Bird’s Estate*, 102 N.E.2d 329, 410 Ill. 390.—Judgm 273(1).

Ill. 1942. Trial court had no jurisdiction after expiration of time allowed by statute for filing report of proceedings in trial court to enter order “nunc pro tunc” as of a date prior to expiration of such period purporting to extend the time for filing report of proceedings in trial court. S.H.A. ch. 110, §§ 76, 101.36.—*Lukas v. Lukas*, 45 N.E.2d 869, 381 Ill. 429.—App & E 624.

Ill. 1915. The office of a “nunc pro tunc” order is only to supply some omission in the record of an order which has been made, but omitted from the record; the rule being that, if an order has actually been made by the court, but has not been entered, the court may correct the mistake in failing to enter it, and make the record show the order which the court actually made as of the time it was made, the court having no authority, however, to create an order by that method, or to supply an order which was never in fact made.—*People v. Rosenwald*, 107 N.E. 854, Am. Ann.Cas. 1915D, 688, 266 Ill. 548.

Ill. 1912. The purpose of an order “nunc pro tunc” is to make a present record of an order which the court made at a previous term, but which was not then recorded; it being improper to make the record show an order not previously actually made, and hence accused, who was sentenced on a plea of guilty, is not entitled to an order nunc pro tunc setting aside the sentence.—*People v. Wilmot*, 98 N.E. 973, 254 Ill. 554.

Ill.App. 1 Dist. 1986. Circuit court’s “nunc pro tunc” order is an entry made on a judgment previously rendered in order to make the record speak now for what was actually done then; “nunc pro tunc” literally means “now for then.”—*Gagliano v. 714 Sheridan Venture*, 98 Ill.Dec. 855, 494 N.E.2d 1182, 144 Ill.App.3d 854.—Judgm 326.

Ill.App. 1 Dist. 1984. A “nunc pro tunc” order is any entry in the present for something previously done, made to make the record speak now what was actually done then.—*Johnson v. First Nat. Bank of Park Ridge U/T No. 205*, 79 Ill.Dec. 305, 463 N.E.2d 859, 123 Ill.App.3d 823.—Motions 56(2).

Ill.App. 1 Dist. 1942. Probate court properly ordered that letters of administration issue to plaintiff in wrongful death action “nunc pro tunc” as of the date plaintiff appeared in court applying for letters, on which date estate was given a file number and a page on the clerk’s docket was designated for entries in the estate, particularly where defendant first filed his answer denying liability only and did not question validity of plaintiff’s appointment as administrator until after expiration of the year within which actions for wrongful death must be com-

menced.—*Gould v. Schlossberg*, 43 N.E.2d 693, 316 Ill.App. 57.—Ex & Ad 20(9).

Ill.App. 1 Dist. 1942. The failure to enter a formal order of appointment of administrator of decedent's estate and to deliver letters of administration were errors which probate court had jurisdiction to correct by "nunc pro tunc" order.—*Gould v. Schlossberg*, 43 N.E.2d 693, 316 Ill.App. 57.—Ex & Ad 20(9).

Ill.App. 1 Dist. 1942. Where appealing defendants, while case was pending in Appellate Court, suggested the death of codefendant, and judgment for plaintiff was proper, judgment would be affirmed and entered "nunc pro tunc" as of a date prior to codefendant's death.—*Regan v. Keating*, 42 N.E.2d 122, 315 Ill.App. 130.—App & E 1184.

Ill.App. 1 Dist. 1942. An order purporting to amend judgment "nunc pro tunc" by inserting finding that malice was gist of the action, while an appeal was pending in Appellate Court, was void on ground that when the appeal was perfected any further proceedings by the trial court were barred.—*Dunwoody & Co. v. Washington*, 42 N.E.2d 113, 315 Ill.App. 54.—App & E 440.

Ill.App. 1 Dist. 1941. Where order was entered in probate court approving administratrix' final report and account and discharging her as administratrix at time claim against defendant for merchandise sold to it by decedent was still pending in municipal court, order discharging administratrix was void as to pending claim, and "nunc pro tunc" order entered in probate court vacating order discharging administratrix and authorizing her to continue in such capacity as though she had not been discharged did not change status of case, but merely corrected record to show true condition.—*Eskildsen v. Chicago Macaroni Co.*, 34 N.E.2d 723, 310 Ill.App. 515.—Ex & Ad 509(10).

Ill.App. 4 Dist. 1973. "Nunc pro tunc" order is one presently made to show what was done earlier, and takes effect from such prior dates; it is device to supply omission and to enter of record an order actually made, but omitted from record; it may correct clerical misprisions, but may not supply omitted judicial action nor correct judicial errors.—*Grissom v. Buckley-Loda Community Unit School Dist. No. 8, Iroquois and Ford Counties*, 296 N.E.2d 624, 11 Ill.App.3d 55.—Motions 54.

Ill.App. 4 Dist. 1939. A "nunc pro tunc" order cannot be made to supply an omission to make an order but can be made only to supply an omission in the record of an order which was really made but omitted from the record.—*Briggs v. Briggs*, 20 N.E.2d 908, 299 Ill.App. 577.—Motions 54.

Ind. 1941. A record may only be changed after term "nunc pro tunc" upon evidence consisting of some written memorial or record, but, when the fact that a judgment was rendered or some other action was taken is so established, parol proof may be resorted to for purpose of showing character, terms, and conditions of action taken.—*Cook v. State*, 37 N.E.2d 63, 219 Ind. 234.—Courts 114.

Ind. 1941. The record would not be changed after term "nunc pro tunc" so as to strike order book entry setting aside judgment sustaining petition for writ of error coram nobis and granting new trial, where minutes in bench docket were consistent with order.—*Cook v. State*, 37 N.E.2d 63, 219 Ind. 234.—Courts 114.

Iowa 1940. Where mortgagee had mortgage on mortgagor's undivided interest in realty which was partitioned before foreclosure, and decree erroneously included all land in which mortgagor originally had undivided interest, and during same term in which decree was entered, same judge that heard foreclosure action, on mortgagee's motion, corrected decree by limiting it to premises awarded mortgagor on partition without notice to the mortgagor who thereafter applied for and secured extension of period of redemption, but made no objection to the decree, mortgagor could not thereafter have supplemental decree set aside on ground that it was made without notice and was without jurisdiction of the court since supplemental decree was in effect a "nunc pro tunc" entry to correct an obvious mistake as to which no notice was required.—*Miller v. Bates*, 292 N.W. 818, 228 Iowa 775.—Mtg 496.

Iowa 1932. Function of "nunc pro tunc" order is to put on record and to render effective finding or adjudication of court actually or inferentially but by oversight not made of record.—*Chariton & Lucas County Nat. Bank v. Taylor*, 240 N.W. 740, 213 Iowa 1206.—Motions 54.

Iowa 1932. Function of "nunc pro tunc" judgment or order is to put on record and to render effective finding or adjudication of court actually or inferentially but by oversight not made of record.—*Chariton & Lucas County Nat. Bank v. Taylor*, 240 N.W. 740, 213 Iowa 1206.—Judgm 273(7).

Iowa 1905. An entry "nunc pro tunc" is something different from an entry correcting an oversight or mistake. Such entry assumes that an act was done at a particular time, which never got of record in the proper books; and the entry is finally made now for then.—*Hofacre v. City of Monticello*, 103 N.W. 488, 128 Iowa 239.

Kan. 1953. The purpose of a "nunc pro tunc" order is not to change or alter a judgment actually rendered, and its function is not to make an order now for then, but to enter now for then an order previously made.—*Mathey v. Mathey*, 264 P.2d 1058, 175 Kan. 446, opinion supplemented on denial of rehearing 267 P.2d 516, 175 Kan. 733.—Judgm 273(1).

Kan. 1949. The function of an order "nunc pro tunc" is merely to correct the record of a judgment by entering now for then an order previously made, and not to make an order now for then.—*Hinshaw v. Hinshaw*, 203 P.2d 201, 166 Kan. 481.—Judgm 273(1).

Kan. 1941. Where judgment for plaintiff canceling deed was entered, but the journal entry did not recite the actual order and the judgment made by the court, the trial court, after expiration of term at which judgment was entered, had power to enter

judgment “nunc pro tunc” based on evidence contained in trial docket entered at time judgment was rendered, shorthand notes of the proceedings taken by the judge, notes of court reporter, and testimony of attorneys for the plaintiff and defendant.—Elliott v. Elliott, 114 P.2d 823, 154 Kan. 145.—Judgm 273(2).

Kan.App. 2000. A “nunc pro tunc” order is designed to make court’s records speak the truth and to record that which was actually done, but not recorded.—Production Credit Ass’n of South Central Kansas v. Mater, 8 P.3d 1274, 27 Kan.App.2d 700.—Judgm 326.

Kan.App. 2000. The function of a “nunc pro tunc” order is not to make an order now for then, but to enter now for then an order previously made.—Production Credit Ass’n of South Central Kansas v. Mater, 8 P.3d 1274, 27 Kan.App.2d 700.—Judgm 326.

Ky. 1942. Where an appeal was premature because no judgment was entered on jury’s verdict and no sentence imposed, when the order book disclosed the return and contents of the verdict, there was sufficient record evidence to justify “nunc pro tunc” entry of judgment permitting appellants to appeal and use record filed with appellate court.—Smith v. Commonwealth, 158 S.W.2d 393, 289 Ky. 257.—Crim Law 994(4).

Ky. 1941. In condemnation proceeding where no order was entered at the time commissioners were appointed to view property, court had no authority to enter a “nunc pro tunc” order purporting to appoint the commissioners as of a date more than a year prior to the entry thereof, where there was no written evidence upon which to base such order, either in the motion book, the order book or the judge’s record.—Paducah Ice Mfg. Co. v. City of Paducah, 157 S.W.2d 490, 289 Ky. 31.—Motions 56(2).

Ky. 1941. Trial court had no power to make “nunc pro tunc” entry after verdict that an agreed order that all affirmative allegations contained in the record should be controverted of record was not entered or noted of record, and that such order should be treated as filed as of the date of filing of reply, which failed to deny allegation of contributory negligence, since nunc pro tunc entry showed on its face that no minute or memorandum of order had been noted in court record.—Brannon v. Scott, 156 S.W.2d 164, 288 Ky. 334.—Judgm 273(1).

Md. 1942. Where California statute authorizing entry of final divorce judgments nunc pro tunc contained no expressions indicating legislative intention that statute should affect only cases arising after its passage and the constitutionality of the statute had not been passed on by the highest court of California, but statute did contain, in addition to words “nunc pro tunc” other expressions indicating a curative intent, Court of Appeals of Maryland would hold the statute “retroactive” so as to validate California marriage performed before statute was passed and before California final judgment of divorce nunc pro tunc was actually entered. Civ.

Code Cal. §§ 131.5, 133.—Bannister v. Bannister, 29 A.2d 287, 181 Md. 177.—Marriage 38.

Md.App. 2001. “Nunc pro tunc” entry is an entry made now of something actually previously done to have effect of former date; office being not to supply omitted action, but to supply omission in record of action really had but omitted through inadvertence or mistake.—Short v. Short, 766 A.2d 651, 136 Md.App. 570.—Judgm 273(1).

Md.App. 2001. “Nunc pro tunc” merely describes inherent power of court to make its records speak the truth, that is, to record that which is actually but is not recorded.—Short v. Short, 766 A.2d 651, 136 Md.App. 570.—Judgm 273(1).

Md.App. 2001. “Nunc pro tunc” signifies now for then, or, in other words, a thing is done now, which shall have the same legal force and effect as if done at time when ought to have been done.—Short v. Short, 766 A.2d 651, 136 Md.App. 570.—Judgm 273(1).

Md.App. 1997. Phrase “nunc pro tunc” signifies a thing that is done now which has same legal force and effect as if done at time it ought to have been done, and is properly used only to correct clerical errors.—91st Street Joint Venture v. Goldstein, 691 A.2d 272, 114 Md.App. 561.—Judgm 273(1), 273(3).

Mass. 1941. To avoid the entry of a judgment liable to be reversed on writ of error, it has become the practice at common law and under statute, where after a verdict or a finding has been made decisive of the rights of the parties, one of them dies pending a decision on some question of law, to enter the judgment “nunc pro tunc” as of a date before the death of the party. G.L.(Ter.Ed.) c. 235, § 4.—Noyes v. Bankers Indem. Ins. Co., 30 N.E.2d 867, 307 Mass. 567.—Judgm 273(5).

Mich. 1938. A “nunc pro tunc” entry is an entry made now of something actually previously done, to have effect of former date, and its office is not to supply omitted action, but to supply omission in record of action really had but omitted through inadvertence or mistake.—Magoun v. Walker, 282 N.W. 868, 286 Mich. 686.—Courts 114.

Mich. 1935. Department held unauthorized to enter order “nunc pro tunc” adding name of dependent minor claimant to original award in proceedings instituted by minor five years after original proceedings, where, in original proceedings, there had been no showing of claimant’s dependency.—Mallory v. Ward Baking Co., 258 N.W. 414, 270 Mich. 91.—Work Comp 1779.

Minn. 1948. The office of an amendment “nunc pro tunc” is to supply a record of judicial action previously taken, not to supply judicial action itself.—Mattfeld v. Nester, 32 N.W.2d 291, 226 Minn. 106, 3 A.L.R.2d 909.—Judgm 326.

Minn. 1946. The office of a “nunc pro tunc” entry is to correctly record, not to supply, judicial action.—Wilcox v. Schloner, 23 N.W.2d 19, 222 Minn. 45.—Judgm 273(4).

Minn. 1941. Where a “nunc pro tunc” entry is made to correct the record, the entry presupposes a judgment actually rendered by the court, but not correctly entered through clerical error, the office of such entry being to correct the record and not to supply judicial action.—*Hampshire Arms Hotel Co. v. Wells*, 298 N.W. 452, 210 Minn. 286.—Judgm 273(4).

Minn. 1941. Where plaintiff recovered a verdict on September 27, and on September 28, defendant served notice of appeal from a judgment, although no judgment had then been entered on the verdict, and judgment was thereafter entered at defendant's request on October 17, trial court could not thereafter change the date of the judgment “nunc pro tunc” from October 17, to September 27, in order to prevent defendant's appeal from being premature.—*Hampshire Arms Hotel Co. v. Wells*, 298 N.W. 452, 210 Minn. 286.—Judgm 273(2).

Miss. 1943. Where presiding judge did not sign minutes either during or on last day of regular term, action of judge in signing minutes on last day of second extension of term could not be considered as a correction of minutes “nunc pro tunc” or as an authority which he should be allowed to exercise in vacation.—*Jackson v. Gordon*, 11 So.2d 901, 194 Miss. 268.—Courts 114.

Mo. 1947. The function of a “nunc pro tunc” judgment is to enter that judgment which the court in effect rendered.—*City of St. Louis v. Essex Inv. Co.*, 204 S.W.2d 726, 356 Mo. 1028.—Judgm 273(1).

Mo. 1942. A misdescription of lands in sewer district by original organization decree including lands not described in published notice of organization proceeding was mere “clerical error”, which circuit court had power to correct by “nunc pro tunc” entry based on original petition and publication order, which were parts of record proper. Laws 1927, p. 439 et seq. (Repealed Laws 1931, p. 355).—*State ex rel. Jones v. Nolte*, 165 S.W.2d 632, 350 Mo. 271.—Mun Corp 12(9).

Mo. 1942. Where county conveyed island to defendant who paid statutory consideration for 75 acres, all parties believing and deed declaring that 75 acres were conveyed, the record made by county clerk of defendant's payment and the deed filed for record were sufficient for a “nunc pro tunc” entry of an order of sale, which should have been spread upon the record at the time the land was ordered sold.—*Howard County v. Snell*, 161 S.W.2d 238, 349 Mo. 386.—Counties 110.

Mo. 1902. A “nunc pro tunc” entry can only be employed to correct a clerical mistake or misprision of the clerk. It can never correct a mistake or oversight of the judge, nor be used to correct judicial errors, nor to render a judgment different from that actually rendered, even though the judgment actually rendered was not the judgment the judge intended to render.—*Burnside v. Wand*, 71 S.W. 337, 170 Mo. 531, 62 L.R.A. 427.

Mo. 1902. A “nunc pro tunc” entry can only be made upon evidence furnished by the papers and

files in the cause, or something of record, or in the minute book or judge's docket, as a basis to amend by. The stenographer's notes of proceedings in an action do not constitute a paper or file in the cause, which can be made the basis of an amendment of a judgment “nunc pro tunc.” A memorandum for a judgment drawn by an attorney to be copied by the clerk does not constitute a record, paper, or file in the action, which can be made the basis of an amendment of a judgment “nunc pro tunc.”—*Becher v. Deuser*, 69 S.W. 363, 169 Mo. 159.

Mo.App. E.D. 1996. Rule allowing trial court to correct clerical mistakes in judgments codifies common-law order “nunc pro tunc,” which is Latin phrase meaning “now for then.” V.A.M.R. 74.06.—*Miller v. Varsity Corp.*, 922 S.W.2d 821, rehearing, transfer denied (67862), and transfer denied.—Judgm 321.

Mo.App. 1953. An order correcting a judgment “nunc pro tunc” can be made at a subsequent term, but must be made upon evidence furnished by the papers and files in the cause, or something of record, or in clerk's minute books, or on the judge's docket.—*Ackley v. Ackley*, 257 S.W.2d 401.—Judgm 326.

Mo.App. 1942. An order correcting a judgment “nunc pro tunc” can be made at a subsequent term, but must be made upon evidence furnished by the papers and files in the cause, or something of record, or in clerk's minute books, or on the judge's docket.—*Vaughn v. Kansas City Gas Co.*, 159 S.W.2d 690, 236 Mo.App. 669.—Judgm 326.

Mo.App. 1942. An order correcting “nunc pro tunc” a judgment can be made only to correct a clerical error or misprision of the clerk.—*Vaughn v. Kansas City Gas Co.*, 159 S.W.2d 690, 236 Mo.App. 669.—Judgm 326.

N.J.Ch. 1920. “Nunc pro tunc” is a phrase used to express that a thing is done at one time which ought to have been performed at another.—*Rinehart v. Rinehart*, 110 A. 29, 91 N.J.Eq. 354.

N.J.Cir.Ct. 1947. The phrase “nunc pro tunc” is used to express that a thing is done at one time which ought to have been performed at another time.—*Adams v. Atlantic County*, 53 A.2d 168, 25 N.J.Misc. 291, reversed 62 A.2d 162, 137 N.J.L. 648.—Motions 56(2).

N.M. 1969. “Nunc pro tunc” has reference to the making of an entry now, of something which was actually previously done, so as to have it effective as of the earlier date; it is not to be used to supply some omitted action of the court or counsel but may be utilized to supply an omission in the record of something really done but omitted through mistake or inadvertence.—*Mora v. Martinez*, 451 P.2d 992, 80 N.M. 88.—Judgm 273(1).

N.M. 1963. “Nunc pro tunc” is a thing done at one time which ought to have been done at another and it is used when a court has done some act, or some one of its immediate ministerial officers, which from some omission, by neglect, forgetfulness, or some other cause was not entered of record or otherwise noted, at time order or judgment was

made by court, or should have been made to appear upon papers or proceedings by ministerial officer.—*State v. Hatley*, 384 P.2d 252, 72 N.M. 377.—Judgm 273(1); Motions 54.

N.Y. 1959. Function of orders “nunc pro tunc” is to correct irregularities in the entry of judicial mandates or like procedural errors.—*Cornell v. Cornell*, 196 N.Y.S.2d 98, 7 N.Y.2d 164, 164 N.E.2d 395, rearugment denied, remittitur amended 199 N.Y.S.2d 493, 7 N.Y.2d 987, 166 N.E.2d 502, rearugment denied 199 N.Y.S.2d 1027, 7 N.Y.2d 995, 166 N.E.2d 519, remittitur amended 7 N.Y.2d 996.—Motions 54.

N.Y. 1943. The function of orders “nunc pro tunc” is to correct irregularities in the entry of judicial mandates or like procedural errors.—*Mohrmann v. Kob*, 51 N.E.2d 921, 291 N.Y. 181, 149 A.L.R. 1274.—Motions 56(2).

N.Y.A.D. 1 Dept. 1941. Where defendant, who pleaded guilty to robbery in the second degree, was sentenced to term of 3½ years to ten years with additional sentence of five years to ten years because defendant was armed with a pistol at time of commission of felony, and there was no proper hearing on issue of defendant's possession of pistol, but indictment afforded basis for such charge, both sentences imposed on defendant were illegal, and a rehearing would be ordered to correct errors and resentence defendant, and any sentence to be imposed upon such rehearing would be “nunc pro tunc” and would give credit to defendant for time already served. Penal Law, §§ 1944, 2126.—*People v. Sandoval*, 28 N.Y.S.2d 370, 262 A.D. 288.—Crim Law 1189; Sent & Pun 420.

N.Y.A.D. 2 Dept. 1942. Where note of issue served on defendant's attorney was lost and defendant failed to demand a jury trial because of his attorney's inability to obtain experienced office assistants to substitute for help lost to military service and there was no evidence of intent to waive a jury trial and defendant's attorney acted promptly to correct the omission, defendant was entitled to leave to serve and file a notice of trial by jury “nunc pro tunc” as an exercise of discretion.—*Rafkind v. Isaacs*, 34 N.Y.S.2d 425, 264 A.D. 742.—Jury 25(6).

N.Y.Sup. 1941. Where copies of summons and complaint had been sent by registered mail to defendant who acknowledged receipt thereof, but plaintiff's counsel, through inadvertence, had omitted to file summons, complaint and affidavit of service within the 30 days prescribed by statute regarding service of summons on nonresident motorists, and there was no showing that defendant would be prejudiced, plaintiff's motion for leave to file summons, complaint and affidavit of service would be granted “nunc pro tunc”. Vehicle and Traffic Law, § 52; Civil Practice Act, § 105.—*Kornfeld v. Hurwitz*, 32 N.Y.S.2d 820, 178 Misc. 216.—Autos 235(4).

N.Y.Sup. 1941. The court may direct entry of judgment or order “nunc pro tunc” to correct a record or in furtherance of justice where the failure to enter was due to accident or excusable oversight

or mistake.—*Karpuk v. Karpuk*, 31 N.Y.S.2d 769, 177 Misc. 729.—Judgm 273(1), 326.

N.Y.Sup. 1941. Where a defendant's motion for affirmative relief against her codefendants was made within a period conceded to be timely and was withdrawn only by reason of the death of the justice before whom it was argued, leave to make the motion thereafter was granted “nunc pro tunc”.—*Levy v. 139 East Seventy-Ninth St.*, 27 N.Y.S.2d 247.—Motions 10.

N.Y.Sup. 1940. A garnishee execution which inadvertently or by mistake omitted a specification of day from which interest upon judgment was to be computed, could be amended “nunc pro tunc” by inserting therein the specification, notwithstanding that at time of application, sheriff's collections on the execution amounted to sum of judgment, without interest, plus sheriff's fees, where there was stated in execution the date when judgment was rendered and there was also set forth therein the amount of the judgment. Civil Practice Act, §§ 481, 640, 642.—*Moran Towing & Transportation Co. v. Fleming*, 23 N.Y.S.2d 750, 175 Misc. 408, affirmed 27 N.Y.S.2d 432, 261 A.D. 978, appealed granted 27 N.Y.S.2d 1022, 261 A.D. 1093, affirmed 38 N.E.2d 232, 287 N.Y. 572.—Judgm 326.

N.Y.Sup.App.Term 1946. “Nunc pro tunc”, meaning now for then, is the procedure whereby a determination previously made, but improperly entered or expressed or not entered at all, may be corrected and entered as of original time when it should have been entered, but such procedure does not authorize a complete change of decision or permit a substantial change or alteration thereof.—*Hendricks v. Ergis*, 66 N.Y.S.2d 349.—Judgm 273(2), 273(3).

N.Y.Gen.Sess. 1955. A resentence, “nunc pro tunc” is the correction of a judgment of conviction as of the time it was entered.—*People v. Manieri*, 148 N.Y.S.2d 546, 4 Misc.2d 567.—Sent & Pun 2316.

N.Y.Gen.Sess. 1942. Where a reading of the record and of the commitment showed that defendant in being sentenced to 20 years in state penitentiary for manslaughter in first degree committed on July 14, 1933, was not dealt with as a second offender under the Baumes Law, but that definite sentence was mandatory under section of Penal Law relating to indeterminate sentences as it existed at time of commission of the crime because defendant had been previously convicted by a New Jersey court of a felony committed after he had committed felony in New York and while a fugitive from justice, the commitment would be amended “nunc pro tunc” to show confirmation of such fact in its sentence. Penal Law, §§ 1051, 1941, 2189.—*People v. Regan*, 32 N.Y.S.2d 509, 177 Misc. 984.—Sent & Pun 466.

N.C. 1942. One who was improperly appointed trustee by clerk of superior court to administer testamentary trust after death of prior trustee, at request of ultimate beneficiaries for such appointment, in proceeding to which all beneficiaries were made parties, and who pursuant to that appoint-

ment handled the trust estate for eight years, making annual returns and dealings therewith without question, was not an "intermeddler", and superior court in the exercise of its equitable jurisdiction should, "nunc pro tunc", validate and give power to the appointment and authorize settlement and closing of trust in accordance with will of testatrix.—Cheshire v. First Presbyterian Church of Raleigh, 19 S.E.2d 855, 221 N.C. 205.—Trusts 170.

N.D. 1913. "Nunc pro tunc" means: "Now for then; that a thing is done at one time as of another time when it should have been done." A judgment entered nunc pro tunc relates back to the time when it was rendered, and stands as a judgment of that date.—*Ex parte Schantz*, 144 N.W. 445, 26 N.D. 380.

Ohio 1950. The phrase "nunc pro tunc" means now for then, and its general purpose is to record a prior but unrecorded act of the court.—State ex rel. Rogers v. Rankin, 93 N.E.2d 281, 154 Ohio St. 23, 42 O.O. 115.—Judgm 273(1).

Ohio 1942. Where counsel of bus line seeking amendment to its operating rights, in mistaken belief that opposing electric traction company would remain in business, stated that bus line was willing to withdraw so much of application as related to removal of operating restrictions between points served by traction company, and order entered on such hearing was ambiguous, in subsequent proceeding by rival carrier, not involved in original hearing, to enforce the restrictions on bus line's operations, an order of Public Utilities Commission granting "nunc pro tunc" bus line's original application for removal of restrictions, disposing of rival carrier's complaint, was proper.—*Schuster v. Public Utilities Commission*, 40 N.E.2d 930, 139 Ohio St. 458, 22 O.O. 507.—Autos 82.

Ohio App. 2 Dist. 1996. Appointment of counsel "nunc pro tunc" is common device used by all courts to make record of proceedings accord with what actually occurred; phrase means "now for then," and signifies that counsel was actually present at proceedings prior to his or her appointment and participated therein on behalf of party he or she is being appointed to represent.—*State v. Murnahan*, 689 N.E.2d 1021, 117 Ohio App.3d 71, dismissed, appeal not allowed 678 N.E.2d 1227, 78 Ohio St.3d 1489.—Crim Law 641.7(1).

Ohio App. 2 Dist. 1941. The purpose of a "nunc pro tunc" order is to have judgment reflect its true finding, and whenever original judgment entry does not do so, trial court has very broad power to correct the entry by nunc pro tunc order.—*Tresemmer v. Gugle*, 42 N.E.2d 712, 70 Ohio App. 409, 25 O.O. 124, 36 Ohio Law Abs. 15.—Judgm 326.

Ohio App. 2 Dist. 1941. While ordinarily as between parties a "nunc pro tunc" order is entered as of date of original judgment, if there is a modification which affects parties' rights, appeal may be perfected from actual date of such order.—*Tresemmer v. Gugle*, 42 N.E.2d 712, 70 Ohio App. 409, 25 O.O. 124, 36 Ohio Law Abs. 15.—App & E 347(3).

Ohio App. 2 Dist. 1941. The court has jurisdiction in the furtherance of justice to make a "nunc pro tunc" entry supplementing a prior judgment or order in any matter over which the court originally had jurisdiction, and the effect of such nunc pro tunc entry may be considered by reviewing court.—*State ex rel. Stephens v. Wiseman*, 42 N.E.2d 240, 35 Ohio Law Abs. 586.—Judgm 326.

Ohio App. 2 Dist. 1941. A court having no authority to make original entry has no authority to thereafter supplement such entry by a "nunc pro tunc" order.—*State ex rel. Stephens v. Wiseman*, 42 N.E.2d 240, 35 Ohio Law Abs. 586.—Motions 54.

Ohio App. 6 Dist. 1989. Function of "nunc pro tunc" journal entry is to correct an omission in a prior journal entry so as to enter upon the record judicial action actually taken but erroneously omitted from the record.—*Roth v. Roth*, 585 N.E.2d 482, 65 Ohio App.3d 768.—Judgm 273(1).

Ohio App. 9 Dist. 1948. The function of an entry "nunc pro tunc" is the correction of judicial records insofar as they fail to record, or improperly record, a judgment rendered by the court, as distinguished from correction of an error in the judgment itself or in the failure to render the judgment.—*Snodgrass v. Snodgrass*, 88 N.E.2d 616, 85 Ohio App. 285, 40 O.O. 195.—Courts 114.

Ohio Com.Pl. 1945. The office of an order "nunc pro tunc" is to correct the record so as to cause it to show an act of the court which, though actually done at a former term, was not entered on the journal, and it cannot be employed to amend the record so as to make it to show that some act was done at a former term, which might, or should have been, but was not, then performed.—*Squire v. Guardian Trust Co.*, 84 N.E.2d 94, 52 Ohio Law Abs. 218.—Courts 114.

Oklahoma 1950. A "nunc pro tunc" entry is one made now of something which was actually done previously, to have effect as of the former date, and its office is not to supply omitted action by the court, but to supply an omission really had, but omitted through inadvertence or mistake.—*Mabry v. Baird*, 219 P.2d 234, 203 Okla. 212, 1950 OK 132.—Judgm 273(1).

Oklahoma 1949. Function of "nunc pro tunc" order is to make record reflect true judgment or order intended by court at time original judgment or order was entered; and if clerk makes a mistake, or incorrectly enters a judgment or order, mistake may be corrected by an order nunc pro tunc; and if court itself by inadvertence uses language in journal entry which does not reflect true judgment or order intended, order may be made nunc pro tunc correcting it.—*Youngblood v. Stephens*, 205 P.2d 279, 201 Okla. 301, 1949 OK 57.—Judgm 326.

Oklahoma 1935. "Nunc pro tunc," literally speaking, means now for then, but a nunc pro tunc entry in practice and is meant in law is an entry made now for something which was actually previously done, to have effect as of the date on which it was done but no record made of it.—*In re Peter's Estate*, 51

P.2d 272, 175 Okla. 90, 1935 OK 754.—Judgm 273(1).

Okla. 1926. “Nunc pro tunc” entry is one made now of something which was actually previously done to have effect as of the former date. Its office is not to supply omitted action by court but to supply omission in record of action really had but omitted through inadvertence or mistake.—Cannon v. Oklahoma Engraving & Printing Co., 249 P. 300, 119 Okla. 196, 1926 OK 675.

Okla.Crim.App. 1958. A “nunc pro tunc” entry is an entry made now, of something which was actually previously done, to have effect as of the former date and its office is not to supply omitted action by the court, but to supply and omission in the record of action really had where entry thereof was omitted through inadvertence or mistake.—Ex parte Bridges, 322 P.2d 427, 1958 OK CR 23.—Judgm 273(1).

Okla.Crim.App. 1937. Nunc pro tunc order, reciting that defendant was sentenced upon plea of guilty of larceny, second offense, and that information and all other papers where offense was erroneously styled “habitual criminal” were changed to read “larceny, second offense,” held unauthorized, where accused was not notified of application for change of pleadings and sentence, and was not present in open court at time order was entered. 21 Okl.St.Ann. § 51, subsec. 3. “Nunc pro tunc” is a decree now for then; a decree which under certain conditions, such as the death of a party or the judge, is not properly entered at the hearing of the case, and may at any time be entered nunc pro tunc as of the date the cause was heard.—Ex parte Wray, 66 P.2d 965, 61 Okla.Crim. 162.

Pa. 1942. In action in trespass where plaintiff failed to file supplementary statement against additional defendant within 20 days as required by court rule, trial court’s refusal of a petition for leave to file “nunc pro tunc” a supplementary statement against additional defendant six months after it was brought upon the record on ground that application was not made within reasonable promptness was not shown to be an abuse of discretion so as to authorize reviewing court to interfere. Pa.R.C.P. No. 2258(a, c), 12 P.S. Appendix.—Pinsky v. Master, 23 A.2d 727, 343 Pa. 451.—App & E 959(2).

Pa. 1941. Where plaintiff’s exceptions to trial court’s findings were not filed in time required by court’s rules, because plaintiff did not receive notice of filing thereof, and because plaintiff’s attorney was absent from jurisdiction at time, plaintiff’s petition to file exceptions “nunc pro tunc” would be granted, particularly where the importance of the substantive rights raised by exceptions required court to exercise its right to waive strict compliance with rules and consider case on its merits. Rules of Court of Common Pleas of Philadelphia County, Rule 231.—Pennsylvania Co. for Insurances on Lives & Granting Annuities v. Clark, 18 A.2d 807, 340 Pa. 433.—Trial 405(2).

Pa.Super. 1942. To permit an appeal “nunc pro tunc”, there must be fraud or its equivalent.—Higgins v. The Educators-A Mutual Acc. & Health

Ass’n, 24 A.2d 19, 147 Pa.Super. 400.—App & E 353.

Pa.Super. 1942. Where defendant, desiring to appeal from judgment of alderman, filed affidavits for appeal and bond before another alderman, and failed to file affidavit for appeal and bond before alderman entering judgment within the 20-day period within which appeal must be taken, the appeal was a nullity and would be stricken off, and defendant would be refused allowance of an appeal “nunc pro tunc”.—Higgins v. The Educators-A Mutual Acc. & Health Ass’n, 24 A.2d 19, 147 Pa.Super. 400.—Courts 190(4).

Tenn. 1931. The term “nunc pro tunc” is a phrase used to express that a thing is done at one time which ought to have been performed at an earlier time.—Collins v. Williams, 36 S.W.2d 93, 162 Tenn. 262.

Tenn.Ct.App. 1940. To justify a “nunc pro tunc” order, at a subsequent term, there must be some matter in the nature of a record to base it upon, such as a decree actually drawn at the time, but by mistake not entered; or an entry on the chancellor’s docket; or a memorandum or opinion in writing by the chancellor.—Hines v. Thompson, 148 S.W.2d 376, 25 Tenn.App. 86.—Judgm 273(4).

Tenn.Ct.App. 1940. The purpose of an order “nunc pro tunc” is to protect against oversight and to make record speak the truth, and such an order may be entered at a subsequent term of court.—Hatcher v. State ex rel. McGill, 142 S.W.2d 326, 24 Tenn.App. 213.—Motions 54.

Tex.Com.App. 1926. In general, the term “nunc pro tunc” is a phrase used to express that a thing is done at one time which ought to have been performed at an earlier time. As applied to judgments, in certain cases, a judgment may be both rendered and entered nunc pro tunc, while in other classes of cases an entry nunc pro tunc presupposes a judgment actually rendered by the court, but not entered by the clerk.—Gulf, C. & S.F. Ry. Co. v. Canty, 285 S.W. 296, 115 Tex. 537.

Tex.Crim.App. 1994. Judgment “nunc pro tunc” (now for then) may not be used to correct judicial errors, that is, those errors which are the product of judicial reasoning or determination but, rather, may be used only to correct clerical errors in which no judicial reasoning contributed to their entry and which for some reason were not entered of record at the proper time. Rules App.Proc., Rule 36.—State v. Bates, 889 S.W.2d 306.—Crim Law 994(4).

Tex.Crim.App. 1942. In prosecution for an aggravated assault where the minutes of the trial court failed to show the return of the indictment, a “nunc pro tunc” entry in the minutes of the return, to make the minutes speak the truth, was not error.—Jackson v. State, 157 S.W.2d 921, 143 Tex. Crim. 143.—Courts 114.

Tex.Crim.App. 1921. The office of an order “nunc pro tunc” is to make a present record of something previously done, though not recorded.—Barnes v. State, 230 S.W. 986, 89 Tex.Crim. 396.

Tex.App.—Houston [1 Dist.] 1996. Trial court had jurisdiction to correct obvious typographical errors in dates of missed child support payments in contempt order “nunc pro tunc,” to make written judgment speak truth of judgment that judge actually rendered verbally in court, although it would not have had jurisdiction to create previously non-existent contempt judgment. Vernon’s Ann.Texas Rules Civ.Proc., Rule 316.—*Ex parte Hogan*, 916 S.W.2d 82.—Child S 470.

Tex.App.—Dallas 2000. Latin phrase “nunc pro tunc” means “now for then,” and describes the inherent power a court possesses to make its records speak the truth; use of a judgment nunc pro tunc permits the court to correct now what the record reflects had already occurred at a time in the past.—*Smith v. State*, 15 S.W.3d 294.—Crim Law 994(4), 996(1).

Tex.App.—Texarkana 1998. “Nunc pro tunc” literally means “now for then,” and describes the inherent power possessed by a court to make its records speak the truth by correcting the record at a later date to reflect what actually occurred at trial.—*Dickson v. State*, 988 S.W.2d 261, petition for discretionary review refused.—Crim Law 994(4).

Tex.App.—Amarillo 1983. Purpose of “nunc pro tunc” order is to have the court records correctly reflect a judgment which was rendered by the court but which for some reason was not entered at the proper time.—*McGinnis v. State*, 664 S.W.2d 769.—Crim Law 996(1).

Tex.App.—Corpus Christi 2001. The purpose of a “nunc pro tunc” order is to reflect correctly the judgment or order actually rendered by the court, which for some reason was not entered of record at the proper time, and to reflect the truth of what actually occurred.—*Rodriguez v. State*, 42 S.W.3d 181.—Crim Law 994(4).

Tex.Civ.App.—Dallas 1941. The entry of a judgment at a subsequent term is denominated “nunc pro tunc” to distinguish it from an entry during the term at which the judgment is pronounced, but neither is appealable until entered on the minutes or reduced to writing and signed by the judge. Vernon’s Ann.Civ.St. art. 1899.—*Loper v. Hosier*, 148 S.W.2d 889, writ dismissed, correct.—App & E 134(1).

Tex.Civ.App.—Texarkana 1941. A judgment “nunc pro tunc” presupposes a judgment actually rendered at proper time but not entered and a judgment nunc pro tunc cannot be regularly entered unless such judgment has in fact previously been rendered except that a judgment may be both rendered and entered nunc pro tunc where delay was caused solely by the court itself or by the process of the law and not by the fault of the prevailing party.—*Stewart v. Gibson*, 154 S.W.2d 1002.

Tex.Civ.App.—Beaumont 1940. While a “judgment” of a court is what the court pronounces, the “rendition of judgment” is a judicial act by which the court settles and declares the decision of the law upon the matters at issue, whereas “entry of the

judgment” is a ministerial act to preserve evidence of the judicial act, and therefore the court has inherent power by a judgment “nunc pro tunc” to correct the record so that it will accurately state the judgment of the court as rendered.—*Jones v. Sun Oil Co.*, 145 S.W.2d 615, reversed 153 S.W.2d 571, 137 Tex. 353.—Judgm 1, 191, 270, 273(1).

Tex.Civ.App.—Beaumont 1940. Where all the papers in a guardianship of minors except guardian’s application for appointment, waivers of minors over 14 years of age, and court order appointing guardian had been misplaced before they were entered of record and together with court docket lost, county court, the same judge presiding as had presided continuously since before inception of guardianship, had power on its own motion to enter a judgment “nunc pro tunc” which set out all the papers filed and proceedings had in the guardianship so as to constitute a complete record thereof, including proceedings for the sale of realty belonging to the minor wards, since the court had inherent right to make its records reflect the truth of all transactions had in that court.—*Jones v. Sun Oil Co.*, 145 S.W.2d 615, reversed 153 S.W.2d 571, 137 Tex. 353.—Judgm 273(2).

Tex.Civ.App.—Beaumont 1940. A judgment “nunc pro tunc” entered for the purpose of correcting the court’s records so as to accord with the judgment of the court as actually rendered or to supply a record of proceedings actually had but omitted from the records is distinguishable from a judgment entered to correct an erroneous judgment, and therefore county court had the power on its own motion to enter at a subsequent term of court a judgment nunc pro tunc for the purpose of supplying a record of guardianship proceedings actually had but never entered of record, and to do so without notice or hearing.—*Jones v. Sun Oil Co.*, 145 S.W.2d 615, reversed 153 S.W.2d 571, 137 Tex. 353.—Judgm 273(2), 273(8), 326.

Tex.Civ.App.—Galveston 1942. Courts must follow the provisions of statutes relating to the time and manner of entering a judgment, but, where a court has, in fact, pronounced and rendered judgment which has not been properly entered and which does not truly reflect the facts, the court has the inherent power, under proper request or on its own motion, with proper notice to interested parties, to enter such judgment “nunc pro tunc”, and lapse of time will not affect such authority, except where rights of third persons and innocent purchasers have intervened.—*Kveton v. Farmers Royalty Holding Co.*, 161 S.W.2d 583.—Judgm 273(3), 273(6).

Tex.Civ.App.—Galveston 1942. Where agreed judgment recited that realty comprehended within the agreement was described in an exhibit attached thereto, and exhibit attached to the judgment merely described the realty as being certain tracts of land situated in certain counties, and rights of third persons or innocent purchasers had not intervened, it was proper to enter a judgment “nunc pro tunc” currently reflecting the intention of the parties to the original judgment and containing a correct description of the realty comprehended in the original

judgment.—*Kveton v. Farmers Royalty Holding Co.*, 161 S.W.2d 583.—Judgm 273(3).

Utah 1946. The insertion in a judgment of the words “nunc pro tunc” as of a particular date purports to fix the time of rendition of entry of judgment as of that date.—*Foreman v. Foreman*, 176 P.2d 144, 111 Utah 72.—Judgm 273(7).

Vt. 1979. Legal significance of “nunc pro tunc” or “now for then” is to set effective date of present order at particular and appropriate time in the past, on basis that correct entry was inadvertently or mistakenly departed from by the court involved.—*In re Parizo*, 404 A.2d 114, 137 Vt. 365.—Crim Law 996(1).

Va. 1920. The object of a “nunc pro tunc” order is to make the record show something which actually took place at a former day of the court, but which the record does not disclose, and not to permit something to be done which was omitted by oversight or otherwise.—*Duncan v. Carson*, 105 S.E. 62, 127 Va. 306.—Motions 54.

Wash. 1938. The office of a “nunc pro tunc” order or judgment is to record some act of the court done at a former time and not then carried into the record, and, if the court has not rendered a judgment that it might or should have rendered, it has no power to remedy those omissions by ordering the entry nunc pro tunc of a proper judgment.—*State v. Mehlhorn*, 82 P.2d 158, 195 Wash. 690.—Judgm 273(1).

Wash.App. Div. 2 1996. “Nunc pro tunc” order records some prior act of court which was actually performed but not entered into record at that time.—*State v. Nicholson*, 925 P.2d 637, 84 Wash. App. 75, review denied 937 P.2d 1101, 131 Wash.2d 1025.—Motions 56(2).

W.Va. 1951. Court order bearing date prior to that of actual entry, but not based upon any memorandum or notation upon court record to indicate entry was intended to be effective as of such prior date, was not an order “nunc pro tunc”.—*McCoy v. Fisher*, 67 S.E.2d 543, 136 W.Va. 447.—Motions 54.

W.Va. 1941. An entry “nunc pro tunc” is an entry made not of something which was previously done, to have effect as of the former date, and the function of such entry is to make the record speak the truth, and to supply something which actually occurred but has been omitted from the record through inadvertence or mistake, and it is not the function of such entry by a fiction to antedate the actual performance of an act which never occurred, or to supply an entire omission to act within the time limit of such action, or to make the record show that which never existed.—*Bloyd v. Scroggins*, 15 S.E.2d 600, 123 W.Va. 241.—Judgm 273(1).

W.Va. 1932. “Nunc pro tunc” order is based on memoranda on court’s record or quasi record, not on oral evidence or recollection alone.—*State v. Haller*, 163 S.E. 635, 112 W.Va. 4.—Motions 54.

## NUNC PRO TUNC ENTRY

Ill.App. 2 Dist. 1989. Judgment that was made retroactive and provided for retroactive post-judgment interest was not “nunc pro tunc entry.”—*Phelps v. O’Malley*, 135 Ill.Dec. 76, 543 N.E.2d 311, 187 Ill.App.3d 150, appeal denied 139 Ill.Dec. 521, 548 N.E.2d 1077, 128 Ill.2d 671.—Judgm 273(1).

Ind. 1995. “Nunc pro tunc entry” is one made now of something which was actually previously done, to have effect as of former date; such entry may be used to either record act or event not recorded in court’s order book or to change or supplement entry already recorded in order book.—*Cotton v. State*, 658 N.E.2d 898.—Courts 114.

Ind.App. 2000. A “nunc pro tunc entry” is defined in law as an entry made now of something which was actually previously done, to have effect as of the former date.—*Holmes v. Holmes*, 726 N.E.2d 1276, transfer denied 741 N.E.2d 1251.—Courts 114.

Ind.App. 1996. “Nunc pro tunc entry” is entry made now of something which was actually done previously to have effect as of former date.—*Beliles v. State*, 663 N.E.2d 1168.—Courts 114.

Ind.App. 3 Dist. 1979. A “nunc pro tunc entry” is an entry made now of something which was previously done, to have effect as of the former date and the entry may serve to change or to supplement an entry already existing in the court’s order book.—*Ford v. State*, 390 N.E.2d 676, 180 Ind.App. 673.—Courts 114.

Iowa 1995. “Nunc pro tunc entry” is one made now of something which was previously done, to have effect as of former date, the function, object, or purpose of such entry being to make record speak truth; to supply on record something which has actually occurred, but has been omitted from record through inadvertence or mistake.—*Beyond the Garden Gate, Inc. v. Northstar Freeze-Dry Mfg., Inc.*, 526 N.W.2d 305.—Courts 114.

Mo.App. 1958. A “nunc pro tunc entry” can only be employed to correct a clerical mistake or misprision of the clerk and cannot be invoked to correct a mistake or oversight of the judge, nor to correct judicial errors, nor to render a judgment different from that actually rendered, even though the judgment actually rendered was not the judgment the judge intended to render.—*Aronberg v. Aronberg*, 316 S.W.2d 675.—Courts 114; Judgm 326.

Oklahoma 1954. A “nunc pro tunc entry” is one made now of something which was actually done previously, to have effect as of the former date, and its office is not to supply omitted action by court, but to supply omission from record of action through inadvertence or mistake.—*Stevens Expert Cleaners & Dyers, Inc. v. Stevens*, 267 P.2d 998, 1954 OK 17.—Judgm 273(1).

Oklahoma.Crim.App. 1960. A “nunc pro tunc entry” is one made now of something which was actually previously done so that the entry will have effect as

of a former date, and its office is not to supply omitted action by the court but to supply, on the record of an action, an omission really had but omitted through inadvertence or mistake.—Seabolt v. State, 357 P.2d 1014, 1960 OK CR 77.—Crim Law 996(1).

Pa. 1948. A “nunc pro tunc entry” is an entry made now, as of them, to have effect as if the event had occurred on former date, and its office is to supply an omission in record caused through possible inadvertence or mistake.—In re Jurkowitz’ Estate, 59 A.2d 895, 359 Pa. 570.—Judgm 273(1).

### **NUNC PRO TUNC FILING**

Ga.App. 2001. A “nunc pro tunc filing” is an entry made now of something actually previously done to have effect of former date.—Coleman v. Grimes, 553 S.E.2d 185, 250 Ga.App. 880, certiorari denied.—Motions 54.

### **NUNC PRO TUNC JUDGMENT**

Tex.App.—Fort Worth 1981. After judgment has become final, “nunc pro tunc judgment” is available to correct only clerical errors, not judicial errors in the court’s judgment; “clerical errors” occur in the entry of the court’s judgment while “judicial errors” are committed in the rendition of judgment.—Petroleum Equipment Financial Corp. v. First Nat. Bank of Fort Worth, 622 S.W.2d 152, ref. n.r.e.—Judgm 304, 306, 326.

Tex.App.—Amarillo 1993. True “nunc pro tunc judgment” is one correcting clerical errors executed after trial court has lost plenary power.—Ferguson v. Naylor, 860 S.W.2d 123, rehearing overruled, and writ denied, and motion overruled.—Judgm 326.

Tex.Civ.App.—Corpus Christi 1980. Purported nunc pro tunc correction of judgment within 30 days of date from which trial judge determined that judgment was actually signed was not a true “nunc pro tunc judgment” where trial court had plenary power to amend and/or correct his judgment within the 30-day time period as such. Rules of Civil Procedure, Rule 329b, subd. 5 (Repealed).—Ortiz v. O. J. Beck & Sons, Inc., 611 S.W.2d 860.—Judgm 326.

### **NUNC PRO TUNC JUDGMENT OR ORDER**

Tex.Civ.App.—Corpus Christi 1973. Order that was signed and rendered by trial court on April 3, 1973, was not a “nunc pro tunc judgment or order” where it did not purport to correct any clerical mistake that had been made in the March 26, 1973 judgment, so that the only appealable judgment that was rendered was the judgment of March 26, 1973, at which time the period for filing of the transcript commenced to run. Rules of Civil Procedure, rule 306b.—National Bank of Commerce of Brownsville v. Southmost Dodge City, Inc., 498 S.W.2d 410.—App & E 622; Judgm 326.

### **NUNC PRO TUNC ORDER**

D.Kan. 1996. “Nunc pro tunc order” is designed to make court’s records speak the truth, and to record that which was actually done, but not

recorded.—In re Atteberry, 194 B.R. 521.—Fed Civ Proc 928.

Ill.App. 1 Dist. 2001. A “nunc pro tunc order” is one entered merely to correct an inconsistency in a written record.—Gounaris v. City of Chicago, 254 Ill.Dec. 613, 747 N.E.2d 1025, 321 Ill.App.3d 487.—Motions 54.

Ill.App. 1 Dist. 2001. A “nunc pro tunc order” may not be used to supply omitted judicial action, to cure a jurisdictional defect, or to correct judicial errors that are the result of deliberate but erroneous judicial reasoning.—Gounaris v. City of Chicago, 254 Ill.Dec. 613, 747 N.E.2d 1025, 321 Ill.App.3d 487.—Motions 54.

Ill.App. 1 Dist. 2001. A “nunc pro tunc order” must be based upon definite and precise evidence in the record; the certainty of evidence must be assured without reliance upon the memory of the judge or any other person.—Gounaris v. City of Chicago, 254 Ill.Dec. 613, 747 N.E.2d 1025, 321 Ill.App.3d 487.—Motions 54.

Ill.App. 1 Dist. 2001. A “nunc pro tunc order” cannot be based upon ex parte affidavits or testimony; evidence must clearly show that the order being modified failed to conform to the decree actually rendered by the administrative agency.—Gounaris v. City of Chicago, 254 Ill.Dec. 613, 747 N.E.2d 1025, 321 Ill.App.3d 487.—Admin Law 494.

Ill.App. 1 Dist. 1999. Order which did not purport to change or amend the provisions of a prior order, but merely interpreted the prior order, was not a proper “nunc pro tunc order,” and thus, having been entered more than 30 days after trial court disposed of the last post-trial motion, the order was beyond the trial court’s jurisdiction and therefore void, such that there was no basis for excusing ex-wife’s failure to timely appeal the prior order; comments of the trial court were replete with statements to the effect that the prior order was clear and unambiguous, indicating that the record already accurately reflected the court’s judgment.—In re Marriage of Breslow, 239 Ill.Dec. 111, 713 N.E.2d 642, 306 Ill.App.3d 41.—Divorce 283.

Ill.App. 1 Dist. 1986. “Nunc pro tunc order” places in record order actually made earlier, but omitted from record because of clerical error.—Matter of Estate of Robertson, 98 Ill.Dec. 440, 494 N.E.2d 562, 144 Ill.App.3d 701.—Courts 114.

Ill.App. 1 Dist. 1985. A “nunc pro tunc order” is an entry now for something previously done, made to make records speak now for what was actually done then.—In re Marriage of Hirsch, 90 Ill.Dec. 646, 482 N.E.2d 625, 135 Ill.App.3d 945, appeal denied.—Motions 56(2).

Ill.App. 1 Dist. 1979. A “nunc pro tunc order” is an entry for something previously done, made to make the records speak now for what was actually done then.—Kooyenga v. Hertz Equipment Rentals, Inc., 35 Ill.Dec. 382, 399 N.E.2d 216, 79 Ill.App.3d 1051.—Courts 114.

Ill.App. 2 Dist. 1985. “Nunc pro tunc order” is decree court enters in the present to make record

speak for something that was done previously.—*In re Marriage of Erickson*, 91 Ill.Dec. 346, 483 N.E.2d 692, 136 Ill.App.3d 907.—Motions 56(2).

Ill.App. 2 Dist. 1967. “Nunc pro tunc order” is one presently made to supply omission in earlier record and takes effect from such prior date.—*Chapman, Mazza, Aiello, Inc. v. Ace Lumber & Const. Co.*, 227 N.E.2d 562, 83 Ill.App.2d 320.—Judgm 273(1), 273(7).

Ill.App. 3 Dist. 2002. “Nunc pro tunc order” is an order entered to correct inconsistency in written record and must be based on definite evidence in record.—*Neumann v. Neumann*, 268 Ill.Dec. 58, 777 N.E.2d 981, 334 Ill.App.3d 305, opinion modified on denial of rehearing, and appeal pending.—Motions 56(2).

Ill.App. 3 Dist. 2002. A “nunc pro tunc order” is designed to allow the record to reflect that which was already done previously, but which was omitted from the record.—*In re Jessie B.*, 262 Ill.Dec. 371, 765 N.E.2d 508, 327 Ill.App.3d 1084.—Crim Law 632(3.1).

Ill.App. 3 Dist. 1992. Order dismissing remaining defendants from civil rights action that purported to relate back to prior dismissal order was not valid “nunc pro tunc order” and could not cause time for taking appeal to run from initial dismissal; dismissal of remaining defendants did not correct or modify prior order where not all defendants had filed motions to dismiss before initial dismissal. S.H.A. ch. 110A, ¶ 304(a).—*Boughton Trucking and Materials, Inc. v. County of Will*, 171 Ill.Dec. 299, 593 N.E.2d 1119, 229 Ill.App.3d 576.—App & E 344; Parties 65(1).

Ill.App. 3 Dist. 1989. A “nunc pro tunc order” is an entry made on judgment previously rendered in order to make record speak now for what was actually done then.—*Hickey v. Union Nat. Bank & Trust Co. of Joliet*, 138 Ill.Dec. 134, 547 N.E.2d 4, 190 Ill.App.3d 186.—Judgm 326.

Ill.App. 5 Dist. 1970. Function of “nunc pro tunc order” is merely to correct record of judgment and not to alter judgment actually rendered. S.H.A. ch. 7, §§ 2, 6, subd. 10.—*Dauderman v. Dauderman*, 263 N.E.2d 708, 130 Ill.App.2d 807.—Judgm 273(3).

Kan. 1951. The function of “nunc pro tunc order” is not to make an order now for then, but to enter now for then an order previously made.—*French v. French*, 229 P.2d 1014, 171 Kan. 76.—Judgm 273(1).

Ky.App. 1994. District court judge’s affidavit, filed after defendant filed postconviction motion, which stated that he considered all factors in statute in making decision to transfer juvenile to circuit court to be tried as youthful offender, was, in essence, a “nunc pro tunc order,” and thus, affidavit could not cure deficiency in transfer order, which did not address all factors listed in statute. KRS 640.010(2).—*Harden v. Com.*, 885 S.W.2d 323.—Afft 1; Infants 68.7(4).

Mo.App. W.D. 1998. “Nunc pro tunc order” is intended as a device whereby a court may correct clerical errors or omissions in the record that inaccurately reflect the judgment actually rendered by the court.—*Dobson v. Riedel Survey & Engineering Co., Inc.*, 973 S.W.2d 918.—Judgm 326.

Mo.App. W.D. 1998. To constitute a “nunc pro tunc order,” a court’s order cannot correct anything that resulted from the exercise of judicial discretion, as any such change constitutes a change in the court’s judgment.—*Dobson v. Riedel Survey & Engineering Co., Inc.*, 973 S.W.2d 918.—Judgm 326.

Neb. 1963. Proper function of “nunc pro tunc order” is not to correct some affirmative action which court ought to have taken but is to correct record which has been made so that it will truly record action which was really had but which through some inadvertence or mistake has not been truly recorded.—*Application of Andrews*, 121 N.W.2d 32, 175 Neb. 222.—Judgm 273(3).

N.M.App. 1999. “Nunc pro tunc order” has reference to the making of an entry now, of something which was actually previously done, so as to have it effective as of the earlier date.—*State v. Reyes-Arreola*, 984 P.2d 775, 127 N.M. 528, 1999-NMCA-086, certiorari denied 981 P.2d 1208, 127 N.M. 390.—Crim Law 632(3.1).

Ohio App. 9 Dist. 1988. Office of “nunc pro tunc order” is limited to memorializing what trial court actually did at earlier point in time; it can be used to supply information which existed but was not recorded, to correct mathematical calculations and to correct typographical or clerical errors.—*State v. Greulich*, 572 N.E.2d 132, 61 Ohio App.3d 22.—Motions 54.

Or. 1999. “Nunc pro tunc order” is a manifestation of inherent power of a court to make its record speak the truth, that is, to correct clerical errors at a later time so that the record reflects what actually occurred at an earlier time.—*State ex rel. Juvenile Dept. of Multnomah County v. Dreyer*, 976 P.2d 1123, 328 Or. 332.—Courts 114.

Tex.App.—Houston [1 Dist.] 1996. “Nunc pro tunc order” is used by court to make its records speak truth by correcting record at later date to reflect what actually occurred at trial.—*Ex parte Hogan*, 916 S.W.2d 82.—Courts 114.

Utah App. 1996. “Nunc pro tunc order” is used to correct the court’s omission or error; however, such an order may not be used to address an issue not previously before the court.—*Marshall v. Marshall*, 915 P.2d 508.—Motions 56(2).

## NUNC PRO TUNC ORDERS

Fla.App. 1 Dist. 1991. “Nunc pro tunc orders” are issued to correct clerical mistakes or refer to judicial acts which memorialize previously taken judicial act.—*D.M. v. State*, 580 So.2d 634.—Crim Law 994(4).

Ill.App. 1 Dist. 1993. “Nunc pro tunc orders” retroactively amend orders previously entered by court.—*Pagano v. Rand Materials Handling Equip-*

ment Co., Inc., 190 Ill.Dec. 157, 621 N.E.2d 26, 249 Ill.App.3d 995.—Motions 54.

### NUNC PRO TUNC SENTENCE

C.A.1 (Mass.) 1968. A “nunc pro tunc sentence” is one which relies solely upon a prior date of commencement to effect automatically all adjustments to which a prisoner has subsequently become entitled by the passage of time.—Desmond v. U.S. Bd. of Parole, 397 F.2d 386.—Sent & Pun 1119.

### NUNCUPATIVE WILL

Ariz. 1940. A “nuncupative will” is one which is not written but is declared orally by the testator in his last illness, in the manner specified by statute. A.R.S. § 14-124.—In re Taylor's Estate, 106 P.2d 492, 56 Ariz. 211.—Wills 136.

Ariz. 1940. An attempt by deceased to adopt a written will by oral statements does not constitute a valid “nuncupative will.” A.R.S. § 14-124.—In re Taylor's Estate, 106 P.2d 492, 56 Ariz. 211.—Wills 136.

Ariz. 1940. Evidence that deceased did not attempt to make oral will, but rather that he endeavored to adopt a written will by oral statements, supported finding that deceased did not make a “nuncupative will.” A.R.S. § 14-124.—In re Taylor's Estate, 106 P.2d 492, 56 Ariz. 211.—Wills 136.

La. 1944. A will not conflicting with any provisions of statute relating to nuncupative will by public act but which might not meet intent of law because date was placed in upper corner of will was valid as “nuncupative will” under private signature where it was executed before four witnesses and dictated to notary public, since notary would be considered the fifth witness required in case of nuncupative will under private signature. LSA-C.C arts. 1578, 1579, 1581, 1595, 1647.—Succession of Lombardo, 17 So.2d 303, 205 La. 261.—Wills 149.

Miss. 1930. “Nuncupative will” is testamentary declaration, not in writing, made before sufficient number of witnesses when testator is in extremis (Hemingway's Code 1927, § 3570).—Lee v. Barrow, 126 So. 648, 156 Miss. 711.—Wills 136.

Miss. 1930. Instrument dictated in form of letter to executor was simply defectively executed written will, and not subject to probate as “nuncupative will” (Hemingway's Code 1927, § 3570).—Lee v. Barrow, 126 So. 648, 156 Miss. 711.—Wills 136.

Mo. 1926. A “nuncupative will,” under Rev.St. 1919, § 529, V.A.M.S. § 468.160, is one which depends merely on oral evidence, being declared or dictated by testator before sufficient number of witnesses and afterward reduced to writing.—Starks v. Lincoln, 291 S.W. 132, 316 Mo. 483.

Pa. 1944. The fundamental consideration in determining whether statements of deceased may be probated as a “nuncupative will” is whether words themselves, in their context and in surrounding circumstances, are testamentary in character. 20

P.S. §§ 180.1, 180.2, 180.3.—In re Buehrer's Estate, 37 A.2d 587, 349 Pa. 353.—Wills 140.

Pa. 1944. To entitle alleged “nuncupative will” to probate, it must appear that decedent intended that his words were meant to operate as a will and that he intended to create an immediate, though revocable, disposition of his property effective at his death, and loose declarations or the expression of wishes, desires or intentions, past or future, are insufficient. 20 P.S. §§ 180.1, 180.2, 180.3.—In re Buehrer's Estate, 37 A.2d 587, 349 Pa. 353.—Wills 140.

Pa. 1937. Where decedent was taken ill 18 days before death and removed to hospital 5 days before death, expression of disposition of personality, made during three-hour rational period 2 days before death and written down by nurse in presence of interne, whom nurse had summoned as another witness, when decedent, in response to nurse's question, expressed desire to make a will, held not a valid “nuncupative will” for lack of extremity of “last sickness” and expressed intention to make a will. 20 P.S. §§ 180.1 et seq., 180.3.—In re McClellan's Estate, 189 A. 315, 325 Pa. 257.—Wills 140.

Tenn.Ct.App. 1937. The essentials of a valid “nuncupative will” are, two disinterested witnesses present at the making thereof, witnesses, or some of them, must have been especially requested to bear witness thereto by testator himself, and will must have been made in testator's last sickness in his own habitation or dwelling house, or where he had previously been residing ten days, at least, except where he dies on journey, or away from home. Code 1932, § 8094.—Ray v. Nanney, 114 S.W.2d 51, 21 Tenn.App. 618.—Wills 136.

### NUNCUPATIVE WILL UNDER PRIVATE SIGNATURE

La.App.Orleans 1942. A will signed by testator and three witnesses, while it could not be considered as a “nuncupative will under private signature” because of lack of sufficient witnesses, was valid as an “olographic will”, since signatures of witnesses were mere “surplusage”. LSA-C.C. arts. 1581, 1588, 1590.—Succession of Eastman, 6 So.2d 788.—Wills 133.

### NUNS

Or. 1917. “Nuns” may be designated as women of Catholic religion who live in a convent under vows of poverty, chastity, and obedience.—Scott Co. v. Roman Catholic Archbishop for Diocese of Oregon, A. Christie, 163 P. 88, 83 Or. 97.

### NUREMBERG DEFENSE

U.S. Armed Forces 1995. Evidence that accused's quit her unit as refusal to obey deployment order which she perceived to be unlawful did not support “Nuremberg defense,” absent evidence that she had been individually ordered to commit positive act that would be war crime, and thus, evidence was irrelevant to whether she quit unit with intent to avoid hazardous duty or shirk important service as required to support desertion conviction.

UCMJ, Art. 85(a)(2), 10 U.S.C.A. § 885(a)(2); Military Rules of Evid., Rule 401.—U.S. v. Huet-Vaughn, 43 M.J. 105, certiorari denied 116 S.Ct. 922, 133 L.Ed.2d 851.—Mil Jus 665, 832.

U.S. Armed Forces 1995. “Nuremberg defense” concerning refusal to obey unlawful order applies only to individual acts committed in wartime, not to government’s decision to wage war; duty to disobey unlawful order applies only to positive act that constitutes crime and that is so manifestly beyond legal power or discretion of commander as to preclude rational doubt about its unlawfulness.—U.S. v. Huet-Vaughn, 43 M.J. 105, certiorari denied 116 S.Ct. 922, 133 L.Ed.2d 851.—Mil Jus 832.

## NURSE

Ill. 1908. An agreement to “nurse” an adult implies that the object of the care is sick, and means much more than mere watchfulness, and contemplates such care and attention of the person as will conduce to the comfort and hasten the recovery of the patient; but the practice of medicine, within the statute regulating its practice, implies not only the knowledge of the professional nurse, but implies much more, and includes the application of medical knowledge of disease, and the loss of health, and hence an agreement to nurse a person during his lifetime in consideration of the devise of the patient’s property is not an agreement to practice medicine without a license prohibited by the statute, so as to prevent specific performance of the contract.—Oswald v. Nehls, 84 N.E. 619, 233 Ill. 438.

Ind. 1910. Merely giving massage treatment or bathing a patient fails properly within the profession of a trained “nurse,” while administering osteopathic treatment does not.—Witty v. State, 90 N.E. 627, 173 Ind. 404, 25 L.R.A.N.S. 1297.

Ind.App. 2 Div. 1902. The verb “to nurse,” used with reference to an adult, conveys the idea that the object of care is sick or is an invalid. It means more than general watchfulness. So that, in an action for board furnished and nursing done to decedent, where a special interrogatory was whether there was any agreement that claimant should receive pay for board furnished to or care bestowed upon decedent, which was answered, “No,” and the general verdict was in favor of claimant, it will be presumed that the jury must have understood the word “nurse” in its most comprehensive sense, and so gave an answer not intended.—Van Hook v. Young’s Estate, 64 N.E. 670, 29 Ind.App. 471.

Kan. 2001. “Nurse” is a person who works in the same area as and under supervision of a physician or other practitioner of the healing arts, but nurse is not a practitioner of the healing arts for purposes of statute which addresses the standard of care for a practitioner of the healing arts. K.S.A. 65-2872(m).—Nold ex rel. Nold v. Binyon, 31 P.3d 274, 272 Kan. 87.—Health 652.

N.Y. 1924. A “nurse” is one who cares for the sick.—Phillips v. Buffalo General Hospital, 146 N.E. 199, 239 N.Y. 188.

Vt. 1993. Medical training that rescuer responding to automobile accident had received, in form of basic CPR course and of his current enrollment in first-responder training program, did not by itself establish his status as “physician” or “nurse,” statements to whom were protected by physician-patient privilege in subsequent DUI prosecution. 12 V.S.A. § 1612; Rules of Evid., Rule 503.—State v. Tatro, 635 A.2d 1204, 161 Vt. 182.—Witn 209.

## NURSE AND HOSPITAL SERVICES

Md. 1962. “Nurse and hospital services” within Workmen’s Compensation Law, included services rendered by wife, who was not a registered or practical nurse, to employee whose arms were amputated. Code 1957, art. 43, § 1 et seq.—A. G. Crunkleton Elec. Co. v. Barkdoll, 177 A.2d 252, 227 Md. 364.—Work Comp 970.

## NURSERY

Ark. 1942. The statutory exemption of certain agricultural products from tax imposed by statute on gross proceeds or receipts from sales of tangible personal property and specific exception of sales by florists and nurserymen from such exemption did not render statute unconstitutional as making arbitrary, unreasonable, and capricious classification, in absence of discrimination among florists and nurserymen, though “agriculture”, in its broadest sense, includes “horticulture”, which includes “floriculture” and “viticulture”. Acts 1941, Act 386, § 4(n). A “florist” is engaged in “floriculture” and is a cultivator of, or dealer in, ornamental flowers or plants; the business of “nurseryman” is a branch of “horticulture”; and a “nursery” is a place where trees, shrubs, vines, etc., are cultivated for transplanting or for use as stalks for grafting, a plantation of young trees or other plants.—Hardin v. Vestal, 162 S.W.2d 923, 204 Ark. 492.

Cal. 1939. The word “nursery,” as used in respect to horticulture, has been held to mean a place where young trees are propagated for purpose of being transplanted.—Story v. Christin, 95 P.2d 925, 14 Cal.2d 592, 125 A.L.R. 1402.

Cal. 1869. The well-known signification of the word “nursery,” as used in respect to horticulture, is a place where young trees are propagated, for the purpose of being transplanted into orchards, plantations, etc.—Attorney General v. State Board of Judges, 38 Cal. 291.

Md. 1974. Even if sales of company operating lumber, hardware and general merchandise business or “home center business” were equally divided between items used inside house and items used outside house, business was not a “nursery” within Sunday closing law exemption of nurserymen, in view of evidence that business was selling a wide range of general merchandise. Code 1957, art. 27, § 534H(c).—Hechinger Co. v. State’s Attorney for Prince George’s County, 326 A.2d 742, 272 Md. 706.—Sunday 5.

Mass. 1955. A “nursery” within the statute respecting the necessity of license for the sale of nursery stock, is a place where trees, shrubs, plants,

etc., are propagated from seed or otherwise for transplanting, for use as stock for grafting and for sale. G.L.(Ter.Ed.) c. 128, § 19.—*Piekos v. Bachand*, 129 N.E.2d 890, 333 Mass. 211.—Licens 16(0.1).

Mass. 1953. The words "greenhouse" and "nursery", as used in zoning by-law permitting such uses in single residence district, were to be interpreted according to the common and approved usage of language without enlargement or restriction, and questions of respective meanings of such terms were matters of law for the court.—*Town of Needham v. Winslow Nurseries, Inc.*, 111 N.E.2d 453, 330 Mass. 95, 40 A.L.R.2d 1450.—Zoning 279.

Mass. 1953. A "nursery", as that term is used in zoning by-law permitting such use in single residence district, is essentially a tree plantation, or place where trees, shrubs, plants, and the like, are propagated from seed or otherwise for transplanting, for use as stock for grafting, and for sale.—*Town of Needham v. Winslow Nurseries, Inc.*, 111 N.E.2d 453, 330 Mass. 95, 40 A.L.R.2d 1450.—Zoning 279.

Mo. 1964. A "nursery" within zoning ordinance permitting premises to be used for "forests, nurseries, farms and truck gardening" is an area where trees, shrubs, or plants are grown for transplanting, for use as stocks for budding and grafting, or for sale.—*Suburbia Gardens Nursery, Inc. v. St. Louis County*, 377 S.W.2d 266.—Zoning 279.

Wash. 1933. A "nursery" is a place where trees, shrubs, vines, etc., are propagated for transplanting or for use as stocks for grafting.—*Miethke v. Pierce County*, 23 P.2d 405, 173 Wash. 381.

### NURSERY BUSINESS

Mass. 1955. A farmer and a grower of spruce trees to be cut as Christmas trees and in advertising and selling them as such, was not engaged in the "nursery business" and came within the exception of the licensing statute providing that the statute should not prohibit the selling of trees by any person who is not a grower of, dealer in, or agent for, "nursery stock". G.L.(Ter.Ed.) c. 128, § 19.—*Piekos v. Bachand*, 129 N.E.2d 890, 333 Mass. 211.—Licens 19(3).

### NURSERYMAN

Ark. 1990. Taxpayer who sold bermuda grass sod to be used as fairways and lawns was "nurseryman" as matter of law, within "nurserymen" exception to gross receipts tax's exemption for sale of raw farm products. A.C.A. § 26-52-401(18)(C), (18)(F)(iv).—*Pledger v. Boyd*, 799 S.W.2d 807, 304 Ark. 91.—Tax 1241.1.

### NURSERYMEN

Ark. 1990. Taxpayer who sold bermuda grass sod to be used as fairways and lawns was "nurseryman" as matter of law, within "nurserymen" exception to gross receipts tax's exemption for sale of raw farm products. A.C.A. § 26-52-401(18)(C), (18)(F)(iv).—*Pledger v. Boyd*, 799 S.W.2d 807, 304 Ark. 91.—Tax 1241.1.

### NURSERY SCHOOL

La.App. 1 Cir. 1960. A "day care center" is not the same as a "nursery school" or "pre-kindergarten school" so as to be permitted in a residential zone within a zoning ordinance, since the primary purpose of the former is not education but the all day care of children of working mothers, in view that the legislature has recognized a difference between a kindergarten and a day care center that none of the persons connected with the center were qualified as teachers and that the program proposed had very little reference to teaching or instruction of any sort.—*Lakeside Day Care Center, Inc. v. Board of Adjustment, City of Baton Rouge*, 121 So.2d 335.—Zoning 288.

### NURSERY STOCK

Mass. 1955. A farmer and a grower of spruce trees to be cut as Christmas trees and in advertising and selling them as such, was not engaged in the "nursery business" and came within the exception of the licensing statute providing that the statute should not prohibit the selling of trees by any person who is not a grower of, dealer in, or agent for, "nursery stock". G.L.(Ter.Ed.) c. 128, § 19.—*Piekos v. Bachand*, 129 N.E.2d 890, 333 Mass. 211.—Licens 19(3).

### NURSES

Iowa 1879. The words "medical attendance," while often used to denote the rendering of professional medical service, does not necessarily exclude all other meanings. The efforts of the physician, however skillful or assiduous he may be, should usually be supplemented by an attendance which he cannot give. It matters not that the persons who usually give such attendance are usually termed "nurses," for their office is to assist the physician to obtain certain medical results; and hence nursing, washing, and boarding furnished to paupers constitute medical attendance.—*Scott v. Winnesheik County*, 3 N.W. 626, 52 Iowa 579.

N.Y.A.D. 1 Dept. 1940. As respects liability of public hospital for negligence of nurses, "nurses" are professional persons employed to exercise their calling on their own responsibility under general direction of the physician in charge and are grouped with physicians and surgeons and not with cooks, chambermaids, etc., employed in purely ministerial and administrative functions.—*Volk v. City of New York*, 19 N.Y.S.2d 53, 259 A.D. 247, reversed 30 N.E.2d 596, 284 N.Y. 279.—Char 45(2).

### NURSING

Cal.App. 4 Dist. 1972. Within statute imposing duty on employer to provide medical, surgical and hospital treatment, including nursing, which is reasonably required to cure or relieve from the effects of the injury the term "nursing" includes services of a practical nurse. West's Ann.Labor Code, § 4600.—*Henson v. Workmen's Comp. Appeals Bd.*, 103 Cal.Rptr. 785, 27 Cal.App.3d 452.—Work Comp 969.

Kan. 1996. Assistance in childbirth rendered by one whose practical experience with birthing provides comfort to the mother, or midwife, is not "nursing" under the Nursing Act, such that licensure is required. K.S.A. 65-1113.—State Bd. of Nursing v. Ruebke, 913 P.2d 142, 259 Kan. 599.—Health 118.

Me. 1930. "Nursing" used in conjunction with "care" does not necessarily so restrict the scope of the latter word as to make proof of general responsibility over deceased's home and extended attention to her and care for her in her illness and enfeeblement constitute a variance from a pleading alleging "care and nursing." To "nurse" is "to take care of or tend, as a sick person or invalid; to attend upon;" or "to care for or provide for tenderly or sedulously."—Emery v. Wheeler, 152 A. 624, 129 Me. 428.

Mo.App. 1946. "Nursing" means to take care of or tend, as a sick person, or an invalid; to attend upon; to care or provide for tenderly or sedulously.—Daugherty v. City of Monett, 192 S.W.2d 51, 238 Mo.App. 924.

N.Y.A.D. 3 Dept. 1994. Evidence did not support determination that "nursing home" was being operated without approval of Public Health Council; homeowner's actions in dispensing medicine and washing residents to prevent infection and promote recovery from certain conditions did not fit within statutory definition of "nursing," and there was no proof that residents could not be cared for in home setting. McKinney's Public Health Law §§ 2801, subds. 1, 2, 2801-a, subd. 1.—Wood v. Axelrod, 610 N.Y.S.2d 332, 203 A.D.2d 645.—Health 276.

Wis. 1907. The word "caring," in an instruction in an action by a parent for injuries to his minor child authorizing a recovery for the services of his wife in nursing, and medical attendance made necessary by the injury, is synonymous with "nursing," and means the usual attendance on sick persons, and the use thereof does not render the instruction misleading.—Johnson v. St. Paul & W. Coal Co., 111 N.W. 722, 131 Wis. 627.

### **NURSING CARE FACILITY**

Mich.App. 1993. District health department did not operate "nursing care facility" so as to be a "county medical care facility" not entitled to benefit of sovereign immunity; department did not provide facility for care of persons unable to look after themselves. M.C.L.A. §§ 333.20104, 691.1407(4).—Jamieson v. Luce-Mackinac-Alger-Schoolcraft Dist. Health Dept., 497 N.W.2d 551, 198 Mich.App. 103, application for leave to appeal held in abeyance 512 N.W.2d 845, appeal denied 526 N.W.2d 914, 447 Mich. 1005.—Counties 141.

### **NURSING DIAGNOSIS**

N.J.Super.A.D. 1999. For purposes of statute limiting the practice of certain registered professional nurses, a permitted "nursing diagnosis" identifies signs and symptoms only to the extent necessary to carry out the nursing regimen, whereas a

prohibited "medical diagnosis" makes final conclusions about the identity and cause of the underlying disease. N.J.S.A. 45:11-23, subd. b.—State v. One Marlin Rifle, 30/30, 30 AS, Serial No. 12027068, 725 A.2d 144, 319 N.J.Super. 359.—Health 192.

### **NURSING FACILITY SERVICES**

D.Me. 2002. Pharmacists did not provide "nursing facility services," for purposes of provision of Medicaid Act guaranteeing public process for determination of rates of payment for nursing facility services, and thus state was not required to give pharmacists right to comment before imposing emergency rule reducing reimbursement rates for prescription drugs, even though some pharmacists provided drugs to nursing home residents pursuant to agreement with nursing facilities. Social Security Act, §§ 1902(a)(13)(A), 1905(f), as amended, 42 U.S.C.A. §§ 1396a(a)(13)(A), 1396d(f); 42 C.F.R. § 483.60.—American Soc. of Consultant Pharmacists v. Concannon, 214 F.Supp.2d 23.—Health 464.

### **NURSING HOME**

Conn.Com.Pl. 1974. Proposed use of residence as state-supervised group home, in which eight or nine employable retarded adults and two supervisory houseparents would reside, was not a "nursing home" within special exception to zoning regulations. C.G.S.A. §§ 17-174, 19-4c, 19-32.—Oliver v. Zoning Commission of Town of Chester, 326 A.2d 841, 31 Conn.Sup. 197.—Zoning 508.

Mo. 1963. Home in which practical nurse had been left in charge and which was equipped with wheel chairs, commodes, bedpans, hospital beds, bedrails, and two stocked medicine cabinets was "nursing home" and unlicensed operation was properly enjoined. Sections 198.011, 198.072 RSMo 1959 V.A.M.S.—State ex rel. Eagleton v. Patrick, 370 S.W.2d 254, 97 A.L.R.2d 1180.—Health 276.

Mo.App. W.D. 1979. Facility, which was licensed as professional "nursing home", which principally provided service of convalescent and rehabilitative care and which was not equipped for surgery, was not "hospital" as defined in group medical policy defining "hospital" as " \* \* \* a legally constituted and operated institution having, on the premises, organized facilities (including \* \* \* major surgical facilities) \* \* \*. In no event \* \* \* will the term 'hospital' include any charges incurred in connection with \* \* \* any institution \* \* \* used principally as a \* \* \* nursing facility or a facility for \* \* \* convalescents \* \* \* or as a facility providing primarily \* \* \* rehabilitatory care." V.A.M.S. § 198.011 et seq.—McManus v. Equitable Life Assur. Soc. of U.S., 583 S.W.2d 271.—Insurance 2498.

N.J.Super.A.D. 1991. Forty-bed residential facility for rehabilitation of head trauma victims constituted "hospital" or "nursing home," within meaning of zoning regulation.—Sica v. Board of Adjustment of Tp. of Wall, 587 A.2d 661, 246 N.J.Super. 338, certification granted 598 A.2d 892, 126 N.J. 334, reversed 603 A.2d 30, 127 N.J. 152.—Zoning 278.1.

N.Y.A.D. 2 Dept. 1976. A "nursing home" is not a family business, but falls within definition of hospital.—*Genuth v. Hynes*, 384 N.Y.S.2d 866, 53 A.D.2d 669.—Health 276.

N.Y.A.D. 3 Dept. 1994. Evidence did not support determination that "nursing home" was being operated without approval of Public Health Council; homeowner's actions in dispensing medicine and washing residents to prevent infection and promote recovery from certain conditions did not fit within statutory definition of "nursing," and there was no proof that residents could not be cared for in home setting. *McKinney's Public Health Law §§ 2801*, subds. 1, 2, 2801-a, subd. 1.—*Wood v. Axelrod*, 610 N.Y.S.2d 332, 203 A.D.2d 645.—Health 276.

N.Y. Sup. 1973. "Nursing home" under New York Mills zoning ordinance was for people requiring skilled nursing care and related medical services, and did not include "family care home" under Mental Hygiene Law family care program to be administered by state hospital. *Mental Hygiene Law §§ 2, 34, 34*, subd. 12.—*Ganim v. Village of New York Mills*, 347 N.Y.S.2d 372, 75 Misc.2d 653.—Zoning 278.1.

Wis.App. 1998. Community-based residential facility (CBRF) into which guardian proposed to move protectively placed adult was neither a "state facility" nor "nursing home," for purposes of statute providing that individual who was in a state facility or nursing home was a resident of county in which he or she was a resident at time of admission. *W.S.A. 50.01(1g), 51.40(1)(h, j), (2)(a)*.—*Matter of Jeffrey D.*, 580 N.W.2d 694, 217 Wis.2d 705, review denied *Juneau County v. Sauk County*, 584 N.W.2d 124, 219 Wis.2d 924.—Mental H 35.

Wis.App. 1987. Purpose of "county home" is to care for those who cannot financially support themselves, whereas purpose of "nursing home" is to care for those who are unable to care for themselves because of mental or physical infirmities. *W.S.A. 49.01(2), 50.01(3)(a)*.—*Local 913, AFSCME, AFL-CIO v. Manitowoc County*, 410 N.W.2d 641, 140 Wis.2d 476, review denied 416 N.W.2d 296, 141 Wis.2d 984.—Health 276.

### **NURSING HOME BEDS**

Ga.App. 1999. Hospital's beds converted from general acute care beds were "skilled nursing beds" or "nursing home beds" within the meaning of State Health Planning Agency (SHPA) rule allowing 47 nursing home beds for every 1,000 civilians outside an institutional population age 65 or older, and, thus, SHPA could grant certificate of need (CON), even though hospital sought to provide subacute care and projected average stay of fifteen days. *O.C.G.A. § 31-6-2(22)*.—*St. Joseph's Hosp., Inc. v. Thunderbolt Health Care, Inc.*, 517 S.E.2d 334, 237 Ga.App. 454.—Health 239, 276.

### **NURSING HOME CARE**

Fla.App. 1 Dist. 1985. Health care facility which provided "nursing home care" and "life care services" was not "hospital institution" so as to be

entitled to property tax exemption under health facilities authorities law [West's F.S.A. § 154.001 et seq.; F.S. 1981, § 154.233] which governs public financing of health facilities.—*Jones v. Life Care of Baptist Hosp., Inc.*, 476 So.2d 726, review denied 486 So.2d 596.—Tax 241.2.

### **NURSING HOME STAY**

N.Y.A.D. 3 Dept. 1996. Insured's hospitalization while incurring subsistence charge to guarantee that space at nursing home would be available after spending only five days there was not "nursing home stay" within meaning of long term care insurance policy defining deductible period as 20 consecutive days at start of each nursing home stay and requiring insurer to provide benefits for each day of nursing home stay after deductible period if insured was confined as inpatient in nursing home and room and board or subsistence charge was made for that day; only reasonable interpretation was that insured's right to receive benefits to defray nursing home expenses before his death in hospital was never triggered because he had not been confined in nursing home for 20-day deductible period.—*McCarthy v. AMEX Assur. Co.*, 636 N.Y.S.2d 475, 223 A.D.2d 819.—Insurance 2523.

### **NURSING POOL**

Ky.App. 1993. Private duty nursing service licensed as a nursing pool is entitled to an exemption from certificate of need (CON) requirement to extent it is acting within confines of definition of "nursing pool" which means providing temporary employment in health care facilities; this definition does not include employment in patients' homes, and thus service could not send nurses working in its private duty nursing service to patient's homes without first obtaining a CON. *KRS 216.010 et seq., 216.860, 216.865(1, 2), 216B.020, 216B.020(1)*.—*Medical Personnel Pool of Louisville, Inc. v. Management Registry, Inc.*, 869 S.W.2d 42, review denied.—Health 276.

### **NURSING SERVICE**

N.Y.A.D. 3 Dept. 1960. Negligence, if any, in raising or adjusting sideboards of bed of patient in nursing home constituted "nursing service" within liability policy excluding coverage as to injury, sickness, disease, death, or destruction due to rendering or failing to render "nursing service".—*Brockbank v. Travelers Ins. Co.*, 207 N.Y.S.2d 723, 12 A.D.2d 691, appeal denied 210 N.Y.S.2d 1025, 9 N.Y.2d 609, 172 N.E.2d 293.—Insurance 2278(10).

### **NURSING SERVICES**

Ark.App. 1997. Services provided by workers' compensation claimant's mother in giving him verbal encouragement to perform personal tasks such as dressing and bathing himself and in assisting him in daily tasks and housekeeping, did not constitute compensable "nursing services," though doctors indicated that claimant was incapable of living alone and taking care of himself; claimant could bathe himself, dress himself and perform other personal tasks, claimant did not need constant supervision

and he could be left alone, and mother provided no medical care to claimant.—Little Rock Convention and Visitors Bureau v. Pack, 959 S.W.2d 415, 60 Ark.App. 82.—Work Comp 970.

Ark.App. 1997. Compensable “nursing services” do not include assistance with household and personal tasks which workers’ compensation claimant is unable to perform.—Little Rock Convention and Visitors Bureau v. Pack, 959 S.W.2d 415, 60 Ark.App. 82.—Work Comp 970.

Iowa 1994. Nonmedical homemaking services provided by members of claimant’s family were not compensable as “nursing services” under section of Workers’ Compensation Act. I.C.A. § 85.27.—Henry v. Iowa-Illinois Gas & Elec. Co., 522 N.W.2d 301.—Work Comp 970.

Pa.Super. 1953. Provision of the workmen’s compensation act requiring employer to furnish “hospital treatment” does not eliminate obligation imposed previously to supply “nursing services”. 77 P.S. § 531.—Toland v. Murphy Bros., 94 A.2d 156, 172 Pa.Super. 484.—Work Comp 969.

#### NURTURE

N.J.Ch. 1935. Statute providing that both parents shall be equally charged with care, nurture, education, and welfare of children must be applied as complement to divorce statute authorizing court to make order regarding custody and maintenance of children since “nurture” means to give nourishment to, to feed, to bring or train up, to educate. 2 Comp.St.1910, p. 2035, § 25; Comp.St.Supp.1924, § 97-21.—Pieretti v. Pieretti, 176 A. 589, 13 N.J.Misc. 98.—Child S 58.

#### NURTURING PARENT DOCTRINE

Pa.Super. 1996. Determination of parent’s ability to provide child support is based upon parent’s earning capacity, rather than upon his or her actual earnings; however, exception to general rule exists in form of “nurturing parent doctrine,” under which earning capacity cannot always be imputed to parent who chooses to stay home with minor child, and in appropriate cases such nurturing parent may be excused from contributing support payments.—Frankenfield v. Feeser, 672 A.2d 1347, 449 Pa.Super. 47.—Child S 90.

Pa.Super. 1994. Application of “nurturing parent doctrine” was not appropriate to excuse mother from contributing to support of first child born out-of-wedlock who was in father’s custody on ground that she had given birth to second child out of wedlock by another man, where mother not only had past work history but she had in past performed private accounting for persons and at one time ran daycare facility out of her home.—Depp v. Holland, 636 A.2d 204, 431 Pa.Super. 209.—Child S 84; Child 21(3).

#### NUT

N.Y.Sup. 1932. As used in slang, the word “nut” contains the suggestion of mental disturbance.—In re Jiggs Nut Club, 256 N.Y.S. 273, 142 Misc. 762.

#### NUTRA-LOAF

E.D.Wash. 1990. Placing inmate on disciplinary five-day diet of “nutra-loaf”—baked meatloaf-like food substance consisting of milk, potatoes, tomato juice, cabbage, salad oil, flour, celery, raw eggs, beans, salt, carrots, and ground beef—did not violate Eighth Amendment’s prohibition against cruel and unusual punishment; although unappetizing, nutra-loaf met daily nutritional requirements, inmate was able to eat some of it, inmate was not suffering from medical condition that could have been aggravated by loaf, and medical problems inmate encountered after eating it were consistent with preexisting conditions. U.S.C.A. Const. Amend. 8.—Adams v. Kincheloe, 743 F.Supp. 1385.—Sent & Pun 1550.

#### NUTRINE

La. 1904. “Nutrine,” which is made out of crushed grain, corn, and wheat sifted, mixed with cotton seed meal and molasses, is not flour, within article 230 of the Constitution of 1898, in reference to exemption from taxation.—Atlas Feed Products Co. v. City of New Orleans, 37 So. 531, 113 La. 611.

#### NUTS

Cust. & Pat.App. 1950. Coconut meats, preserved in syrup, were not dutiable as “nuts” under paragraph 761 of 1930 Tariff Act fixing tariff on edible nuts. Tariff Act of 1930, § 1, par. 761, 19 U.S.C.A. § 1001, par. 761.—U.S. v. Charles R. Allen, Inc., 184 F.2d 846, 37 C.C.P.A. 110, certiorari denied 71 S.Ct. 48, 340 U.S. 818, 95 L.Ed. 601.—Cust Dut 30(5).

C.C.A.5 (Ga.) 1942. Under Fair Labor Standards Act exempting employees engaged within area of production in preparing, in their “raw or natural state”, agricultural commodities for market, shelling peanuts though done by machinery and off the producing farm and by one not a farmer is a work excepted from the act. Fair Labor Standards Act of 1938, § 1 et seq., § 13(a) (10), 29 U.S.C.A. § 201 et seq., § 213(a) (10). “Raw” means in common speech not cooked, or refined. “Natural state” is one that has not been artificially changed. “Peanuts” are not really “nuts” but “peas”, the pod and the kernels it contains maturing in the ground instead of in the air and in Georgia they are commonly and accurately called “ground peas”.—Fleming v. Farmers Peanut Co., 128 F.2d 404.

#### N. W.

N.D. 1906. The abbreviation “N. W.” in a column headed “Part of section,” was sufficient to identify the land as the northwest quarter of the section named in the assessment roll.—Beggs v. Paine, 109 N.W. 322, 15 N.D. 436.—Tax 421(3), 421(9).

#### NYSTAGMUS

Ill.App. 4 Dist. 1997. “Nystagmus,” which is physiological phenomenon measured during horizontal gaze nystagmus (HGN) test during stop of suspected intoxicated driver, is involuntary jerking

of the eyeball; nystagmus may be congenital or it may be caused by conditions affecting the brain, including ingestion of drugs such as alcohol and barbiturates, palsy of lateral or vertical gaze, disorders of the vestibular apparatus and brain stem and cerebellar dysfunction. S.H.A. 625 ILCS 5/11-501(a)(2).—People v. Kirk, 224 Ill.Dec. 452, 681 N.E.2d 1073, 289 Ill.App.3d 326, appeal denied 227 Ill.Dec. 12, 686 N.E.2d 1168, 174 Ill.2d 580.—Autos 411.

Mont. 1998. “Nystagmus,” for purposes of horizontal gaze nystagmus (HGN) field sobriety test, is the involuntary jerking of the eyeball resulting from

the body’s attempt to maintain balance and orientation.—Hulse v. State, Dept. of Justice, Motor Vehicle Div., 961 P.2d 75, 289 Mont. 1, 1998 MT 108.—Autos 411.

Tenn. 1997. “Nystagmus,” measured by Horizontal Gaze Nystagmus (HGN) sobriety test to determine whether driver was under influence of intoxicant, is involuntary jerking movement of eye either as it attempts to focus on fixed point or as it moves to one side; phenomenon results from body’s attempt to maintain orientation and balance.—State v. Murphy, 953 S.W.2d 200.—Autos 411.